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OF THE
UNITED STATES.

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¹Retired.

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CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

MOORE *v.* BAKER *et al.*

(Circuit Court, E. D. Wisconsin. February 18, 1888.)

PRINCIPAL AND SURETY—CONTRIBUTIONS BETWEEN CO-SURETIES—ENFORCEMENT IN EQUITY—EXHAUSTING REMEDY AT LAW.

A bill by a surety against a co-surety, to compel contribution, and to set aside certain conveyances and subject the property conveyed to the satisfaction of such liability, is not a creditors' bill, and a court of equity may, upon suitable averments, proceed to grant such relief, without requiring the surety to first exhaust his remedy at law by judgment and return of *nulla bona*.

In Equity. On demurrer to bill.

The case made by the bill was this: In April, 1880, one John C. Pierron was elected treasurer of the city of Fond du Lac. He executed to the city a bond for the faithful performance of the duties of the office, in the sum of \$100,000. The bond was also signed by John Hughes, James Gaynor, Charles B. Bartlett, Leon Lallier, Thomas Mason, Robert A. Baker, one of the defendants in the present suit, and the complainant, Moore,—all of whom executed the bond as sureties of Pierron. Subsequently, Pierron, as such treasurer, became liable to the city in the sum of over \$37,000, and the city brought suit upon the bond against him and his sureties to recover said sum. Mason died after the bringing of the suit, and before judgment. Pierron appeared, and answered that he had taken proceedings in insolvency, under the statutes of the state, had made an assignment of his property in said proceedings, and had been discharged from all his debts and liabilities. Judgment was obtained in the suit in favor of the city against Baker, Hughes, Lallier, Moore, Gaynor, and Bartlett, in the sum of \$39,707.93, which became a lien upon the real estate of each of the judgment defendants situated in the county of Fond du Lac. This judgment was affirmed, on appeal, by the supreme court of the state, (*City of Fond du Lac v. Moore*, 15 N. W. Rep. 782,) as to all of the defendants except Hughes, who was discharged from all liability, as surety of Pier-

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ron. Subsequently an execution was issued on the judgment, and, to prevent a levy upon the property of the defendants, Gaynor, Bartlett, and Moore paid and satisfied the judgment. Gaynor and Bartlett then assigned to the complainant, Moore, all demands and rights of action growing out of the judgment and payment thereof which they had against the defendant Robert A. Baker, and all right and claim which they had jointly or severally for contribution from Baker, on account of the payment of the judgment. The bill then charged that the defendant Robert A. Baker, as one of the judgment defendants in the suit brought by the city, was liable for, and ought to have paid, one-sixth of the sum of \$37,732.34, but that he had not paid any part thereof; that, in justice and equity, he was liable to the complainant in this suit, and should pay him one-tenth of the sum last mentioned, with interest, the same being the contributive share that he ought to pay to the complainant, as representing his own interest and the interests of Gaynor and Bartlett, which had been assigned to the complainant. The bill then alleged that the defendant Robert A. Baker was, and had long been, wholly insolvent; that he and his wife, the defendant C. Estelle Baker, had removed out of the state of Wisconsin, and were non-residents of the state; and that in 1881, which was prior to the recovery of the judgment against the sureties of Pierron, he had, in contemplation of insolvency, and in fraud of creditors, and in pursuance of a fraudulent scheme to vest in his wife the title of certain property which he then owned, so that creditors could not reach it, conveyed certain real estate, described in the bill, to his son Robert C. Baker, who conveyed the same to the defendant C. Estelle Baker; and that, since that time, this property has been held by Baker's wife, for his use and benefit. It was alleged that these conveyances were without consideration, and were made for the sole purpose of hindering and defrauding creditors, and that, in justice and equity, the lands so conveyed ought to be applied by the defendant Baker, by way of contribution, in satisfaction of the demand of his co-sureties, and be made subject to the lien of the judgment recovered by the city, for the purpose of enforcing such contribution. It was also alleged that Baker is the owner of certain other premises in the city of Fond du Lac, which he has claimed as a homestead; but that his alleged homestead right therein has been lost by his abandonment thereof, and by the removal of himself and his family out of the state of Wisconsin. The prayer of the bill was that the defendant Robert A. Baker be required to pay to the complainant the sum of \$3,773.23, his contributive share of the judgment aforesaid; that the conveyances mentioned, executed by him to his son, and by the latter to the defendant C. Estelle Baker, be adjudged fraudulent; that the lands therein described be decreed to be subject to sale to satisfy the complainant's demand; that the complainant be subrogated to the rights of the city of Fond du Lac under the judgment recovered by it against the sureties of Pierron, as to the defendant Robert A. Baker; that Baker be adjudged to have lost and forfeited his homestead right in that portion of the premises in which he has heretofore claimed such right; that the complainant be adjudged and decreed

to have a paramount lien upon all the lands and premises described in the bill; that the same may be ordered to be sold to satisfy the decree for the payment of money prayed therein, and for such other and further relief as shall be deemed just and equitable. The bill was demurred to for want of equity.

Stark & Sutherland, for complainant.

E. S. Bragg, for defendants.

DYER, J. As is apparent from the foregoing statement of facts, the object of this suit is to enforce contribution between sureties, and, in aid thereof, to obtain a decree setting aside certain conveyances of property made by the defendant Robert A. Baker, which are alleged to have been fraudulent, so that such property, or its proceeds, may be applied in payment of Baker's contributive share of the judgment recovered by the city against the sureties of Pierron.

In support of the demurrer, the point is made and strenuously urged that, as to the defendant C. Estelle Baker, this is a creditors' bill, and that, as to the property conveyed to her, the complainant is not entitled to the relief he seeks, because it is not alleged in the bill that he has recovered a judgment at law against Robert A. Baker upon which execution has been returned unsatisfied. It is insisted that the complainant must first exhaust his remedy at law against Baker, before he can come into a court of equity and invoke its aid for the purpose of avoiding the alleged fraudulent conveyances; and that the allegation of Baker's insolvency does not answer the requirements of the rule on the subject, as applied to creditors' bills, or bills for relief against fraudulent transfers of property. The law is well settled that the right of a creditor to pursue specific real property alleged to have been fraudulently conveyed by the debtor, to obtain satisfaction of his debt, depends upon the fact of his having exhausted his legal remedy by the recovery of a judgment, and return of execution unsatisfied. The proposition has become so far elementary that authorities in support of it need not be cited. If, therefore, this were a creditors' bill, pure and simple, or merely a bill by a creditor at large to set aside fraudulent conveyances, the point made by the demurrer would be unanswerable. But the bill embraces other matters clearly cognizable in a court of equity. It is a bill by one surety to compel contribution by a co-surety, and, as supplementary to the main purpose of the bill, relief is sought against certain conveyances of real estate, to the end that the property conveyed may be ultimately reached to satisfy such liability to contribution by the co-surety as may be established by final decree. As is said in *Mason v. Pierron*, 63 Wis. 244, 23 N. W. Rep. 119:

"Actions to enforce contribution between sureties, and to subrogate a surety who has paid the debt of the principal debtor to the securities and rights of the creditor, are constantly sustained by courts of equity, and have been from the earliest times."

The enforcement of contribution between sureties is a recognized subject of equity jurisdiction. "The ground of relief does not," says Story,

(section 493, Eq. Jur.) "stand upon any notion of mutual contract, express or implied, between the sureties to indemnify each other in proportion; but it arises from principles of equity, independent of contract." In *Stirling v. Forrester*, 3 Bligh, 590, Lord REDESDALE said:

"The principle established in the case of *Dering v. Lord Winchelsea*, 1 Cox, 318, is universal, that the right and duty of contribution is founded in doctrines of equity. It does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of averages in equity rest upon the same principle."

Where the legal remedy is adequate, a court of law has concurrent jurisdiction with that of a court of equity in cases of contribution. "But still," says Story, (section 496, Eq. Jur.), "the jurisdiction now assumed in courts of law upon this subject in no manner affects that originally and intrinsically belonging to equity. Indeed there are many cases in which the relief is more complete and effectual in equity than it can be at law; as, for instance, where an account and discovery are wanted, or where there are numerous parties in interest, which would occasion a multiplicity of suits. In some cases the remedy at law is now utterly inadequate; as, if there are several sureties, and one is insolvent, and another pays the debt, he can, at law, recover from the other solvent sureties only the same share as he could if all were solvent. Thus, if there are four sureties, and one is insolvent, a solvent surety who pays the whole debt can recover only one-fourth part thereof (and not a third part) against the other two solvent parties. But in a court of equity he will be entitled to recover one-third part of the debt against each of them; for in equity the insolvent's share is apportioned among all the other solvent sureties. Where two are bound for the payment of a specific sum, and one pays the whole, he can, either in law or in equity, call upon the other to contribute, and thus recover a moiety of what he had paid." Will. Eq. Jur. 107. See, also, 3 Pom. Eq. Jur. §§ 1416, 1418, 1419, and notes. This being the law on the subject of jurisdiction in equity in cases of this character, it follows that the complainant could properly file his bill on the equity side of the court, to enforce contribution by his co-surety, the defendant Robert A. Baker. As the case is one, so far as it seeks to compel contribution, of which a court of equity has undoubted jurisdiction, it could be rightfully brought here in the first instance, even though it may be a case of which a court of law has concurrent jurisdiction. If, then, original relief in equity may be rightfully sought by the complainant to compel Baker to pay his contributive share of the judgment recovered by the principal creditor against all the sureties, why may not the complainant, as an incident to such relief, or as supplementary to it, and in order to satisfy a demand properly enforceable in equity in the first instance, upon averments of Baker's insolvency, reach property which it is alleged Baker has caused to be fraudulently conveyed to his wife? To hold that he cannot, for the reason that he must first exhaust his legal remedy against Baker, is in effect to deny to the com-

plainant the right in the first instance to bring his suit in a court of equity to compel Baker, as a co-surety, to pay his contributive share of the indebtedness of all the sureties to the city. If the complainant, without having brought a suit at law against Baker, has the right to institute an original proceeding in a court of equity to enforce the payment by Baker of his alleged contributive share of the liability which all the sureties have incurred, then it must follow that he has the right in the same proceeding, upon alleging and showing that he cannot otherwise collect his demand against his co-surety, to pursue the property of that co-surety which it is alleged has been fraudulently conveyed to a third party, who is made a defendant in the suit. That part of the relief sought which relates to the application of certain property to the satisfaction of the complainant's demand because of the alleged insolvency of Baker, may be said to be incidental to the principal recovery prayed in the bill; and, as a court of equity has jurisdiction to grant the principal relief asked, without reference to the fact that a court of law may have concurrent jurisdiction, it may proceed, upon suitable allegations made, to dispose of the whole controversy.

From what has been said, it seems to the court quite apparent that there is a well-founded distinction between a suit of the nature of this—which is one to determine the sum which the defendant Robert A. Baker ought to pay his co-surety, and to enforce the payment thereof—and a creditors' bill brought to enforce a liability already established in a suit at law. As bearing on the question decided, see *Mason v. Pierron*, 63 Wis. 259, 23 N. W. Rep. 119, and *Smith v. Rumsey*, 33 Mich. 183.

Demurrer overruled, with leave to the defendants to answer the bill.

FRANKENTHAL *et al.* v. GILBERT *et al.*

(Circuit Court, S. D. Mississippi, W. D. January Term, 1888.)

1. FRAUDULENT CONVEYANCES—TAKING TITLE IN WIFE'S NAME—AGREEMENT WITH CREDITORS.

An insolvent trader sold the whole of his estate to certain of his creditors for the amount of their debts, and certain others which they assumed, the total exceeding the value of the estate. The creditors immediately took possession, and managed the business for a few days, after which one of their number bought out the others, and sold the estate to the insolvent's wife, for cash and promissory notes. She then went into possession, under her own sign, employed her husband, but without salary, with others as assistants, and eventually paid off the notes. *Held*, that although the wife was not shown to have any separate estate prior to the purchase by her, there was no fraud.

2. HUSBAND AND WIFE—LIABILITY OF WIFE'S ESTATE—DEBTS OF HUSBAND—DECLARATIONS TO COMMERCIAL AGENCY.

In a creditors' suit against an insolvent's wife to subject property in her hands to the payment of their debts, statements of the husband as to his financial condition made at periods antecedent to his insolvency, to a commercial agency, cannot defeat the rights of the wife, unless participated in by her.

In Equity. Creditors' bill.

Shelton & Crutcher, for complainants.

Miller, Smith, & Hirsch, for defendants.

HILL, J. The bill, in substance, charges that the complainants were, before January, 1885, creditors of said Phil Gilbert; that at that time said Gilbert was the owner of two stores in the city of Vicksburg, in which were \$24,000 worth of goods and merchandise, besides the one-half owner of a stock of goods at Fidler's landing, in Issaquena county; that on the 21st day of January, 1885, said Gilbert, for the expressed consideration of \$8,789.45, and the agreement to pay certain taxes due by said Gilbert, and other indebtedness, amounting to the sum of \$358.45, by an instrument in writing, purporting to be a bill of sale, conveyed all of said goods, and the interest of said Gilbert in the store at Fidler's landing, to Baer & Bro. and others; that on the 10th day of February thereafter said Baer & Bro., and others made a pretended sale of said stock of goods and merchandise, and the interest of said Gilbert in the stock of goods at Fidler's landing, to the defendant, Cecilia Gilbert, wife of said Phil Gilbert, for the pretended sum of about \$6,000; that said Phil Gilbert remained all the time, and is still, in the possession of said stocks of goods and merchandise unsold, and is carrying on said business in the name of his wife, but in fact for his own benefit; and that said sales and transfers were made with a fraudulent purpose to defeat the complainants, and other creditors of said Phil Gilbert, in the collection of their debts, and are therefore void; and prays that the defendant be declared a trustee for the complainants, and other creditors of said Phil Gilbert, as to said stocks of goods, and their proceeds, and for a decree against said Phil Gilbert and wife for the amounts due them. The answers deny all the fraud charged in the bill, which throws the burden upon complainants to prove the same. I have considered the evidence, and from it find that the sale made to Baer & Bro. and others, on the 21st of January, 1885, was in payment of debts due these creditors, and the debts assumed by them, which amounted to more than the value of the goods and merchandise in Vicksburg. The proof also shows that the stock of merchandise in the store at Fidler's landing was not of sufficient value to pay the debts owing by that firm. I further find from the evidence that when the purchase was made by Baer & Bro. and others, on the 21st of January, the purchasers went into immediate possession, and by their agent continued to sell off the stock until the 10th of February, when the sale was made to Mrs. Gilbert by the agent for one of the creditor firms, who had before that time purchased the interest of the others at a large discount; and that Phil Gilbert had had nothing to do with the business after his sale until the purchase in the name of his wife, so that I am satisfied that the sale from Phil Gilbert to these creditors was a valid sale, and passed to them a good title, and there is no evidence that there was any fraud on their part in the sale to Mrs. Gilbert. It is contended, however, on the part of complainants, that the sale to Mrs. Gilbert was really a sale to Mr. Gilbert, and that the title was taken in her name to defraud his creditors, and to prevent them from

subjecting these goods to the payment of their debts, and this question is the only point in the case that need be considered. The proof shows that the contract of purchase was that Mrs. Gilbert was to pay \$400 in cash, give her note for \$2,907, indorsed by a solvent indorser, and give her 12 notes, without indorsement, for equal amounts, and falling due at the end of each month, the payment of the indorsed note to be secured by a trust deed on the stock which was consummated by the payment of the money, which Mrs. Gilbert borrowed, and the execution and delivery of the notes and trust deed, according to the contract. Mrs. Gilbert immediately went into possession of the goods, under her own sign, and by her husband, son, and daughter, and other clerks employed, has since continued the business, and, though not promptly, has paid off the notes.

It is contended for complainants that as Mrs. Gilbert is not shown to have had any means of her own with which to make the purchase, that she could not borrow the money, or buy on credit, and that Gilbert, being employed in the business without any contract for wages, the proof showing there was not any agreement for wages, or any paid, other than that he obtained his support, and the contribution to the support of his family, by his services. Our statute completely emancipates married women from all marital disabilities as to their personal rights and liabilities as though they were unmarried, enables them to borrow money, purchase property on a credit, and carry on in their own names any lawful business, and makes them liable for all their contracts, and subject to a personal judgment as though unmarried. It often happens that friends of the wife are willing to aid her in procuring the means of support for herself and family in case of the inability of her husband to do so, from any cause, to loan her money, sell on a credit, or indorse her paper, and this with the expectation that she will be aided in the management of her business by her husband, whose first duty is to provide for the support of his wife and children, including the education of his children. This may well be done without any fraud or injury to the husband's creditors, provided the husband does not reserve to himself any interest in the property, or the income of the business, beyond his own support and necessary personal expenses. There is no obligation upon his wife to support and maintain him so long as he is able, by his own labor, to support himself. Applying these rules, sanctioned by the laws of this state, I am unable to find, from the evidence, the fraud charged in the bill sufficient to declare Mrs. Gilbert to be the trustee for the creditors of her husband, as prayed for in the bill. Counsel for complainants rely very much upon statements made by Phil Gilbert to the commercial agency as to his financial condition, some time before the sale to his creditors, for the relief prayed for in the bill. While this evidence might be of weight, upon an attachment issue, as grounds therefor, it cannot defeat the rights of Mrs. Gilbert, unless participated in by her. The purchasers from Gilbert, having obtained a good title, could convey it to another, although that other knew that the sale upon the part of Gilbert was made with the design to defeat his creditors, had such been the case; but the

proof in this case fails to show such fraudulent purpose. The result is that the prayer of the bill must be denied, the bill dismissed, and the complainants decreed to pay the costs.

WOLCOTT v. STUDEBAKER *et al.*

(*Chancery Court, N. D. Illinois.* December 15, 1887.)

1. MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANTS.

An elevator boy, an engineer, and plaintiff were in the employ of defendant. The engineer's duty was to furnish the motive power for an elevator, which carried plaintiff to an upper story to his work, and the boy's duty was to run the same. The engineer always took the elevator on a trial trip every morning with nobody on board. On one occasion plaintiff entered the elevator in the morning shortly before the hour when he was required to go to work, just as the engineer was taking it on the trial trip. The elevator boy was not there, and the plaintiff was injured. *Held*, that if the injury was caused by negligence other than that of plaintiff, it was the negligence of the elevator boy or the engineer, who were fellow-servants of plaintiff, for which defendant would not be liable; the ordinance of the city requiring persons owning elevators to keep a competent person to run them being merely declaratory of the common-law duty and liability in regard to such employees.¹

2. PRACTICE IN CIVIL CASES—DISMISSAL AND NONSUIT—ILLINOIS CIRCUIT.

In the federal courts of Illinois, where, at the conclusion of plaintiff's testimony, the court would, if a verdict were rendered for him, set the same aside, and motion is made by defendant to direct a verdict for him, plaintiff is not allowed to take a nonsuit, but may withdraw a juror and discontinue.

At Law.

Suit for damages for injury to plaintiff while in the defendants' employment, resulting from an elevator accident. The plaintiff's testimony tended to show that he was employed by the defendants, who were manufacturers and dealers in wagons, carriages, etc., in the city of Chicago, to crate or box carriages. His place of work was on the fourth floor of defendants' building. It was his habit, and that of the other employes, to begin work at 7 o'clock in the morning, and to be carried to the fourth floor by the elevator in question. The elevator was used to carry both freight and passengers, and ordinarily began running at about five minutes before 7 o'clock. It was made to descend to the basement of the building, but the employes got on the elevator platform at the first floor. The elevator was under the control of defendants' engineer, who had charge of the engine in the basement, which supplied the motive power to run the elevator. Defendants also employed an elevator boy, who took charge of the elevator when the engineer informed him it was in working order, and ready to carry the men to their work on the upper floors. Plaintiff's testimony also tended to show that it was the practice of the engineer to make a trial trip before 7 o'clock, with no one on the elevator, for the purpose of getting the air out of the cylinders, and the

¹ See note at end of case.

elevator in smooth running order. On such trial trip the elevator was controlled by the engineer by means of the ropes in the basement. On the morning of the accident, and just before 7 o'clock, it appeared that the plaintiff and five other of defendants' employes got on the elevator platform in the absence of the elevator boy; that the elevator was started for a trip up by the engineer in the basement, with no one on the elevator platform in charge; and there was no evidence that the engineer knew that anybody was on the elevator. The elevator ran up past the third floor, where one man jumped off. At the entrance to the elevator shaft on the third floor, the only protection was a chain stretched across the opening, about three feet from the floor. Plaintiff testified that before the elevator reached the fourth floor where he intended to get off to go to his work, it stopped suddenly and began to descend very rapidly; that somebody on the elevator shouted that it was falling, and plaintiff, believing that it was falling, attempted to jump off at the third floor, and, his foot striking the chain stretched across the opening, he was thrown out upon the floor on his head and shoulder, and seriously injured. The elevator in fact did not fall, but was stopped by one of the men on the platform before it reached the second floor. It was made to appear further that at the time of the accident there was an ordinance in force in the city of Chicago which provided as follows: "It shall be the duty of every person owning, controlling, operating, or using as owner, lessee, or agent, any passenger or freight elevator in any building within the corporate limits, to employ some competent person to take charge of and operate the same; and any such person who shall neglect to comply with the provisions of this section shall be fined the sum of \$10 for each and every day of such neglect." Upon the case made on the part of the plaintiff, and at the conclusion of his testimony, the defendants moved the court to instruct the jury to return a verdict in their favor.

E. L. Harpham and S. P. Douthart, for plaintiff.

Flower, Remy & Holstein, for defendants.

DYER, J., (*orally.*) Without discussing the question of contributory negligence, which I am inclined to think would be one for the jury, if the case were to be submitted to them, I proceed to consider the other grounds of alleged liability in the case. It is said by counsel for the plaintiff that the ordinance of the city which made it the duty of the defendants to employ some competent person to take charge of and operate the elevator in question, fixes upon the defendants, under the facts disclosed, a liability to the plaintiff for the injury which he sustained. The ordinance, it seems to me, simply declares a common-law duty; that is, that every person owning, controlling, or operating a passenger or freight elevator shall employ some competent person to take charge of and operate it. As I understand it, that is precisely the duty which the law, in the absence of such an ordinance as this, imposes. The law says to every person who owns, controls, and operates one of these elevators, that he must employ some person to run it, and that he must exercise all reasonable care in the selection of a competent person for that purpose. This

ordinance merely imposes a penalty for the disregard of that duty. The testimony shows that the defendants had in their employment a person spoken of by the witnesses as "the elevator boy," whose duty it was to run this elevator. It is not shown that he was not a competent person. If he was absent from his post when he ought to have been there, then he was guilty of negligence. The ordinance was not intended to punish a man for non-compliance with its requirements because in a case where he has in his employment a competent person whose duty it is to take charge of and run an elevator, an injury has resulted from the negligence of such employe. The defendants complied with the ordinance; and the most that can be said is, that if it was the duty of the elevator boy to be at his post on the occasion referred to, to take this elevator up with these people upon it, then his absence from his post of duty made him guilty of negligence. Such being the true state of the case, I do not see how the further conclusion is to be escaped from, that the elevator boy was a co-employe of the plaintiff, and of the other employes of the defendants who were on the elevator at the time. The engineer controlling the motive power in the basement of the building was also a co-employe. Suppose, then, there was negligence on the part of the engineer in starting the elevator for a trial trip when he did, without knowing, as it may be said he ought to have known, that there were people upon it, and that this negligence brought about the accident which befell the plaintiff, are the defendants liable to the plaintiff for the consequences of that negligence? As we all know, much has been said and written upon this subject of the liability of an employer to one servant for the negligence of a fellow-servant; and oftentimes it is difficult to draw the line with accuracy, and apply the law correctly to the given case. But much of the doubt which has prevailed upon the subject has been cleared away by decisions which must be regarded as controlling here. Decisions of the federal courts upon this question, are, it is said, in conflict with decisions of the supreme court of Illinois; but if the question, substantially as it arises in the case at bar, has been determined by the supreme court of the United States, of course the adjudications of that court must prevail in this court.

Hough v. Railway Co., 100 U. S. 213, was a case where an engineer on a locomotive sustained an injury caused by the defective condition of the pilot or cow-catcher. There was a certain person in the employment of the company whose duty it was to see that the engine was kept in suitable and proper condition for use. He was the master mechanic, to whom was committed the exclusive management of the motive power of the defendant's line, with full control over all engineers, and with unrestricted power to employ, direct, control, and discharge them at pleasure. There had been neglect of duty in keeping the engine in safe condition for use. The pilot had been left in a defective and dangerous condition, and the engineer had called the attention of the master mechanic to the fact, and had repeatedly requested him to have the defect repaired, and the engine put in safe condition for use. The engineer continued to run the engine, relying upon the requests that he had made

to the master mechanic, and the assurances he had that the pilot should be put in proper condition. Upon that state of facts, the court held that the company was liable to the engineer for the injury he sustained, and that it was not relieved from liability by showing that the engineer continued to use the engine after he knew of the defect, because he had given the company, through the person who had charge of the motive-power department, notice of the defect, and had demanded that it be repaired. This was just and right. The engineer and the master mechanic were engaged in distinct and different departments of service. The master mechanic was the superior in his department, exercising control over men whose business it was, under his direction, to keep the engines of the company in proper repair, so that they might be used with safety by persons engaged in another branch of the company's service.

Now let us consider the bearing upon the case we have in hand of the case of *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322. That was a case where the court held that a brakeman working a switch for his train on one track in a railroad yard was a fellow-servant with the engine-man of another train of the same corporation upon an adjacent track, and that he could not maintain an action against the corporation for an injury caused by the negligence of the engine-man in driving his engine too fast, and not giving due notice of its approach, without proving negligence of the corporation in employing an unfit engine-man. Here was a brakeman working a switch for the train on which he was employed, on one track in a railroad yard. His employment had no connection with the operation of the engine which was upon an adjacent track. His work was entirely disassociated from the running of the engine, and, by the carelessness of the engineer who controlled the movements of the engine, the brakeman was struck and injured. The supreme court held that those two men, engaged in their respective employments, were fellow-servants, according to the great preponderance of judicial authority, and therefore that the railroad company was not liable for the injury which the brakeman on one train sustained through the negligence of an engineer on another train. Said Mr. Justice GRAY, speaking for the court:

"They are employed and paid by the same master. The duties of the two bring them to work at the same place, at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object,—the moving of the trains. Neither works under the orders or control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service; and neither can maintain an action for an injury caused by such negligence, against the corporation, their common master."

This is not in conflict with the ruling in *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184. In that case, it was decided that where an engineer on a locomotive was injured through the carelessness of a conductor on the same train, the company was liable. The grounds of that decision were that the conductor had the right to command the

movements of the train, and to control the persons employed upon it, that his relation was that of a superior officer in charge of the train, and that he stood for and as the representative of the corporation; that the engineer was subject to his control. And the court likened it to the case of a representative of a corporation who has control of a certain department in the service, other persons employed in the same department being subject to his directions. The superior employed in such a position represents the corporation, and it is therefore bound by his acts, and responsible for his negligence, because the corporation must act through persons who are placed in positions of superior authority in the different departments of the service. On the grounds stated, the *Randall Case* and the *Ross Case* appear to be distinguishable. *Randall v. Railroad Co.* was followed in the case of *Howard v. Railway Co.*, 26 Fed. Rep. 837. In that case it was held that a fireman on a passenger train, and an engineer in charge of an engine not connected with such train, but belonging to the same railroad company, are fellow-servants, and where the fireman was killed by a collision between the engine and train occasioned by the negligence of the engineer, the company was not liable. Judge BREWER discusses the question at length in his opinion in that case.

Following out the logic of the *Randall Case* and this case to which I have just referred, it is my conviction that the plaintiff in the case at bar has made a case in which, if there was negligence at all, it was negligence on the part of the engineer who controlled the motive power of this elevator, and of the elevator boy, one or both, and that they were the fellow-servants of the other employes, including the plaintiff, who were in the habit of riding in the elevator to and from their work. All were in the service of the defendants. The elevator was used in carrying on the business in which all were engaged. It is like the case of the engineer who is running an engine connected with a train, and the other employes who are in service on the same train. Here was an apparatus which was put into the defendants' building for the purpose of enabling the employes to prosecute the work which they were employed to do. They were engaged in different rooms, and different stories of the building. They went to and from their work by means of this elevator. Here was a man in the basement who controlled the use of the steam-power by which the elevator was moved up and down. The elevator was one of the instruments by which the work of all was being carried on. The engineer had not charge of a department. He was simply an instrumentality controlling the use of the motive power, and was certainly a fellow-servant with the plaintiff, as was the elevator boy, if the persons employed by the railroad company in the *Randall Case* were fellow-servants. They were all doing work—to use the language of some of the cases—which conduced to a common result; neither worked under the orders or control of the other, and so they were fellow-servants.

Counsel are familiar with the rule in relation to the duty of the court in submitting a case to the jury. That rule is, as laid down by the

supreme court, that if the trial court can plainly see that upon the case made by the plaintiff, if a verdict in his favor should be rendered by the jury, it would be incumbent upon the court to set that verdict aside, then it is the duty of the court to direct a verdict for the defendant. Upon the showing here made, and applying to the case the law as I have endeavored to state it, it follows that, if the jury should give the plaintiff a verdict upon the evidence as it stands, it would be the duty of the court to set the verdict aside. The court must therefore direct a verdict for the defendants, at this stage of the case.

Mr. Harpham. I would like to take a nonsuit.

Mr. Holstein. I object, and ask for a verdict in favor of the defendants.

The Court. It is not our practice to grant what is technically known as a nonsuit. The proper practice would be for the plaintiff to ask to withdraw a juror and discontinue the case.

Mr. Holstein. I don't think he has that right after submitting his case.

The Court. There is a statutory provision of this state to the effect that every person desiring to suffer a nonsuit shall be debarred from doing so, unless he do so before the jury retires from the bar. As I am advised, it was the practice of Judge DRUMMOND, applying by way of analogy this statute to such a case, and is the practice of Judge BLODGETT, to allow the plaintiff before the jury retires to withdraw a juror, and discontinue. So I shall permit the plaintiff to take that course.

NOTE.

FELLOW-SERVANTS—WHO ARE. Within the meaning of the rule exempting the master from liability for injuries resulting to a servant from the negligence of a co-employee, fellow-servants are defined to be persons engaged in the same common service, under the same general control. *Gravelle v. Railway Co.*, 10 Fed. Rep. 711. They must be directly co-operating with each other in a particular business, in the same line of employment, or their usual duties must bring them habitually together, so that they may exercise a mutual influence upon each other promotive of proper caution. *Railway Co. v. Snyder*, (Ill.) 7 N. E. Rep. 604. A track-repairer and an engineer are held to be fellow-servants. *Van Winkle v. Railway Co.*, 33 Fed. Rep. 278. So, also, a brakeman employed by a railroad company on one of its trains, and an engineer working for the same company on a different train. *Randall v. Railroad Co.*, 3 Sup. Ct. Rep. 322. And a station agent, required to look after the safety of switches, and to see that the main track is kept free and unobstructed for the passage of trains, is a fellow-servant of a brakeman or engineer. *Toner v. Railway Co.*, (Wis.) 31 N. W. Rep. 104; *Brown v. Railway Co.*, (Minn.) 18 N. W. Rep. 884; *Dealey v. Railroad Co.*, (Pa.) 4 Atl. Rep. 170. An inspector of cars is held to be a fellow-servant of a brakeman. *Smith v. Potter*, (Mich.) 9 N. W. Rep. 273. The foreman of a gang of section or track men engaged in the discharge of his ordinary duties in the course of his employment is a fellow-servant with them. *Olson v. Railway Co.*, (Minn.) 35 N. W. Rep. 866. Section or track men are held to be fellow-servants with the engineer or brakemen of a train. *Connolly v. Railway Co.*, (Minn.) 35 N. W. Rep. 532. It is immaterial that a negligent servant is in a position of greater responsibility than the injured one, or in a different line of employment, so long as both are in the same general business. *Mining Co. v. Kitts*, (Mich.) 3 N. W. Rep. 240. The rule obtains regardless of the fact that one employee may be the superior in rank of others in the same general undertaking, unless he occupies the place of vice-principal. *Railway Co. v. Adams*, (Ind.) 5 N. E. Rep. 187; *Copper v. Railroad Co.*, (Ind.) 2 N. E. Rep. 749; *Fraker v. Railway Co.*, (Minn.) 19 N. W. Rep. 349; *Peschel v. Railway Co.*, (Wis.) 21 N. W. Rep. 269. A mining boss is a fellow-servant of other employees. *Reese v. Biddle*, (Pa.) 3 Atl. Rep. 813. But a foreman having entire supervision of a mine, and all its workings, employing and discharging laborers, and prescribing their duties, is not a co-employee within the rule which exempts the master from responsibility for the injuries received by a servant through the negligence of a fellow-servant. *Reddon v. Railroad Co.*, (Utah.) 15 Pac. Rep. 262. And a conductor is held to be a fellow-servant of a brakeman. *Pease v. Railway Co.*, (Wis.) 20 N. W. Rep. 903. On the other hand, in limitation of the general rule, it is held that the master is liable for injuries occurring to an employee while doing an act beyond the

scope of his employment at the direction of a co-employee having authority over him. *Gilmore v. Railway Co.*, 18 Fed. Rep. 866. So, also, where a servant is injured through the negligence of an employe in providing suitable material or appliances, the latter being authorized or required by his employment to discharge this duty. *Id.*; *Kruger v. Railway Co.*, (Ind.) 11 N. E. Rep. 957; *Benzing v. Steinway*, (N. Y.) 5 N. E. Rep. 449. And the broad principle is laid down that where a servant is invested with control or superior authority over another employe, and injury is incurred by the latter, through the negligent exercise of the authority so conferred, the master is liable. *Thompson v. Railway Co.*, 14 Fed. Rep. 564; *Gravelle v. Railway Co.*, 10 Fed. Rep. 711; *Ross v. Railway Co.*, 8 Fed. Rep. 544, 5 Sup. Ct. Rep. 184; *Railway Co. v. Perego*, (Kan.) 14 Pac. Rep. 7; *Mason v. Machine-Works*, 28 Fed. Rep. 228. A station agent is held not to be a fellow-servant of a carpenter employed by the railroad company in a department wholly disconnected from that in which the agent is working. *Palmer v. Railway Co.*, (Idaho,) 18 Pac. Rep. 425. And a common hand engaged in the business of relaying a track under the control of a foreman is not in the same employment within the sense of the rule as one who is managing a switch-engine which is used in moving cars and not engaged in the work of relaying said track. *Garrahy v. Railroad Co.*, 25 Fed. Rep. 258. At common law, where the master delegates to any officer, servant, or agent, high or low, the performance of any duty which really belongs to the master himself, the latter is not relieved from liability for the negligent acts of such servant. *Railroad Co. v. Fox*, (Kan.) 8 Pac. Rep. 820; *Railroad Co. v. Moore*, (Kan.) 1 Pac. Rep. 644. So it is held, directly contrary to the decision in the case of *Smith v. Potter*, *supra*, that an inspector of cars is not a fellow-servant of a brakeman. *Braun v. Railroad Co.*, (Iowa,) 6 N. W. Rep. 5. And when a railroad company confers authority upon one of its employes to take charge and control of a gang of men, in carrying on some particular branch of its business, such servant, in governing and directing the movements of the men under his charge with respect to that branch of its business, is a representative of the company, and not a fellow-servant of the men under his control. *Railway Co. v. Hawk*, (Ill.) 12 N. E. Rep. 253; *Railway Co. v. Lundstrum*, (Neb.) 20 N. W. Rep. 198. See, also, upon the point as to who are fellow-servants, *Van Wickle v. Railway Co.*, 32 Fed. Rep. 278; *Theleman v. Moeller*, (Iowa,) 34 N. W. Rep. 765; *Railroad Co. v. De Armond*, (Tenn.) 5 S. W. Rep. 800; *Railroad Co. v. Norment*, (Va.) 4 S. E. Rep. 211; *Torians v. Railroad Co.*, Id. 399; *Ewald v. Railway Co.*, (Wis.) 86 N. W. Rep. 12; *Easton v. Railway Co.*, 32 Fed. Rep. 898; *Naylor v. Railroad Co.*, 33 Fed. Rep. 801.

CHURCHILL v. HUDSON.

(Circuit Court, E. D. Missouri, E. D. February 24, 1888.)

CURTESY—NATURE OF ESTATE DURING COVERTURE—EXECUTION—EXEMPTIONS.

Under Rev. St. Mo. § 3295, exempting from levy of execution, during coverture, the interest of the husband in any right of the wife in any real estate acquired by her before or after marriage, for his sole debt, the husband's estate, by the curtesy, is exempt, during coverture, from such sale, and the purchaser cannot maintain an action of ejectment for such interest after the death of the wife.

At Law. Suit in ejectment.

P. Taylor Bryan and M. W. Huff, for plaintiff.

A. J. P. Garesche, for defendant

THAYER, J., (*orally*.) This is a suit in ejectment. The lands involved in the controversy belonged to Mrs. Marie C. Chambers, wife of B. M. Chambers, in her life-time. Issue capable of inheriting was born of that marriage in the year 1874, by virtue of which fact the husband, B. M. Chambers, became entitled to an estate as tenant by curtesy in the lands in question. Thereafter, the lands were levied upon and sold under and

by virtue of a judgment and execution against the husband for his sole debt, the sale taking place during the existence of coverture. Mrs. Chambers died in the year 1883, and after her death this suit was brought, the plaintiff claiming that, notwithstanding the provisions of section 3295 of the Revised Statutes of the state of Missouri, the sale under the judgment and execution against B. M. Chambers was effectual to pass his estate by the curtesy in the lands in question. On the other hand, the defendant contends that the section last referred to prohibited a sale of the husband's curtesy during the existence of coverture. Which of these theories is correct is the sole point for determination.

The case has been very fully and well argued for the plaintiff, and I may say that while the question has been incidentally alluded to in some of the decisions in this state, it has never been authoritatively decided by the state courts. Section 3295 reads as follows:

"The rents, issues, and products of the real estate of any married woman, and all moneys and obligations arising from the sale of such real estate, and the interest of her husband in her right in any real estate which belonged to her before marriage, or which she may have acquired by gift, grant, devise, or inheritance during coverture, shall, during coverture, be exempt from attachment or levy of execution for the sole debts of her husband; and no conveyance made during coverture by such husband of such rents, issues, and products, or of any interest in such real estate, shall be valid, unless the same be, by deed, executed by the wife jointly with the husband, and acknowledged by her in the manner now provided by law in the case of the conveyance by husband and wife of the real estate of the wife."

The position of plaintiff's counsel on the question involved may be stated as follows: The statute under consideration is an innovation on the common law, and, therefore, should be strictly construed. At common law, the husband, upon marriage, becomes tenant, by the marital right, of his wife's lands, and, as such, is entitled to the rents, issues, and products thereof. On the birth of issue capable of inheriting, he becomes tenant by the curtesy, which, before the death of the wife, is termed "curtesy initiate," and after her death "curtesy consummate." These two estates at common law, are essentially different. The former, termed an "estate by the marital right" was said to be held by the husband in right of the wife; the latter, or "tenancy by the curtesy," was an estate said to be held, not "in right of the wife," but in the husband's own right; and, inasmuch as the statute above quoted uses the words "in her right," and in terms only exempts from seizure and sale those interests of the husband held "in right of the wife," it is argued that the husband's curtesy is not within the terms of the exemption created by section 3295, and therefore may be seized and sold, and that a recovery in ejectment may be had on such title after the wife's death. The following cases are cited in support of the various propositions last stated: 2 Bish. Mar. Wom. §§ 17-148, and 1 Bish. Mar. Wom. §§ 531, 532; Rop. Husb. & Wife, c. 1; Washb. Real Prop. bk. 1, c. 9, § 1; *Foster v. Marshall*, 22 N. H. 491; 2 Kent, Comm. 130; Co. Litt. 67a; Bright, Husb. & Wife, 113; *Valle v. Obenhausse*, 62 Mo. 81; *Dyer v. Wittler*, 89 Mo. 89; Clancy, Husb. & Wife, 185; and *Mattocks v. Stearns*, 9 Vt. 326.

It may be conceded that the two estates of the husband in his wife's lands, as above described, exist at common law. It may also be conceded that all the text writers speak of the estate by the marital right as held by the husband "in right of the wife," and of an estate by the curtesy as held by the husband in his own right. Nevertheless, it is my opinion that the legislature did not use the words "interest of the husband in her right," on which the whole argument hinges, in the technical sense now contended for, and for the express purpose, as it is assumed, of leaving the husband's curtesy in his wife's lands open to seizure and sale on execution during coverture. In the first place, the statute is remedial in its character, and should receive a liberal construction to effectuate the purpose of the law-maker. The purpose of the legislature was to secure to the wife and family the full enjoyment of her own property; to protect it from seizure by the husband's creditors and from conveyances by the husband himself, which might affect it. With this general purpose in view, the last clause of the section provides that no conveyance made during coverture by the husband, "*of any interest*" in such real estate shall be valid unless, by deed, executed by the wife jointly with the husband. The husband himself is thus prohibited, during coverture, from making a sale or conveyance of his estate by the curtesy, unless with the consent of the wife; and it is hardly probable that, having put such a restriction on the husband's power to convey, even his curtesy consummate, on the death of the wife, that the legislature intended to leave this same estate open to seizure and sale on execution during coverture. Viewing the section as a whole, I think the first clause was intended to be as comprehensive as the last,—that is to say, creditors are forbidden, during coverture, to seize any interest of the husband in the real estate of the wife, acquired by virtue of the marriage. It is not probable, I think, that in drafting the section, the law-maker had in view the particular distinction now invoked between an "estate by the marital right" and an "estate by the curtesy," and that the words relied upon by the plaintiff's counsel were used advisedly with reference to that distinction. On the contrary, it seems far more probable that, in speaking of the husband's interest, the words were used, as they are often employed in ordinary conversation, to indicate the source from whence the interest had been derived.

Something was said in the course of the argument to the effect that the sale of the husband's curtesy would not impair the wife's power to fully enjoy her own property during coverture, inasmuch as the purchaser at such sale could only be let into possession when the curtesy became consummate at the wife's death. In other words, it was not claimed that the husband's estate by the curtesy initiate would pass at such sale, as that would lead to a disturbance of the wife's possession during coverture, and to a sequestration of the rents and profits which are expressly exempt by the statute from seizure and sale. With reference to this suggestion it is only necessary to say that if plaintiff's construction of the statute be correct, it is easy to foresee several ways in which the wife's right to the uninterrupted and full enjoyment of her property, which the

statute aims to secure, might be seriously impaired by subjecting the husband's curtesy to seizure and sale on execution.

Upon the whole, I think the law is with the defendant, and accordingly direct a judgment to be entered in her favor.

STRONG v. UNITED STATES.

(*District Court, S. D. Alabama. February 21, 1888.*)

1. UNITED STATES COMMISSIONERS—FEES—COMPLAINT—OATH—FILING COMPLAINT.

Under Rev. St. U. S. §§ 828, 847, 1014, a commissioner of the United States circuit court in Alabama is entitled to a fee for administering the oath to every criminal complaint made before him, and for filing the same, but not for drawing the complaint.

2. SAME—REDUCING TESTIMONY TO WRITING.

The Alabama statute requires a committing magistrate to reduce to writing the testimony of witnesses examined before him on preliminary examination, but the examination is not illegal by his failure so to do, and the testimony may be proved by any witness who heard it. An examination before a United States commissioner, so reduced to writing by him, is not a deposition under Rev. St. U. S. § 847, which prescribes a fee for taking and certifying depositions to file, and the commissioner is not entitled to a fee for such services.

3. SAME—WARRANTS AND SUBPOENAS—FILING RETURN.

A commissioner is entitled, under Rev. St. U. S. § 847, to a fee for issuing a warrant and subpoena and filing the same when returned, but not for entering the return.

4. SAME—BAIL-BONDS—ACKNOWLEDGMENT.

Under Rev. St. U. S. §§ 828, 847, a commissioner may charge 15 cents a folio for drawing a bail-bond, but is not entitled to a fee for taking an acknowledgment to the bond, the acknowledgment being unauthorized by statute.

5. SAME—OATHS TO WITNESS FEES—CERTIFICATES OF ATTENDANCE.

Rev. St. U. S. §§ 828, 854, authorize a commissioner to charge a fee for administering the oath to each witness as to his mileage and attendance, and he is entitled to 15 cents a folio for every certificate given a witness and on which he is paid.

6. SAME—DOCKET FEES.

Rev. St. U. S. §§ 828, 847, authorizing a commissioner to receive docket fees, was repealed by the act of congress of August 4, 1886, (24 U. S. St. at Large, 256, 274.) entitled "An act making appropriations to supply deficiencies, * * * and for other purposes," where, in a proviso, it is expressly declared that commissioners shall not be entitled to any docket fees.

7. SAME—TRANSCRIPTS TO CIRCUIT CLERK.

Under an order of the circuit court, requiring commissioners to forward to the clerk of the United States circuit court a certified copy of the proceedings in every case on their docket, and to make out and forward to the clerk, at the end of each month, a report in duplicate of all cases instituted before him during the month, a commissioner is entitled to 10 cents a folio for the copy, and 15 cents a folio for the certificate attached, and for one report made in duplicate 15 cents a folio, and 15 cents for the certificate attached.

At Law. Original action for services.

The plaintiff, William H. Strong, who is a commissioner of the United States circuit court, brought this suit to recover a balance claimed to be due him on an account for services rendered as such commissioner for and on behalf of the United States. The original account, as presented v.34f.no.1—2

to the proper accounting officer of the treasury department, was for \$919.10, and runs from February 18, 1887, to June 7, 1887. On this account there was allowed and paid by such officer the sum of \$296.25. The balance claimed to be due was \$622.85.

Geo. H. Patrick, for plaintiff.

J. D. Burnett, U. S. Dist. Atty., for defendant.

TOULMIN, J., (after stating the facts as above.) This is a suit brought under the recent act of congress, approved March 3, 1887, (24 U. S. St. at Large, 505.) The plaintiff is a commissioner of the circuit court of the United States for the Southern district of Alabama, and claims that the amount sued for is a balance due him for services rendered by him as commissioner for and on behalf of the United States. The account sued on is itemized, and is fully set out in the petition. It was verified by oath, and duly presented to and approved by the circuit court of the United States for the Southern district of Alabama, and was transmitted to the first comptroller of the treasury department. A partial payment was made on the account, but a large portion of it was disallowed by the comptroller; and this suit is brought to recover the balance, the payment made being admitted as a credit on the account. To the petition or complaint the district attorney interposes the plea of general issue,—a general denial of the allegations of the complaint. The issue as presented brings before the court the entire account as set out in the petition, and makes it incumbent on the plaintiff to show to the satisfaction of the court that the services therein charged for were actually rendered as stated, and that the charges therefor are according to law. The evidence submitted by the plaintiff in support of his claim consists of his sworn statement in court, the papers in the several cases specifically numbered and mentioned in the petition, the account set out in the petition, and the order of the circuit court allowing the same.

The first question to be considered is whether all the services charged for were actually rendered, and, secondly, whether all the fees claimed in the account are authorized by law. The law of costs must be deemed and held a penal law, and no fee must be taken except in cases expressly provided by law. 1 Brick. Dig. 417, § 6; *Day v. Woodworth*, 13 How. 363. Officers who are entitled to receive fees for their services can receive only such fees as are specifically prescribed by law. Rev. St. §§ 823, 1764, 1765; *Railroad Co. v. Railway Co.*, 81 Ala. 94-96, 1 South. Rep. 214. The statutes of the United States prescribe the services for which commissioners are entitled to receive fees, and prescribe the fees that shall be charged. See Rev. St. §§ 828, 847. Unless we find in the statutes authority for the fees charged in the account sued on, they cannot be allowed. *Jerman v. Stewart*, 12 Fed. Rep. 271, 275. The first item found in the account, and which is charged in every case mentioned in it, (except the first five,) is for a complaint. The usual mode of proceeding before a magistrate or justice of the peace in a criminal prosecution in this state is by a complaint in writing made by the person who institutes the prosecution, which is sworn to and filed with the magistrate.

Hence the proceeding by complaint before commissioners. But I find no fee allowed for a complaint by either of the sections of the statutes referred to. There is none provided for in terms in section 847, which prescribes commissioner's fees; and there is no like service performed by clerks of the United States courts, and for which they receive compensation. Such clerks have no authority to receive complaints of this character, or in any manner to institute or to take cognizance of criminal prosecutions. My opinion is that the petitioner is not entitled to a fee for the complaint in any case. But the complaint is sworn to before the commissioner, and is filed by him, and the statute provides a fee for him for administering an oath, and for filing every paper in a cause. I therefore hold that the petitioner, while not entitled to a fee for the complaint, is entitled to a fee for administering the oath to every complaint made before him, and for filing the same. But it is urged in argument that if there is no fee allowed for the complaint *eo nomine*, the commissioner is required to examine the complainant, and to reduce his testimony to writing, and that this then becomes a deposition, for which the commissioner is entitled to be paid at the rate of 20 cents a folio, under section 847, Rev. St. In the first place, it will be noted that the petitioner does not claim in his account or in his petition any compensation for taking depositions. It is apparent, then, that the claim now set up for this compensation is an after-thought. However, if I should agree with counsel in the suggestion that the petitioner was entitled to compensation for taking depositions in these criminal proceedings, I would allow an amendment of the petition to cover this claim.

Section 1014, Rev. St., in conferring criminal jurisdiction upon commissioners, declares that proceedings before them shall be agreeable "to the usual mode of process" in the state where they are appointed. In this state it is the duty of a committing magistrate to reduce to writing the testimony of witnesses examined before him on preliminary examination, but if he neglect the duty, the examination is nevertheless legal and valid, and the testimony given may be proved by any witness who heard and remembers it substantially. *Harris v. State*, 73 Ala. 495. The examination reduced to writing by the commissioners is not a deposition in contemplation of section 847, Rev. St., which prescribes a fee for taking and certifying depositions to file. A deposition is the testimony of a witness, reduced to writing, and signed as given under oath before a commissioner, examiner, or other judicial officer, in answer to interrogatories and cross-interrogatories, to be filed and read as evidence on the trial of a case pending in court. *Burrill*, Law Dict.; 1 Bouv. Law Dict. 408; *Couch v. State*, 63 Ala. 163. Rev. St. §§ 863, 866, 867, provide for the taking of depositions, and name, among other officers, commissioners and clerks of the courts, as authorized to take and certify them to file in court. And sections 828 and 847 prescribe the compensation for this service. But in *Iron Factory v. Corning*, 7 Blatchf. 16, in 1869, it was held by Mr. Justice NELSON that the word "deposition," in the act of 1853, did not include oral testimony taken in court or before a master, and applied only to a deposition given in evidence on the trial of a case

at common law, and to one read at the hearing of a suit in equity. The act of 1853 referred to is chapter 16 (relating to fees) in the Revised Statutes, pages 153 to 161, and in which chapter are found sections 828 and 847, which prescribe the fees of commissioners and clerks for taking and certifying depositions. I am satisfied that petitioner is not entitled in this suit to any fees for taking depositions.

The next fee charged in every case mentioned in the petition, and for which there is no authority, is for entering return of warrant. The petitioner is not entitled to this fee. There is no statute which authorizes it. Section 847 does not provide for it. He has no record on which to enter such return, and the proof shows, as a matter of fact, that he did not enter it. But he is entitled to a fee for issuing warrants, and for filing the same when returned. What I have said in regard to the fee charged for entering return of warrant applies equally to the charge for entering return of subpoenas. The petitioner is, however, entitled to a fee for issuing a subpoena, and for filing the same when duly returned. It will be observed that in some cases I have not allowed him a fee for filing subpoenas. This disallowance has only been in cases where there was no return.

The statute authorizes a charge for drawing a bond at 15 cents a folio. Rev. St. §§ 847, 828. On inspection of the bonds submitted in this case I find they contain four folios. I think petitioner should be allowed 15 cents a folio for drawing bonds as charged. But the charge for acknowledgment of bonds is unauthorized by law, and, as the proof shows, by practice. Section 847, Rev. St., provides for a fee for taking acknowledgments. I am of opinion that this acknowledgment has no reference to a bail-bond. There is no such thing as an acknowledgment to a bond. A commissioner is authorized to take bail; that is, to take security for the appearance of a party in court,—see Rev. St. § 1014; Code Ala. (1886,) §§ 4406, 4407,—the form of which is simply an acknowledgment or admission by the accused and his sureties of indebtedness to the United States in the sum prescribed, or an agreement to pay to the United States the sum prescribed, unless the accused appear at the proper court, from term to term, or at a particular term, to answer the particular charge preferred against him. This is signed, sealed, and delivered to the officer taking the bail, and, if approved, the accused is released from custody. 1 Brick. Dig. 203, § 71. There is no oath required, or further acknowledgment required or, as a matter of fact, taken. A bond duly signed, with sureties, and with a condition for the appearance of the principal in a criminal case before a court, accepted by a person authorized to take bail, is good as a recognizance. In the case of a formal recognizance the obligation is acknowledged by the parties present in open court, and entered of record. 2 Bouv. Law. Dict. 828. But in the case of a bond in the nature of a recognizance, where the parties sign their names, there is no absolute necessity for the principal being present before the person authorized to accept such bond. In the absence of the principal, the magistrate might refuse to accept the bond, but if he is satisfied that it was duly signed and sealed, and the sureties are sufficient,

and he accepts the bond, it is valid. *U. S. v. Ebbs*, 10 Fed. Rep. 371; *Ozley v. State*, 59 Ala. 94. When bail is taken by commissioners it should be by bond, where the principal and sureties sign their names, as courts of commissioners are not courts of record, authorized to take acknowledgment of recognizances for future appearance before them or some court. Courts of justices of the peace are not courts of record, authorized to take acknowledgment of recognizances for future appearance before them. *U. S. v. Harden*, 10 Fed. Rep. 805. And, as was said by the court in that case: "The powers and duties of the United States commissioners in criminal matters are not as extensive as those of justices of the peace, but are confined to those which they must necessarily exercise as examining and committing magistrates in enforcing the criminal laws of the United States, and within this limit of jurisdiction they must conform as near as may be to the forms and mode of procedure required by law of justices of the peace." The commissioner holds no court; he acts as an arresting, examining, and committing magistrate. *Ex parte Perkins*, 29 Fed. Rep. 909; *U. S. v. Case*, 8 Blatchf. 250; *U. S. v. Martin*, 17 Fed. Rep. 150; *U. S. v. Ambrose*, 7 Fed. Rep. 554. For form of bail not in open court, see Code Ala. (1886) § 4420. It is required to be in writing, signed by the defendant and at least two sufficient sureties, and approved by the magistrate or officer taking the same; and this is all that is required.

Under the statute of this state a sheriff has authority, and it is his duty, to discharge on bail persons charged by indictment with criminal offenses. In the case of a misdemeanor, no order of a judge or court is necessary, but the sheriff fixes the amount of bail, and it is his duty to discharge the accused on sufficient bail being given. In the case of a felony, the court makes an order fixing the amount of bail required, and the sheriff has authority, and it is his duty, to discharge the defendant on his giving bail as required by such order; and a sheriff may discharge an accused on his giving sufficient bail when arrested on a warrant issued by a magistrate. See Code Ala. (1886,) §§ 4275, 4291, 4408, 4409; *Hammons v. State*, 59 Ala. 164; *Ozley v. State*, Id. 94. A sheriff has no authority to take an acknowledgment. If, then, an acknowledgment is essential to bail, how is it that a sheriff can take bail without such acknowledgment? The acknowledgment, for the taking of which a fee is prescribed, is an act having reference to conveyancing. It is the act of the grantor in going before a competent officer and declaring the instrument to be his act and deed. The officer before whom this declaration is made is considered as taking the acknowledgment, and his certificate on the instrument that such a declaration has been made to him is also called an acknowledgment. 1 Bouv. Law. Dict. p. 50; Worcester. Dict.; Webster. Dict. Nothing of this kind is done or required to be done in taking bail. But there are certain instruments required to be acknowledged to entitle them to be recorded, and such instruments, to be valid in certain cases, must be recorded. Rev. St. §§ 4192, 4193. Commissioners of the circuit court are authorized to take such acknowledgments. Rev. St. § 1778. And for taking acknowledgments they are entitled to receive a fee. Rev. St. § 847.

I think the charge for pay-roll of witnesses excessive in most of the cases in which it is made. The petitioner is entitled to a fee for administering the oath to each witness as to his mileage and attendance, and is entitled to 15 cents a folio for every order or certificate given the witness, and on which he is paid. This is what the petitioner calls a "pay-roll." I find that in most of the cases in which the fee for pay-roll is charged there was but one witness, and I further find that the certificate contains less than 150 words. Rev. St. §§ 828, 854.

In the case of *U. S. v. Wallace*, 116 U. S. 398, 6 Sup. Ct. Rep. 408, it was held that commissioners were entitled to docket fees under the provisions of Rev. St. §§ 828, 847. This decision was rendered on January 18, 1886. But by act of congress of August 4, 1886, it is provided that they shall not be entitled to any docket fees. The docket fees claimed in this case accrued in the year 1887, from February to June, inclusive. The contention of the petitioner is, in substance, that the provision referred to is found in the appropriation bill of August 4, 1886, in the proviso to the clause excepting docket fees, and that it excepts them only from the sum there appropriated for payment of commissioners; and, further, that inasmuch as congress did not continue the exception in the appropriation bill for the fiscal year 1887, the proviso has no effect on the claim here made. In other words, that payment of docket fees to commissioners was simply suspended temporarily by act of August 4, 1886; and the case of *U. S. v. Langston*, 118 U. S. 389, 6 Sup. Ct. Rep. 1185, is cited in support of this proposition. This case is clearly distinguishable from *U. S. v. Langston*, as I understand it. That case was where the claimant, Langston, brought suit to recover an unpaid balance of salary claimed to be due him as minister to Hayti. It appears that on the creation of the office of minister to Hayti congress fixed the salary of that officer at \$7,500 a year, and from that time until the year 1883 made an annual appropriation of that sum for the salary. By act of July 1, 1882, there was appropriated by congress for the fiscal year ending June 30, 1883, only \$5,000 to pay the salary of the minister to Hayti, and the same appropriation was made for each of the years ending June 30, 1884, and June 30, 1885. The suit was brought in the spring of 1886, to recover the difference between \$7,500 a year and \$5,000 a year, for the period from June 30, 1882, to July, 1885. The defense was that congress, by appropriating a lesser sum, had indicated its purpose to reduce the salary. The court held that the statute which fixed the annual salary at \$7,500, without limitation as to time, was not abrogated or suspended by subsequent enactments appropriating a less amount for the salary for a particular year, the same containing no words which expressly or impliedly modified or repealed it. Congress did not say that said minister should receive no more than \$5,000 a year for his salary. The converse of the proposition laid down in *U. S. v. Langston*, *supra*, must then be true: that a statute fixing the salary of an officer must be deemed abrogated by a subsequent enactment appropriating money to pay for the services of that officer, and containing words which, by clear implication, repeal the previous law. Now, does the act of August

4, 1886, repeal the earlier statutes under which docket fees were allowed to commissioners? See 24 U. S. St. at Large, 256, 274. The title of the act of August 4, 1886, is "An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June 30, 1886, and for prior years, and for other purposes," showing that the purpose of the act was not only to make appropriations to supply deficiencies in the appropriations for the fiscal year ending June 30, 1886, but that there were other objects in view. One of these objects is clearly shown upon the face of the act, where it is expressly declared that commissioners shall be entitled to receive fees for certain services therein specified, but they shall not be entitled to any docket fees. The language is "that for issuing any warrant or writ, and for any other necessary service, commissioners may be paid the same compensation as is allowed to clerks for like services, but they shall not be entitled to any docket fees." If the intention of congress was simply that docket fees were to be excepted from the sum appropriated in that act for the payment of commissioners, then why was any reference made to their compensation for issuing warrants, writs, etc.? Why did not congress simply say, "provided that no part of this appropriation shall be applied to the payment of docket fees?" Under the construction contended for, the only effect to be given the clause under consideration is retrospective, and that it should apply only in those cases where the commissioners had not been paid, or would not be paid, their fees for services rendered during the year ending June 30, 1886, out of the regular appropriations for that year. The clause under consideration is found in a proviso in the deficiency appropriation bill for 1886. But for the fact that the clause declaring that commissioners shall not be entitled to any docket fees comes under a proviso, there would be no difficulty at all in determining what the intention of congress was. As a general rule, a proviso is intended to restrain the enacting clause, and to except something which would otherwise have been within it. But I look on this proviso as a legislative construction of the law,—as a legislative declaration by congress that commissioners shall not be entitled to docket fees, notwithstanding the decision of the supreme court. Congress having spoken on the subject, it is the duty of the courts to give effect to its words.

What reason could congress have for declaring, in effect, that although commissioners had theretofore been entitled to docket fees, and although they shall be entitled to them hereafter, yet they shall not be entitled to have them paid out of this small appropriation? Such, however, is the contention. How unreasonable and unjust would such a construction of the statute make the action of congress. Is it not more reasonable and just to hold that congress intended to make the law applicable to, and to operate prospectively on, all commissioners alike,—to put them all on the same footing, by cutting off all docket fees from that time?

It may be that the statute under consideration is framed in an inartificial manner,—that there is want of perspicuity or precision in it. When this is the case, courts are often required to look less at the letter or words of the statute than at the reason and spirit of the law in endeavoring to

arrive at the will of the law-maker. It is well known that there had been much controversy over the claim set up by commissioners to docket fees; they contending for them, and the comptroller of the treasury denying their right to them. At last the matter was brought into the courts, and the supreme court decided that commissioners were entitled to such fees. In a few months thereafter congress passed the act of August 4, 1886, in which it makes a deficiency appropriation to pay commissioners' fees, and for other purposes, and in which act it takes occasion to say that commissioners shall not be entitled to any docket fees. Is there any other conclusion than that the reason and spirit of that act was to meet the decision of the supreme court, and to finally settle by a legislative declaration the question in controversy? Again, it is contended that inasmuch as congress did not continue the proviso,—or exception, as it is called,—in the appropriation bill for the year ending June 30, 1887, the act of August 4, 1886, had the effect only to suspend section 828 temporarily. It seems to me the fact that the provision denying the payment of docket fees to commissioners was omitted from the appropriation bill for the year ending June 30, 1887, is a very strong argument to show that the intention of congress was to abrogate the statute allowing such fees by adopting the provision on that subject to be found in the act of August 4, 1886, which we have been considering. And this argument is strengthened by the fact that both acts were passed on the same day, August 4, 1886. See 24 St. at Large, 222, 256. Docket fees having been abolished by one act passed on that day, there was no reason for another act to the same effect, on the same day. I cannot adopt the view contended for by the petitioner unless I eliminate from the act the words, "they shall not be entitled to any docket fees," which congress has inserted. My duty is to give them effect. Not only do these words, in the light of the circumstances under which they were used, make the intention of congress manifest, but that intention is plainly repugnant to the former statutes,—sections 828, 847,—as construed by the supreme court. My opinion, therefore, is that the later statute repealed the earlier, although there are no express words of repeal employed in it; and I am constrained to hold that the petitioner is not entitled to recover any docket fees in this suit. *U. S. v. Fisher*, 109 U. S. 143, 3 Sup. Ct. Rep. 154; *U. S. v. Mitchell*, 109 U. S. 146, 3 Sup. Ct. Rep. 151.

Since the trial in this case the charge for docket entries has been abandoned and withdrawn.

By an order of the circuit court in this district commissioners are required to forward to the clerk of the United States circuit court a transcript or certified copy of the proceedings in every case on their docket. For this copy I think they are entitled to be paid at the rate of 10 cents a folio, and for the certificate to it 15 cents a folio. I find that such copy averages two folios, and that the charge made by the petitioner for the certificate is correct. Rev. St. §§ 828, 847. The same order of the circuit court requires a commissioner to make out and forward to the clerk of the court, at the end of each month, a report in duplicate of all cases instituted or examined during the month. The petitioner has

charged a fee for a monthly report in each case. This is not correct. He is not required to make a separate monthly report in each case, but he is required to make, at the end of each month, one report of all cases had during the particular month. For this report made in duplicate he is entitled to 15 cents a folio, and for the certificate attached thereto 15 cents.

In conclusion I find that the fees to which petitioner is entitled on the account sued on amount in the aggregate to \$477.25. But he admits having been paid on this account the sum of \$296.25. Judgment will therefore be entered in his favor for the sum of \$181, being the balance found to be due on the account.

I have carefully and critically examined the account and the papers therewith submitted in evidence in this cause, and, after mature consideration, have prepared an opinion of unusual length. I could hardly have done less and covered all the points presented in the cause, which I desired to do because of their importance to the United States, to the petitioner, and to all others of like interest with the petitioner.

WILLIAMS v. UNITED STATES.

(*District Court, D. Maryland. February 24, 1888.*)

ELECTIONS AND VOTERS—SUPERVISORS—COMPENSATION—REV. ST. U. S. §§ 2012, 2031.

The compensation of a supervisor of elections appointed under section 2012 is, by section 2031, limited to \$50, notwithstanding he may, in the performance of his duties, have necessarily served more than 10 days.

(*Eyllabus by the Court.*)

At Law.

John A. Williams brings this action against the United States, under the act of March 3, 1887, to recover compensation beyond the sum allowed for services as supervisor of elections in the city of Baltimore.

John E. Bennett, for petitioner.

Thomas G. Hayes and *A. Stirling Pennington*, for the United States.

MORRIS, J. This is a suit by a supervisor of elections, appointed under section 2012 of the United States Revised Statutes, to recover from the United States compensation beyond and in addition to the sum of \$50, upon the ground that he was necessarily employed in the performance of his duties for a longer period than 10 days.

The United States, by its demurrer, admits the statement of the plaintiff that he was duly appointed and qualified and served as supervisor of elections in the city of Baltimore for 19 days in the months of September and October, 1886, but denies that his service for 19 days gives the plaintiff a cause of action against the United States for more than the

sum of \$50, for which amount the plaintiff admits he has been already satisfied, partly by payment and partly by a judgment against the United States. In my opinion the plaintiff, by his service, acquired no legal right of action against the United States for more than \$50. In accepting the employment under the provisions of the act of congress, he accepted also the rate of compensation fixed by the act. It is provided by section 2031 that there shall be paid to him compensation at the rate of five dollars a day for each day he is actually on duty, *not exceeding 10 days*. This is equivalent to saying that his maximum pay for performing all the services required of him under the law shall be \$50. The act has, as I read it, fixed and limited the compensation to \$50, and the plaintiff cannot have a right of action for more than the maximum sum so allowed. I sustain the demurrer, and enter judgment for the United States.

UNITED STATES *v.* FORD.

(*District Court, W. D. North Carolina. February Term, 1888.*)

1. RESCUE—INDICTMENT FOR—CERTAINTY.

An indictment charging, in the exact words of Rev. St. U. S. § 8177, that defendant "did forcibly attempt to rescue" property seized by a revenue collector, does not state with sufficient certainty what acts were done by defendant that constituted the attempt charged.

2. SAME.

A conviction on such indictment, although fully warranted by the evidence, will be arrested on motion, the want of certainty not being waived by failure to demur.

On Motion in Arrest of Judgment.

This is a criminal action against George Ford. The indictment charges that defendant "did forcibly attempt to rescue" certain property seized by a revenue collector. Defendant, being convicted, moves in arrest of judgment for want of certainty in the indictment.

H. C. Jones, U. S. Atty., and *G. F. Bason*, Asst. U. S. Atty., for the United States.

D. A. Covington and *F. I. Osborne*, for defendant.

DICK, J. The question of law presented as the ground for this motion has produced some conflict and confusion in judicial opinions, but I think it has been settled by a decided weight of authority.

The principle has often been judicially announced that at common law an attempt to commit a felony is a misdemeanor, and an attempt to commit a misdemeanor is itself a misdemeanor. The difficulty has been in defining an attempt to commit a crime with satisfactory accuracy, as each case was, in a greater or less degree, dependent on its own circumstances. An effort to make a general definition of such offense has, there-

fore, always been vague and indefinite. A mere intention to commit a crime does not render a person amenable to law. It must be manifested by some accompanying act of willful wrong or culpable negligence to make it criminal in law. A man's motives and intentions can only be properly inferred from the means which he uses, and the acts which he does. An attempt imports something done towards the accomplishment of a conceived purpose, without success. An attempt to commit a crime is an incomplete effort made by some act intermediate to a criminal intention and a consummated crime. The intention of the actor can alone be clearly ascertained by the movements which he has made to complete his design. The criminal nature of an offense is a conclusion of law derived from the facts and circumstances of the case. In an attempt to commit a crime, the acts and words of a wrong-doer are, therefore, essential ingredients to constitute an offense, and show the purpose he had in view. The word "attempt" is generally used in the law in describing the offense of an unsuccessful effort to commit a crime; but it has no technical meaning importing sufficient legal certainty as to the manner, the means used, and the intention of the wrong-doer. Its force and effect in an indictment was dependent upon a statement of the facts and circumstances that accompanied and constituted the illegal effort alleged. An assault is an *attempt* to do some personal violence to another, and the word "assault" has acquired a technical signification that imports an allegation of intentional violence and illegality. This definite technical meaning of the word makes it unnecessary, in an indictment for an assault with intent to commit a crime, to describe such offense with the same particularity that would be required in an indictment for the commission of the crime itself. In the indictment now before us, for an attempt to rescue spirituous liquors duly seized by the officers of the law, if it had been alleged that such attempt was made by an assault upon such officers while in the discharge of their official duty, such allegation would have been sufficiently definite, and would have been supported by the evidence offered on the trial.

In 2 Whart. Crim. Law, § 2686, there is a definition of an indictable attempt to commit a crime, and it is as full and accurate as can, probably, be made; but Mr. Wharton says, in a subsequent section, (2703,) "Attempt is a term peculiarly indefinite."

The indefinite nature of the offense, at common law, of an attempt to commit a crime, has induced the enactment of many statutes in England and this country, setting forth, in express terms, what acts shall constitute an attempt to commit the crimes referred to in such statutes. In a case not thus specifically defined, the offense of an attempt to commit a crime, although declared, in general terms, in a statute as a crime, remains as at common law, and its nature is dependent upon its peculiar circumstances, and they must be distinctly alleged in an indictment. The overt acts or words that indicate the intention of the alleged wrong-doer must be considered by the jury, upon the evidence, in determining the essential question—whether such intention was criminal. Everything necessary to be proved must be alleged.

Brevity in pleading is very desirable in criminal cases, and unnecessary prolixity in the manner of statement should be carefully avoided; but every matter legally essential to constitute the offense must be so definitely alleged as to be clearly intelligible. The want of specific averment cannot be supplied by implication. It is not waived by the failure of the defendant to avail himself of a demurrer, or a motion to quash, and it is not cured after verdict by any United States statute of jeofails. There are many non-essential matters that are often found in indictments that may be regarded as surplusage, while there are others that must be proved as alleged, or there will be a fatal variance on the trial.

A person indicted for crime has a constitutional right "to be informed of the nature and cause of the accusation," by having the offense, and the facts that constitute it, plainly and fully alleged in the indictment, so that he may have a reasonable opportunity of introducing evidence, and making defense before a jury that can investigate the facts, and a court that can see whether the facts alleged constitute the crime charged.

Every indictment should show that an offense has been committed, and *how* committed, so that the defendant may have all the privileges humanely accorded by law to all persons accused of crime,—a motion to quash the indictment, a demurrer to the indictment, a fair trial before a well-informed jury, a motion in arrest of judgment, a writ of error, and full security against a second prosecution for the same offense.

In the case *U. S. v. Cruikshank*, 92 U. S. 542, Chief Justice WAITE announced in clear, precise, and comprehensive terms, the requisites of a good and sufficient indictment, as settled by many adjudications; but I deem it unnecessary to quote the language so carefully and accurately employed, and so easily accessible to the legal profession.

In some cases words spoken are *acts* sufficient to constitute an attempt to commit a crime, if they are of such a character as to be well calculated and adapted to accomplish the crime intended. Thus, threats of immediate personal violence, made against a reasonably prudent and firm officer of the law, while in the discharge of his legal duty, well calculated to intimidate him, and make him desist from further effort to execute the mandate of the law, if they are unsuccessful, constitute the offense of an attempt to obstruct, hinder, or resist the execution of legal process.

As such threatening words do not constitute the gist of the offense, they need not be set forth with particularity and accuracy in an indictment. The substance and purport will be sufficient. A general allegation of verbal threats of personal injury would be sustained by proof of any words of the defendant calculated to show a purpose of immediate violence if the unlawful demands of the wrong-doer are not complied with by the officer.

There are many cases where a wrongful act is alleged in an indictment, and the evidence relied on to prove the criminal intention of the wrong-doer consists of a series of facts of a kindred nature, constituting but one offense. It is not necessary, in such cases, that each fact should be

specifically set forth and described, for a general description; reasonably including the series, will be sufficient, as certainly to a certain intent in general is all that is required in an indictment in such cases.

This class of cases includes such offenses as common barratry, common scolds, keeping a gaming-house, a disorderly house, a house of ill fame, the carrying on the business of a retail liquor-dealer without paying the special tax, and other offenses of a like nature, where continuous acts and duration of time enter into and constitute crime. *U. S. v. Howard*, 12 Myers, Fed. Dec. § 2402. There are other special and peculiar offenses referred to and explained in *U. S. v. Gooding*, 12 Wheat. 460; *The King v. Higgins*, 2 East, 5; *U. S. v. Simmons*, 96 U. S. 360; but they only form exceptions to the general and salutary rule of the common law, that an indictment must contain allegations of the facts necessary to constitute the criminal charge preferred, expressed with reasonable precision, directness, and fullness, so as to enable the person accused to avail himself of such legal defenses as may be in his power.

There is another class of cases which do not come within this general rule as to the sufficiency of indictments:

"When a statute makes a particular act an offense, and sufficiently describes it by terms having a definite and specific meaning, without specifying the means of doing the act, it is enough to charge the act itself without its attendant circumstances." *State v. George*, 93 N. C. 567, and cases cited.

The indictment in the case before us charges the offense in the words of the section of the United States Revised Statutes (3177) upon which it is based; but such words are not sufficient, as they do not define the offense with proper accuracy for certainty of allegation in an indictment. The words "did forcibly attempt to rescue" import some means of unlawful violence; but they do not distinctly specify any act done. The offense alleged is substantially an *attempt to commit a forcible trespass* by endeavoring to retake property that had been duly seized, and was then in the proper custody of the officers of the law. In a civil suit for a trespass the words "with force and arms" are sufficient in a declaration, but they are not sufficient in an indictment for a "forcible trespass." In such a case it must be charged and proved that there was such force, or show of force, as was well calculated to prevent or overcome any resistance on the part of the person whose rights were thus violently invaded.

The offense alleged in this case is not purely statutory, but has relation for certainty of description to the definition of a similar offense at the common law. Upon this subject the supreme court of the United States says, in *U. S. v. Carll*, 105 U. S. 611:

"In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes of the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

The question now before us was determined by Mr. Justice MILLER, in *U. S. v. Ulrici*, 12 Myers, Fed. Dec. § 2425. It has also been decided by the supreme court of this state, after considering several cited cases. In *State v. Colvin*, 90 N. C. 717, Mr. Justice ASHE said:

"From an investigation of the authorities upon the subject, our conclusion is that, to warrant the conviction of a defendant for such an offense, it is essential that the defendant should have done some acts, intended, adapted, approximating, and which in the ordinary and likely course of things, would result in the commission of a particular crime; and this must be averred in the indictment and proved." See, also, *State v. Brown*, 95 N. C. 685.

The evidence on the trial of this case was amply sufficient to warrant the verdict of the jury; but as the averments in the indictment are not made with the certainty required by well-settled rules of law the judgment must be arrested. It is so ordered.

UNITED STATES v. CRECILIOUS.

(District Court, E. D. Missouri, E. D. February 27, 1888.)

BANKS AND BANKING—NATIONAL BANKS—MAKING FALSE ENTRIES—ERASURES— Rev. St. U. S. § 5209.

The erasure of figures constituting part of a number already written on an account-book of a national bank and the writing of different figures in place of those erased constitutes "making an entry," within the meaning of Rev. St. U. S. § 5209, making it a misdemeanor for an officer or clerk of a national bank to make, with intent to injure or defraud, any false entry in any book, report, or statement of the bank.

On Demurrer to the Indictment.

Thomas P. Bashaw, U. S. Dist. Atty., for the United States.

C. H. Krum, for defendant.

THAYER, J. The demurrer which has been interposed to the second, fourth, and sixth counts of the indictment raises the question whether the erasure of one or more figures constituting a number already written on the books of account of a national bank, and the writing of different figures in the place of those erased, constitutes "making an entry," within the meaning of section 5209, Rev. St. U. S.

That part of the section material to the present inquiry is as follows:

"Every president, director, cashier, teller, clerk, or agent of any (national banking) association * * * who makes any false entry in any book, report, or statement of the association, with intent in either case to injure or defraud the association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, * * * shall be deemed guilty of a misdemeanor," etc.

In three counts of the indictment under consideration, being counts Nos. 1, 3, and 5, the offense is charged generally in the words of the

statute,—that is to say, the defendant is accused of having made a false entry on three several occasions in the "General Balance Book of the Association," whereby the actual amount of cash on hand at the close of business on said three days was largely exaggerated. In counts Nos. 2, 4, and 6, the defendant is accused of making false entries in the same book, and on the same days, as in counts Nos. 1, 3, and 5; but the manner of making the entries is particularly described, and as described the false entries consisted in the erasure of certain figures of numbers previously written, and the substitution of different figures in their place. For example, it is alleged that the first two figures of the number (136,302) representing the amount of cash on hand on a given day were erased, and the figures 2 and 9 substituted, whereby the number became 296,302. It is obvious that the two sets of counts relate to the same transactions, there being only three false entries involved in the six counts. Therefore, while the demurrer only professes to question counts 2, 4, and 6, it really challenges the whole indictment; for if the erasure of figures and the substitution of others in their stead is not in effect "making an entry," within the meaning of section 5209; then, as no entry has been made, no offense has been committed which is punishable under either count of the indictment.

The contention on behalf of the defendant is that the indictment merely charges an alteration of an entry previously made which was correct when made, and that the statute has not made it an offense to alter an entry, even though the books of the association are thereby falsified. As there are no adjudications applicable to the question at issue it must be decided by a fair interpretation of the phrase "make any false entry," and also by a due consideration of the purpose of the statute, and the mischiefs intended to be guarded against. In section 5209 the word "entry" is used with reference to books of account, reports, and statements. When used in such connection Webster defines the word as "the act of making or entering a record;" that is to say, the act of making a record of a fact or transaction. But in section 5209 it is obviously used to denote the result of the act, rather than the act itself. It signifies that which is written, be it words or figures, and if that which is so written misrepresents the fact or transaction which it was intended to authenticate, then it is a false entry, within the meaning of the statute. When a person makes an entry in books of account, the act may involve, and oftentimes does involve, an alteration of an entry previously made; but the act does not lose its character on that account. An entry is made, notwithstanding the fact that a previous entry is altered. Adopting the definition before stated of the words "entry" and "false entry," it appears to me that a person makes a false entry, within the meaning of the statute, who erases one or more figures from a number already written in a book of account, and writes other figures in lieu thereof, so that the fact intended to be recorded is falsified. I can see no substantial difference between erasing certain figures of a number, and writing different ones in their place, and making an entry every part of which is in the writer's handwriting. The act in question, as I conceive,

may be correctly termed either the alteration of an entry or the making of an entry. It may appropriately be said of such an act that an "entry has been made" rather than "altered," because a new number is the result of the act, and for the reason that a new record is created which bears different testimony as to the fact or transaction intended to be authenticated. If attention is paid to the purpose which underlies the law under which the indictment is framed, there is ample ground to base an inference that the construction above given is in accordance with the legislative intent. The statute was obviously enacted to prevent bank officials and employes from concealing the actual financial condition of national banking associations, by means of a falsification of any of the books of account or statements or reports which they are by law required to make. With this purpose in view, it cannot be supposed for a moment that the law was framed with a view of punishing persons who made original false entries, and, at the same time, of exempting from punishment those who falsified correct entries previously made, by erasing figures and substituting different ones in their stead. I think it is too clear for argument that congress intended, at least, to punish such acts as are described in the second, fourth, and sixth counts of the indictment, and I am furthermore of the opinion that, by the prohibiting "the making of any false entry," and imposing a penalty for so doing, they have used language fully adequate to that purpose.

For the purpose of showing that congress did not intend, by section 5209, to make it an offense to alter entries in the books of national banks, my attention was called, on the argument, to numerous sections of the Revised Statutes, whereby it has been made an offense against the United States to alter public books, documents, and instruments, such as court records, surveys, maps, patents, bonds, treasury notes, powers of attorney, money-orders, etc. An examination of each of those sections—5394, 5411, 5414, 5415, 5416, 5418, and 5463—shows, however, that in every instance the word "alter" was aptly used; in every instance there was an apparent necessity for the use of the word "alter," as it described an act not distinctly covered or embraced by any preceding word. But in the section under consideration there was no apparent need of making use of any additional words or phrases. The section prohibits every officer or employe of a national bank from making "any false entry in any book, report, or statement." The language so used was sufficiently comprehensive to forbid a falsification of the books of a national bank in any manner, whether it was accomplished by an original false entry or by changing an entry already made. In either event it would be necessary to write in the books,—to make an entry of some sort,—and if the words or figures so written falsified the fact or transaction intended to be authenticated, the act would necessarily be within the prohibition of the statute.

As a further reason for sustaining the demurrer it was suggested that the acts described in the second, fourth, and sixth counts may have amounted to a forgery. I assume that by this counsel intended to say that if the act amounted to a forgery defendant cannot be punished un-

der section 5209, although the act falls within the provisions of that section. With reference to such suggestion it is sufficient to say that if it be conceded that a falsification of the books of a national bank, committed under such circumstances as to amount to a forgery, could not be punished under section 5209, yet such concession cannot avail the defendant on demurrer, for the reason that the demurrer admits the facts pleaded in the indictment; and as the offense is there stated, it clearly did not amount to a forgery. *In re Windsor*, 6 Best & S. 522, 10 Cox, Crim. Cas. 118; *State v. Young*, 46 N. H. 266; 1 Bish. Crim. Law, § 586.

I think the demurrer should be overruled, and it is so ordered.

SEIBERT CYLINDER OIL-CUP CO. v. MICHIGAN LUBRICATOR CO.

SAME v. GRACE *et al.*

(Circuit Court, E. D. Michigan. February 8, 1898.)

PATENTS FOR INVENTION—APPLICATION FOR INJUNCTION—SUSTAINED PATENT—EVIDENCE TO OVERTHROW PRESUMPTION OF VALIDITY.

Upon an application for a preliminary injunction in an action for infringement of a patent, the validity of which has been sustained in three former suits, defendant, a witness and party in one of the former suits, corroborated by one other witness, testified that a machine identical with the one used by him was perfected and in use more than two years prior to the issuance of plaintiff's patent, but admitted that he did not apply for a patent for more than nine years after perfecting his invention, and the evidence tended to show that the invention as patented by him differed essentially from the one originally used. *Held*, that this testimony not having been introduced in the former suits, does not establish prior invention and use beyond a reasonable doubt, so as to overcome the presumption arising from the issuance of plaintiff's patent, supported by three adjudications in his favor.

In Equity. On motion to dissolve an injunction, and motion for injunction.

On motions for injunctions under the Gates "Sight-Feed Lubricator Patent, No. 138,243, of April 29, 1873. An interference proceeding was had in the patent-office, in 1880, between Parshall and others, who are strangers to these suits. The record in the interference proceeding was stipulated into the case of *Oil-Cup Co. v. Lubricator Co.*, 10 Fed. Rep. 677, in which the patent was sustained on final hearing. Subsequently, new defenses having arisen, a suit was commenced under this patent against William Burlingame, the agent of the Detroit Lubricator Co., and counter-suits were commenced by the Detroit Lubricator Co., against the vendees of the complainant. The prior proceedings in the patent-office and in the *Phillips Case* were stipulated into this *Burlingame Case*. Parshall was again examined, and his alleged anticipation further inquired into. This case was argued at length, and taken under advisement, and, having been held under advisement for seven months, was settled,

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the settlement involving a consent decree sustaining the Gates patent. Subsequently complainant commenced suit against Nightingale. All the prior proceedings and proof were stipulated into this case, and on final hearing the patent was sustained. *Vide*, 32 Fed. Rep. 171. On the strength of these cases suit was begun, and on motion, an injunction *pendente lite* was issued November 27, 1887, as to the Michigan Lubricator Co., and subsequently a motion was made and presented, and is now re-presented, for an injunction *pendente lite* as to Grace and Parshall. The defendants here relied upon affidavits to establish the *public use and sale* for more than two years prior to the date of the application for the Gates patent, of lubricators made and sold by defendant Parshall which, it is alleged, involved the patentable subject-matter of the Gates patent. Parshall took out a patent involving the subject-matter of this controversy, in 1879. Defendants' contention is that the testimony establishing the statutory defense of prior *public use* and sale by Parshall in 1869 has, in the prior proceedings, been suppressed, for the reasons that, if developed, not only would the Gates patent be defeated, but also that the Parshall patent of 1879 would be defeated, but that now, priority of invention having been established in favor of Gates, Parshall for the first time presents the testimony as to the *public use and sale* of his device in 1869.

C. J. Hunt, J. H. Raymond, and Edmund Wetmore, for complainant.
John B. Corliss and Rodney Mason, for Michigan Lubricator Co.
Wells W. Leggett, for Grace and Parshall.

JACKSON, J., (*orally after stating the facts as above.*) From the facts that have been presented in the preceding adjudications, and also in this new evidence, the difficulty grows, of course, out of the facts, if they be facts, connected with Baugh's use of the machine in 1869-1870. It is perfectly clear that under these previous adjudications,—the *Phillips Case*, the *Burlingame Case*, and the *Nightingale Case*,—the plaintiffs, on the original applications, presented to the court a *prima facie* case,—a clear *prima facie* case, which warranted the issuance of the preliminary injunction. They had the presumption growing out of the issuance of the patent on the 29th of April, 1873, in favor of Gates, and that presumption has been supported by three adjudications. It is true that in the *Phillips Case* all the questions were not presented that could have been presented, or that were presented in the subsequent litigation. We come now to the *Burlingame Case*, in which Mr. Parshall is called as a witness. In that case Mr. Parshall testifies, and so does Mr. Willetts, the pattern maker, that they used two of the machines of the character indicated in the exhibit to his testimony in that case, and in the form designated by a model now before the court. Those two machines were used, one at the copper-works and the other at the Champion flour-mills. It is perfectly clear, under the statements of the witnesses themselves in that case, that the courts were justified in arriving at the conclusion that machines thus introduced at the Champion mills and at the copper-works were imperfect and defective, and were not a completed invention. I

think the court reasonably reached a proper conclusion, and we will not review that now. They had the facts before them, and Mr. Parshall, the alleged original inventor was before them, and he testified to the use of the machines in those two instances. Now, if human testimony is to be credited, Willetts and Parshall both identified the machines that they made in 1869 as corresponding identically with the machine here presented, and which was tested at the copper-works and at the Champion mills. Mr. Baugh says,—and the difficulty arises on Mr. Baugh's testimony,—Mr. Baugh says that was not the machine he used, at least not in that form. Mr. Baugh identifies the form of a different machine corresponding with a photograph now presented, and which the proof indicates, from Mr. Parshall's own statements, previously made, was made at a later period than 1869.

Now, what was Parshall engaged in, and what are the probabilities? When we come to consider evidence, we must consider probabilities. Mr. Parshall was engaged in an effort to invent a lubricator that would do its work, and conform to the needs of the business and of the trade. He was engaged in the effort to invent an up-drop lubricator, and we have him, according to the testimony of Mr. Baugh, now introduced, as having perfected that sort of a machine in June, 1869, and yet we find Mr. Parshall postponing an application, although an inventor, and engaged in the effort at inventing and discovering that want,—we find him failing to make any application for an up-drop lubricator until 1878. Now, is it not probable that Mr. Parshall must have known more about this than any other living man? Is it probable that, if he had had a completed invention or a thing that performed its work as efficiently as it is now alleged that the plaintiff's does he would have postponed his application for a patent upon that invention until 1878, when he presented a different instrument. The probabilities are against that theory. Matters of importance are not conducted in that way. Inventors do not act in that way. If Mr. Parshall had in 1869 what is now claimed, Mr. Parshall would undoubtedly have applied for a patent for it. The probabilities from Mr. Parshall's conduct, and the probabilities from Mr. Parshall's previous testimony, are all very decidedly in favor of the fact that Mr. Baugh is in some way mistaken as to what he had or as to the date at which he had it.

Now, in addition to that, the abandonment by Parshall is some evidence of an incomplete instrument. Looking at him in his situation as an inventor engaged in an effort to make a machine that would work, the abandonment of the Baugh machine is evidence, and strongly persuasive evidence, of some incompleteness in the machine itself, such as was found by Judge LOWELL and by Judge COLT in the preceding cases, in which they found that the machine as used at the copper-works and at the Champion mills was a defective and incomplete machine. We have this strong *prima facie* case besides the presumption of the patent, and in view of the decisions we are not satisfied that Mr. Baugh's evidence breaks down that strong *prima facie* case. We will, therefore, allow the injunction to stand.

As to laches, I ought to say that we do not think that laches can be attributed to the complainant in this case, under the facts surrounding it. Parties are not required to litigate at all points at the same time. They may give notice to an infringer that he is infringing, and from that time forward no acquiescence will be presumed, provided the suit is instituted within a reasonable time. There are cases under the general equitable doctrine that after notice of a superior right a party who proceeds proceeds at his peril, and can acquire no benefits thereafter as against the party who has given notice of his superior right. We think the doctrine of laches has no foundation in this case. The facts fail to break down, we think, the strong *prima facie* case made on behalf of the complainant. So we continue the injunction in the case against the Michigan Lubricator Co. and order an injunction to issue in the case against Grace and Parshall.

BROWN, J., (*orally.*) I am very glad to have had the assistance of the circuit judge in this case, as it seems to me a very close one, and I should have hesitated to take the responsibility of continuing this injunction, if I had not been advised by him upon this hearing. While I am not free from doubt with regard to the case, I think, upon the whole, the defendants have not established an anticipation of this patent beyond a reasonable doubt. I should not be surprised that, if this case were further heard, it might resolve itself into something like a question of law. While if the affidavits produced on behalf of the defendants here are taken broadly for their face value, the anticipation would be proven, I think that we should look upon them with a good deal of suspicion. The defense really is that Mr. Parshall made certain machines in 1869 anticipatory of this device, and his testimony seems so to indicate this. The reply is virtually that these machines were not operative, and so Judge LOWELL found with regard to the Champion mills and the copper-works machine,—that they burst and were not operative devices. The testimony of Mr. Baugh would tend to show that the machine which was put into his mill was an operative device, but in reply to that it may be said that Mr. Parshall, who is engaged in the patent business, who is an inventor by profession, and who has shown himself very alert to secure patents for his own benefit, had not sufficient confidence in this machine to induce him to apply for a patent for it until 1878. Now, we have to consider too, in this connection, the fact that when Parshall was examined as a witness in the other cases, and in his interference in the patent-office, he never set up any of these machines except those which were sold to the Champion mills and to the copper-works, and no allusion is made in his testimony to the other machines upon which reliance is placed in this case. His excuse is, as I understand, that the glass was not good enough, was not strong enough, to make the machine operative; that while the same thing would have been operative upon a low pressure engine, the extra pressure of the steam in the high pressure engine burst the glass, and rendered the machine inoperative,—that is, when used upon that class of engines. His explanation amounts to this: that

there was no defect in the construction of the machine, but merely in the strength of the glass. Now, that may be a question of law. It comes pretty near being a question of law, whether a machine can be said to anticipate another machine which is not operative, when its inoperativeness is caused by reason of not employing sufficiently strong material. We have the testimony of Mr. Parshall that he made three machines like the exhibit in the *Burlingame Case*, now produced, and no mention is made of other devices which are alleged to have been made about the same time. The testimony of Mr. Baugh indicates that his was not the one that was used, but a device with a smaller glass. That tends to throw, in my mind, a good deal of doubt upon his whole testimony, and I find it impossible to reconcile the testimony of Mr. Parshall and Mr. Baugh. Was his a machine which Mr. Parshall made? Mr. Baugh says it was. Mr. Parshall said he had but one set of patterns. There is a mystery here I do not understand, and in reply I can only say that I do not think there is any equity here which calls upon us to dissolve this injunction. Here is a machine for which Mr. Gates obtained a patent in 1873, and they have been making that machine year after year for 14 or 15 years. I think when a party comes in at this late day and sets up practically a new defense to this patent, that he ought to establish it beyond a reasonable doubt. I think that the equities of this case are entirely with the complainant. Of course, we cannot anticipate what developments may be made when these witnesses come to be examined and cross-examined, but upon the whole my own conclusion is, although, I confess, not without some doubt, that the injunction ought to be continued.

MORSE v. UFFORD *et al.*

(Circuit Court, D. Massachusetts. February 23, 1883.)

PATENTS FOR INVENTIONS—INFRINGEMENT—DRESS FORMS.

Letters patent No. 233,240, issued October 12, 1880, to John Hall, for improvements in dress forms, in which the skirt form consists of ribs suspended from braces hinged at each end to a movable block, supported by rests, and sliding up and down an upright central standard, is infringed by a device for the same purpose, having similar standard, ribs, and braces, in which a collar fixed to the standard takes the place of the upper block, and a nut, working on a thread in the standard, takes the place of the lower block, such collar and nut being merely an equivalent for the sliding blocks supported by rests.

In Equity. On bill for injunction.

C. F. Perkins, for complainant.

J. K. Beach, for defendants.

COLT, J. The complainant is the owner of letters patent No. 233,240, dated October 12, 1880, issued to John Hall, for improvements in dress forms. The invention relates to improvements "by means of which

every part of the device is rendered adjustable, so that it may be applied to a dress of any size or style, and fill it out perfectly, in order that trimming may be placed upon it." The patent describes both a waist form and a skirt form. The present suit is confined to the skirt form. The skirt form shows a series of upright ribs corresponding in general outline to the skirt of a lady's dress, surrounding a standard. The form is suspended from the outer ends of several series of braces, the inner ends of the braces being provided with adjusting mechanism for adjusting them up or down on a central standard, and thereby contract or expand the entire form, or by adjusting one or more sets of braces to contract or expand the form at different points. The defendants are charged with infringement of the second claim of the patent, which is as follows: "In combination with the standard, a , and ribs, c , the double braces, e^2 , sliding blocks, f^1 , f^2 , and rests, h^1 , h^2 , substantially as and for the purpose set forth." This claim describes the hip portion of the skirt. In defendants' form there is a standard like Hall's, and surrounding ribs designed to impart shape to a dress, and so arranged as to be adjustable through their entire length. In the upper or hip portion of the form there are found the series of double or oppositely inclined braces, such as are seen in the Hall patent. Claim 2 is made up of a combination of five elements, and it is apparent that defendants' form has the standard, the ribs or their equivalent, and the double braces of the Hall patent. The question of infringement turns upon whether the defendants' form contains the sliding blocks, f^1 , f^2 , and the rests, h^1 , h^2 . In place of the upper sliding block and rest the defendants have a collar, which is fixed to the standard, and in place of the lower sliding block and rest they have substituted a nut and threaded standard. The outer ends of the braces are hinged to this fixed collar, instead of to a sliding block, and the inner ends of the braces are hinged to the nut in place of a sliding block. I am satisfied that these adjusting devices are substantially the equivalent of each other. A nut and threaded standard for adjusting the inner ends of hinged braces was a known equivalent for a sliding block and rest. This is shown by the patent granted Charles Franke, September 7, 1875. So the fixed collar in defendants' form must be considered the equivalent of the Hall block and rest. Assuming the upper rest in the Hall device to be provided with a thumb-screw, so as to enable it to be adjusted vertically on the standard, still, when once it is fixed, it does not differ from the fixed collar of the defendants' device. I regard this change made by the defendants as a formal one. Confining ourselves strictly to the second claim of the patent, it seems to me clear that the defendants' device is an infringement of this claim. There is nothing in the prior state of the art as exhibited in the record which can be called an anticipation of the Hall patent, though each of the elements of the second claim, with the exception, perhaps, of the ribs, is found to be old. I am of opinion that complainant is entitled to a decree, and it is so ordered. Decree for complainant.

KRAUS *et al.* v. FITZPATRICK *et al.*

(Circuit Court, S. D. New York. February 24, 1888.)

PATENTS FOR INVENTIONS—DESIGN PATENTS—CORSETS—PATENTABILITY.

The design patent No. 13,620, dated February 13, 1888, and granted to Frank Walton, being a design for corsets, readily distinguishable by ordinary persons from those of any prior design, is valid.

In Equity. On bill for injunction.

Bill for injunction by Leopold Kraus *et al.* against James G. Fitzpatrick *et al.*, for infringement of design patent No. 13,620, dated February 13, 1888.

Robert H. Duncan, for orators.

Lawrence E. Sexton, for defendants.

WHEELER, J. This suit is brought upon design patent No. 13,620, dated February 13, 1888, and granted to Frank Walton, assignor to the orators, to run seven years, for a corset. The principal features of the design, as specified in the claim, are a ribbed band at the lower edge, extending from the extreme front up over the hip, and down to the rear portion, and a series of ribs each side of the central hip line, beginning at the top and extending downward, and diverging onto the ribbed band. The shape given to the corset by extending the lower edge up over, instead of around, the hip, appears to add to the utility of the corset as an article of manufacture, as well as to its appearance. The patent is not, however, for an article of manufacture as such, which would have to be taken out under other provisions of the law than those relating to design patents; but is merely for the new appearance given to the article by constructing it according to the design. But the fact that a corset made according to the design would have that utility would not appear to make the design any the less patentable, if in itself, as a design, it was sufficiently new. The test of infringement of a design patent appears to be the existence of such similarities as will lead ordinary persons to think the articles in question are the same. *Gorham Co. v. White*, 14 Wall. 511; *Jennings v. Kibbe*, 20 Blatchf. 353, 10 Fed. Rep. 669. The test of novelty would, therefore, appear to be the existence of such differences between articles embodying the patented design and those existing before as would be recognized by the same class of persons. *Lehnbeuter v. Holthaus*, 105 U. S. 94. The nearest approach to the design of this patent shown by the evidence, and the one most relied upon by the defendants, is that shown in the patent to Paul T. Hertzog, No. 12,773, dated February 21, 1882. That has the ribbed band at the lower edge, but not extending up over the hip so far; and it does not have the series of ribs, distinguishable from the rest, on each side of the hip line. Most of the special features of this design are to be found, separately, in prior things, but they are nowhere combined so as to make such an effect as a whole; and that is what is to be looked at. *Perry v. Starrett*

3 Ban. & A. 485. As a matter of fact, in this view, it clearly enough appears that corsets of this design would be readily distinguishable by ordinary persons from those of any prior design. The patent appears, therefore, to be valid. Infringement is not disputed, and is clear; so clear that it shows the results of copying. The orators are, therefore, entitled to a decree.

Let a decree be entered that the patent is valid; that the defendants infringe; and for an injunction and an account according to the prayer of the bill, with costs.

WELLING v. LA BAU.

(*Circuit Court, S. D. New York. February 25, 1888.*)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—REFERENCE.

Upon a reference in a suit for infringement of reissued letters patent No. 5,940, for an improvement in artificial ivory, consisting of shellac and talc in substantially equal parts, it appeared that defendant used a composition of shellac and "fiber white," claimed to be a different substance from talc, and to have been discovered since the issue of the patent. The master found that "fiber white" had all the physical and chemical properties of talc, and was talc. *Held*, that as his report showed there was, as to that fact, much conflicting testimony, his finding will not be set aside.

2. SAME—INFRINGEMENT—DAMAGES.

Where plaintiff's invention relates to a new composition of matter, and the infringing article is made of the patented material, and this alone, the measure of the patentee's damages is the entire profit he would have made, to the extent of the sales by defendant of the infringing article.

On Exceptions to Master's Report.

On the 30th of June, 1882, the complainant, William M. Welling, obtained a decree sustaining reissued letters patent No. 5,940, dated June 30, 1874, for an improvement in artificial ivory. See 12 Fed. Rep. 875. The defendant, John H. La Bau, having made and sold certain articles containing the patented composition, viz., shellac and talc, in substantially equal parts, was adjudged an infringer, and a master was appointed to take the account. After a long and vigorously contested controversy, during the progress of which the court was several times appealed to, (see 32 Fed. Rep. 293,) the master, on the 24th of December, 1886, presented a report, in which he assessed the complainant's damages at \$3,634.94. After the date of the original patent, and, probably, about the year 1872, in the extreme southeastern portion of St. Lawrence county, New York, a mineral was discovered which was placed upon the market and known commercially as "fiber white." Large quantities of this mineral were used by the defendant. The question of fact over which the main contest arose was whether "fiber white" was or was not talc. The master found that it had all the physical and chemical properties of talc, and was talc. He further found as follows: That the white checks sold by the defendant contained shellac and talc, in substan-

tially equal proportions; that from March 1, 1876, to May 1, 1879, the complainant had no competitor in the manufacture and sale of these checks other than the defendant; that, during this period, the defendant sold large quantities of infringing checks, which, in very much the larger part, were sold to parties who were or had been regular customers of the complainant; that the complainant was at all times ready and able to supply the market, and if the defendant had not interfered he would have sold, in addition to his regular sales, at least the number of checks sold by the defendant. Although the defendant's infringement continued, in connection with others, after May 1, 1879, the master limited the recovery to damages sustained prior to that date, the measure being the loss of profits which the complainant would have made had he sold the checks sold by the defendant at the defendant's prices. On the 28th of December, 1886, the defendant filed exceptions, disputing the accuracy of the report in 12 particulars, the principal grounds being the alleged errors of the master in finding—*First*, that "fiber white" was talc; *second*, that the infringing checks contained shellac and talc, in substantially equal parts; *third*, that the defendant was a competitor, and the only competitor, of the complainant; and, *fourth*, that the complainant was ready and able to supply the market. Other exceptions allege error in the computation and dispute the master's conclusions of law.

Frederick H. Betts, for complainant.

Lucien Birdseye and *James C. Cloyd*, for defendant.

COXE, J., (*after stating the facts as above.*) The master has decided no question of fact which was not the subject of protracted and vehement contention. Testimony was introduced by both parties. Experts were called, and the disagreement between them was radical and irreconcilable. Every forward step made by the complainant was vigorously resisted by the defendant. Between them the master was compelled to decide. It is wise not to lose sight of the fact that the court is not to determine these facts *de novo*. If the report has been fairly and honestly rendered, without undue influence or manifest error, it should be permitted to stand. It is a matter of no moment that a different result might have been reached had the accounting been taken by the court. If the record shows that there was testimony *pro* and *con*, so that intelligent minds might differ upon the questions presented, the court will not assume to substitute its judgment for that of the master. His decision upon disputed facts should be final. A master stands as the representative of the court. He is selected with special reference to his fitness and experience. In seeing and hearing the witnesses he possesses advantages in determining questions of fact which a reviewing tribunal can never have. A master's report is not to be lightly brushed aside. It is entitled to respect. The proceedings before him have almost the same solemnity as a trial before a referee or a jury, and the familiar rule which precludes the court from setting aside a verdict which is not against the weight of evidence is, to a great extent, applicable. *Bates v. St. Johnsbury*, 32 Fed. Rep. 628; *Welling v. La Bau*, 32 Fed. Rep. 293; *Metaker*

v. *Bonebrake*, 108 U. S. 66, 2 Sup. Ct. Rep. 351; *Wooster v. Thornton*, 26 Fed. Rep. 274; *Bridges v. Sheldon*, 7 Fed. Rep. 17; *Greene v. Bishop*, 1 Cliff. 186; *Donnell v. Insurance Co.*, 2 Sum. 366; *Mason v. Crosby*, 3 Woodb. & M. 268.

The principal contention arises over the finding of the master that the "fiber white" used by the defendant was talc. The complainant cannot succeed upon the theory that "fiber white" was an equivalent for talc, for it was not known at the date of the patent. If, however, it was talc in fact, the principal obstacle in the complainant's path is swept away. Recognizing its importance the complainant has bent every energy to establish the affirmative, and the defendant the negative, of this proposition. As this is largely a scientific question, the situation may be well illustrated by placing in juxtaposition an epitome of the views of the expert witnesses, each being to some extent corroborated, and to some extent contradicted, by other testimony, and by collateral facts and circumstances.

Prof. Chandler, for the complainant.

I am familiar with the commercial article known as "fiber white." It is talc. I know "fiber white" to be talc by looking at it. It has the structure of talc; it has the fracture of talc; it has the lustre of talc; it has the unctuous feel of talc,—and no other mineral possesses all these properties at the same time. Taken together they constitute the mineralogical identity of talc. There is no other mineral with which you would be liable to confound it. *Secondly*. I have examined the pulverized mineral under the microscope, and the powder has the appearance of talc. *Thirdly*. Analysis shows it to be talc. I am satisfied, therefore, that this mineral is talc, as it possesses all the physical and chemical properties of talc.

Dr. Ledoux, for the defendant.

It is utterly unreasonable, if not impossible to even assume that "fiber white" is talc, because it does not correspond with one of the thirty-six analyses of talc shown in Dana's *Mineralogy*, or with any recognized specimen of talc. It contains more alumina, more lime, more manganese than any of them. "Fiber white" is fibrous. Talc is not fibrous. "Fiber white," when considered from a strictly mineralogical view, or chemically, or from a microscopic or other personal examination, cannot possibly be talc. I am confirmed in my opinion that "fiber white" is not talc by my recent investigations, and by my failure to find any samples of fibrous talc by the most diligent search and inquiry.

It was the duty of the master to decide between these two opinions. He did decide that "fiber white" was talc, and he had so decided when this court (*Welling v. La Bau*, *supra*) said:

"If the master has found that 'fiber white' is talc, although not dealt in commercially by that name, he has determined a disputed question of fact upon which the evidence is very conflicting. * * * The report of a master will not be set aside as to matters of fact upon which the evidence is doubtful, or the inferences uncertain, much less where his conclusions are reached upon conflicting testimony, and involve, to a greater or less degree, the credibility of the witnesses."

If the finding of the master upon this question were against the evidence, the court should not hesitate to set it aside; but it is thought,

after a careful consideration of the testimony, that it is not against the evidence, and should be undisturbed.

The foregoing views dispose of nearly all the other exceptions, which are based upon alleged errors of the master in deciding disputed questions of fact. If "fiber white" was talc, the proof is sufficiently clear that the defendant's white checks contained shellac and talc, in substantially equal parts. The evidence adduced to establish the identity of the checks analyzed by Prof. Chandler with those manufactured by the defendant was sufficient to sustain the master's action in that regard, and the same is true of the testimony upon the question of competition and the ability of the complainant to supply the market. It is thought that the rule enunciated in the carpet design cases (*Dobson v. Dornan*, 118 U. S. 10, 6 Sup. Ct. Rep. 946; *Dobson v. Carpet Co.*, 114 U. S. 439, 5 Sup. Ct. Rep. 945) has little application to the case at bar. Those decisions proceeded upon the theory that, as there was no evidence to establish the value imparted to the carpet by the design, it was error to attribute to the patent the entire profit made upon the sale of the carpets. When, however, the invention relates to a new composition of matter, and the infringing article is made of the patented material, and this alone, the measure of the patentee's damages may be the entire profit which he would have made. There is no room for segregation. It is not at all like a patented improvement upon an existing machine, for there it is entirely clear that evidence must be given to show what portion of the profits is due to the patented feature. Where the patent covers the infringing article in its entirety, no such evidence can be given. There can be nothing in the proposition that because the defendant's checks were of a lower grade than the complainant's the master's computation is erroneous, for the reason, among others, that they were so nearly alike in appearance as to deceive buyers not only, but experts in the trade.

The evidence has been examined with care, and no error which would warrant the court in refusing to confirm the report has been discovered. In many respects the report is a most conservative one. The exceptions are overruled, and the report of the master is confirmed.

THOMPSON *et al.* v. GILDERSLEEVE.

(Circuit Court, S. D. New York. February 27, 1888.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—MACHINES FOR FORMING STAPLE-SEAMS IN LEATHER.

The third claim of letters patent No. 136,340, issued February 25, 1873, to Samuel W. Shorey, for an improvement in machines for forming staple-seams in leather, which consists of an inclined and retreating bar or anvil, in combination with a bender-foot and a driving-bar, the improvement being that the inclined end of the anvil, retreating under the wire staple, supports it as it is being driven into the leather, and so obviates the necessity of boring holes for it in advance, is infringed by a device for stapling together the sheets of books and pamphlets, in which the staple, while being driven in, is sup-

ported by a similar inclined plane, although such incline is separate from the anvil, and the machinery moving the incline is different from that described in the patent.

2. SAME—DEFENSES—DIFFERENT USE.

It is no defense to a suit for the infringement of a patent that the patented machine is used solely for sewing leather and the infringing device for sewing paper, when either machine might be used indifferently on either material, as a patent covers the exclusive right to the use of the patented machine for all purposes.

In Equity. Bill for injunction for infringement of a patent.

Horace Barnard, for complainants.

M. B. Philipp, for defendant.

WHEELER, J. This suit is brought for an alleged infringement of the third claim of patent No. 136,340, dated February 25, 1873, and granted to Samuel W. Shorey, assignor to Arza B. Keith, for an improvement in machines for forming staple-seams in leather, and which is now owned by the orators. The principal defense is non-infringement. There were such machines prior to Shorey's invention. The wire of which the staples are formed is made to pass across a bar, called an "anvil," in width equal to the length of the crown of the staple, until the end projects beyond the anvil to an extent equal to a prong of the staple; then the machine cuts the wire at an equal distance from the other side of the anvil for the other prong; a bender-foot, with a projection on each side of the anvil, having a groove on the inside next to the anvil, then comes down and presses the ends of this piece of wire over the edges of the anvil, forming the staple with its crown across the top of the anvil, and its prongs down the sides of the anvil, in the grooves of the bender-foot; then a driving-bar follows the bender-foot until it strikes the crown of the staple, when the anvil is withdrawn and the prongs of the staple are pressed through the sheets of leather beneath the bender-foot by the force of the driving-bar on the crown. The wire used is too fine to be stiff enough to be forced through the material by pressure on the crown of the staple without support, and, until Shorey's invention, holes for the prongs of the staple were punched. Shorey made the end of the anvil inclined, and had it withdrawn so that the driving-bar would strike the crown of the staple at the top of the incline, and the crown would follow down, and be supported by, the incline as it was driven home, so that the prongs would be pressed through the material to be stapled without having holes previously prepared for them. This claim is for this inclined and retreating anvil, in combination with the bender-foot and driver, operating substantially as described. The patent describes a lever, moved by a cam, to so withdraw the anvil as to make the crown of the staple coincide with the incline in its descent, and a spring working against the cam to return the anvil to its place for the next operation. In the defendant's machine the bender-foot forms the staple over an anvil which is forced from beneath the crown of the staple by the driver, leaving the crown of the staple on an incline that supports the crown as it is driven home, so that the prongs are forced through the material or-

erated upon without having holes previously made for them. The incline is moved away by the action of the driver forcing the crown of the staple down it, against a spring, in a direction opposite to that in which the anvil is moved, and is brought back to its place for the next operation by the action of the spring. The defendant uses his machine wholly on paper for stapling together the sheets of books and pamphlets.

One point made in behalf of the defendant is that his machine is used in forming staple-seams in paper, and not in leather. The machine of the patent unites the leather by driving successive staples through the parts to be united, twisting together the prongs on the other side of the work, and forming thereby a continuous seam. The machine of the defendant does the same with sheets of paper. Either machine will operate upon either kind of material, in the same manner, as upon the other. The material is operated upon, and the kind of it has no effect upon the mode. The patent covers the exclusive right to the use of that part of the machine patented without restriction, and as much for new purposes as for old. *Roberts v. Ryer*, 91 U. S. 150.

Another point is that grooves in the bender-foot are necessary to support the prongs of the staple, and prevent them from crippling while being driven; that such grooves are not described in the patent, and are employed for that purpose in the defendant's machine, making a different machine from the patented one. These grooves were, however, well known, and in use as parts of a bender-foot for this purpose at the time of the patent. This claim is for the inclined and retreating anvil, in combination with the bender-foot and driver, and not for the bender-foot or driver. These grooves are no part of the anvil, and have no share in supporting the crown of the staple while it is being driven. It was not necessary to describe them in describing the operation of the anvil, for the purposes of this claim, any more than it would be to describe any other parts of this intricate machine, and their operation. The new part was to be described; those parts which were old and well known would be understood without description. *Loom Co. v. Higgins*, 105 U. S. 580.

Another point is that the cam and lever for withdrawing the anvil are taken by the specification into the combination of this claim, and that, as the defendant does not make use of such a cam and lever, he does not use that combination. Many cases are referred to which show that a patent covers only what is described in the claims, and that, when a claim is for a combination, whatever is made a part of the combination, by the words of the claim itself, or by necessary inference, is a material part in the construction of the patent. *Bridge Co. v. Iron Co.*, 95 U. S. 274; *Fay v. Cordesman*, 109 U. S. 408, 3 Sup. Ct. Rep. 236; *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. Rep. 72; *Hartshorn v. Barrel Co.*, 119 U. S. 664, 7 Sup. Ct. Rep. 421; *Snow v. Railway Co.*, 121 U. S. 617, 7 Sup. Ct. Rep. 1343. There can be no question about this. The only question on this part of this case is whether it comes within the principles of those and other similar cases. The anvil, as a former of the staple, and retreating after it is formed, out of the way, was not new.

The inclined part, as a supporter of the crown of the staple, and retreating to give way to the crown as it is forced downward by the driver, was new. The cam and lever are necessary to draw the forming part of the anvil backward until the crown of the staple is brought to the top of the incline; then the downward motion of the driver on the crown will force the inclined portion back while it is giving support. The cam and lever are not brought into the combination of this claim by its terms, neither are they necessary to the operation of the inclined and retreating part of the anvil; therefore they are not brought in by any necessary implication. This claim appears to be valid to cover this inclined and retreating anvil, operating to support the crown of the staple in the manner described, while the prongs are being supported by the bender-foot, and the staple is being driven home by the driver. While these parts work together in this manner they are the combination of this claim; and all the other parts of the machine that make these parts operate in this way to produce the result required are, for that purpose, equivalents of the parts of any other machine, however different they may be in themselves, which also make these parts operate in the same way to produce the same result. *Clough v. Barker*, 106 U. S. 166, 1 Sup. Ct. Rep. 188, 198.

In the defendant's machine, what is called in this patent the "anvil," is divided, and the part over which the staple is formed is in one piece, and the inclined part, which supports the crown of the staple while being driven, is in another. But the inclined and retreating portion operates to support the crown of the staple while the prongs are supported by the bender-foot and the staple is being driven home by the driver, precisely as these parts work in the combination of this claim. The forms are somewhat different, but the operation and result are the same. In this manner the defendant appears to make use of Shorey's invention as it was patented by this claim. *Mason v. Graham*, 23 Wall. 261; *Ives v. Hamilton*, 92 U. S. 426; *Valve Co. v. Valve Co.*, 113 U. S. 157, 5 Sup. Ct. Rep. 513.

Let there be a decree that the third claim of the patent is valid; that the defendant infringes that claim; and for an injunction and an account, with costs.

EMACK v. KANE *et al.*

(Circuit Court, N. D. Illinois. February 27, 1888.)

1. PATENTS FOR INVENTIONS—THREATENING PURCHASERS WITH SUITS FOR INFRINGEMENT—INJUNCTION.

A court of equity has jurisdiction to restrain an attempted intimidation by one issuing circulars threatening to bring suits for infringements against persons dealing in a competitor's patented article, the bill charging, and the proofs showing, that the charges of infringement were not made in good faith, but with malicious intent to injure complainant's business.

2. SAME—EVIDENCE—VALIDITY OF PATENT—COLLATERAL ATTACK.

In a suit to restrain one from issuing circulars threatening to bring suits for infringements against all customers dealing in a competitor's patented article, a court of equity will not pass upon the validity of the patent, but it may consider the state of the art in connection with the defendant's conduct, to ascertain his good faith in issuing the circulars.

In Equity. On bill for injunction.

Matthews & Dicker, for complainant.

Banning & Banning, for defendants.

BLODGETT, J. This is a bill in equity, in which the complainant seeks to restrain the defendant Kane from sending circulars injurious to the complainant's trade and business. Both complainant and defendants are manufacturers of what are known as "noiseless" or "muffled" slates for use of school children. The complainant is the owner of a patent issued to one Ebenezer Butler, February 15, 1870, in which the slate was muffled, or rendered noiseless, as it is said, by making a slot through the frame near the outer edge, into which was spirally wound a piece of listing, cloth, or other fibrous material, which would deaden or break the sound of the slate when it came in contact with the desk or any other hard substance; the listing operating to muffle the faces and the edges of the frame. Complainant is also the assignee of letters patent granted April 3, 1877, to Francis W. Mallett, for a noiseless or muffled slate; the muffling being obtained by encircling the outer edge of the frame of the slate with a strip of wood a little larger than the thickness of the frame, which strip of wood was covered with cloth, or other soft material, so as to muffle both the edges and the faces of the slate frame. The bill also alleges that the defendants are manufacturers of noiseless or muffled school slates,—having their place of business in the city of Chicago,—under a patent, as they claim, granted March 28, 1877, to Harry C. Goodrich, which was reissued September 26, 1882, with an additional claim. It also appears that this class of goods is sold extensively by both these manufacturers to jobbers, who supply the retail dealers, from whom the slates are purchased for school use; and that the competition between these manufacturers is active and vigorous; that both are seeking to control as much of the trade as possible, or all of it, if they can do so; and that since August 1, 1883, up to the filing of this bill, which was in March, 1884, the defendants have sent out to the trade,—that is, to the jobbers and persons engaged in this class of slates,—circulars threatening all who should buy from the complainant, or deal in his slates, with law-suits, upon the ground that the complainant's slate is an infringement of the Goodrich patent as reissued. I do not intend to quote all these circulars, but extracts from a few will illustrate the character of the attacks which the defendants have made upon the complainant's business. In a circular issued September 26, 1882, and sent generally to the trade, occurs the following language:

"WHAT DO WE PROPOSE TO DO WITH INFRINGERS? Nothing for the present, so far as prosecuting Emack is concerned, and for reasons that the

trade well understand. We could stop him, of course, but he would open out the next day in another loft or basement, and under another name, and put us to the expense of another suit, and so on indefinitely. *When we commence suit we want to be sure of damages.* The language of the original patent was somewhat ambiguous, and hence there was some excuse for those who sold it, believing that it was not an infringement. *There can be no mistake now.* The language of the claims could not be made plainer. Any dealer who now sells the Emack slate knows that he is selling an infringement of our patent, and we shall protect ourselves and our friends by holding all who are responsible for royalty and damages."

"TO OUR FRIENDS: We will say that very few *jobbers* have handled the Emack slate. Failing to sell to the jobbing trade, he went to the leading retailers, and sold them all he could. They, of course, had heard nothing of our claims as to infringement, as we sell only to jobbers. We *now* know every man in the country who handles these slates, and shall notify them all promptly of the reissue of the patent. Then, if they continue to sell, we shall be forced to adopt legal measures."

In another circular occurs the following language:

"SLATE PATENTS. We advise any who are tempted to buy the Emack slate to 'go slow.' Don't accept the statement that, because he uses a 'bar,' and we do not, that his slate is not an infringement. We have a straight, square, 'no nonsense' patent on a *cord muffler*. *He uses a cord muffler, and hence he infringes our patent.* If you doubt it, ask any patent lawyer, and also ask regarding the truthfulness of his statement, in a late circular, that, if he is infringing, 'the law compels us to close his factory.' Better pay something to *keep out of trouble* than to pay to *get out*, and fail, besides. Of course, we know of every shipment he makes, and the quantity. Shipping to his own address shows, of course, that he and those who may buy them are afraid of the consequences, but it will do no good; we shall know who *sells them*, and royalty will be demanded in good time, by the proper parties, of the proper parties, and in a legal way."

In a still later circular occurs the following paragraph:

"We have, jointly with the patentee, placed the matter in the hands of attorneys of this city and New York, who have for many years had an extensive and very successful practice in law, and especially in prosecuting infringement cases. We instruct them to give the entire trade fair warning, and make very favorable terms with any who have been deceived, and propose to stop selling the so-called 'E. I. Slate;' but parties who want a lawsuit can have it. And here again we announce our purpose *not to sue Emack*, and here again we state that *every man in the trade knows why*. No one of you would do it, and if in our place you would do just as we are doing. We expect to commence some suits in August and September, selecting parties whose sales we think have amounted to enough so that the royalty and damages will pay at least a part of our expenses. If others want their suits later this year, or next season, all they have to do is to sell infringing slates until their sales aggregate a sufficient sum to justify us, and we will try to accommodate them."

And in a still later circular, addressed to the jobbing trade, defendants wrote:

"And now once more we say *we shall not sue Emack*. If this be libel, we take the consequences; but we *do expect and fully intend* to bring suits against those who sell infringing slates. * * * The longer we wait, the more royalty and damages we will collect from those who continue to sell infringing slates."

Many more extracts might be made from these circulars, which appear in the proof, but this is enough to show the spirit in which the defendant attempted to intimidate the complainant's customers from dealing with him, or dealing in the slates manufactured by him; and the proof shows abundantly that much business has been diverted from the complainant by these threats and circulars; that the complainant's business has been seriously injured, and his profits very much abridged by the course pursued in sending out these circulars. The proof in this case also satisfies me that these threats made by defendants were not made in good faith. The proof shows that defendants brought three suits against Emack's customers, for alleged infringement of the Goodrich patent by selling the Emack slates; that Emack assumed the defense in these cases, and, after the proofs were taken, and the suits ripe for hearing, the defendants voluntarily dismissed them,—the dismissals being entered under such circumstances as to fully show that the defendants knew that they could not sustain the suits upon their merits; that said suits were brought in a mere spirit of bravado or intimidation, and not with a *bona fide* intent to submit the question of infringement to a judicial decision.

The defense interposed is—*First*, that these circulars were mere friendly notices to the trade of the claims made by defendants as to what was covered by the Goodrich patent; *second*, that a court of equity has no jurisdiction to entertain a bill of this character, and restrain a party from issuing circulars, even if they are injurious to the trade of another.

In support of this latter point defendants rely upon the opinion of Mr. Justice BRADLEY, in *Kidd v. Horry*, 28 Fed. Rep. 773, and *Wheel Co. v. Bemis*, 29 Fed. Rep. 95, decided by Judges COLT and CARPENTER in the district court of Massachusetts. *Kidd v. Horry* was an application for an injunction restraining the defendant from publishing certain circular letters alleged to be injurious to the patent-rights and business of the complainant, and from making and uttering libelous and slanderous statements, written or oral, of, or concerning the business of, complainant, or concerning the validity of their letters patent, or of their title thereto, pending the trial and adjudication of a suit which had been brought to restrain the infringement of said patents; and Mr. Justice BRADLEY in deciding the case said:

"The application seems to be altogether a novel one, and is urged principally upon a line of recent English authorities, such as *Dixon v. Holden*, L. R. 7 Eq. 488; *Food Co. v. Massam*, 14 Ch. Div. 763; *Thomas v. Williams*, *id.* 864; and *Loag v. Bean*, 26 Ch. Div. 306. An examination of these and other cases relied on convinces us that they depend on certain acts of the parliament of Great Britain, and not on the general principles of equity jurisprudence. * * * But neither the statute law of this country, nor any well-considered judgment of a court, has introduced this new branch of equity into our jurisprudence. There may be a case or two looking that way, but none that we deem of sufficient authority to justify us in assuming the jurisdiction. * * * We do not think that the existence of malice in publishing a libel, or uttering slanderous words, can make any difference in the jurisdiction of the court. Malice is charged in almost every case of libel; and no cases or v.34F.no.1—4

authority can be found, we think, independent of statute, in which the power to issue an injunction to restrain a libel or slanderous words has ever been maintained, whether malice was charged or not."

The principle of this case, concisely stated, is that a court of equity has no jurisdiction to restrain the publication of a libel or slander. But it seems to me the case now under consideration is fairly different and distinguishable from the cases relied upon by the defendants in what seems to me a material and vital feature. In *Kidd v. Horry* the owner of a patent sought the interference of a court of equity to restrain the defendants from publishing and putting in circulation statements challenging the validity of his patent, and of his title thereto, on the ground that such publications were libelous attacks upon his property. Here the complainant seeks to restrain the defendants from making threats intended to intimidate the complainant's customers under the pretext that complainant's goods infringe a patent owned or controlled by defendants, and threats that if such customers deal in complainant's goods they will subject themselves to suit for such infringement; the bill charging, and the proof showing, that these charges of infringement are not made in good faith, but with a malicious intent to injure and destroy the complainant's business. While it may be that the owner of a patent cannot invoke the aid of a court of equity to prevent another person from publishing statements denying the validity of such patent by circulars to the trade, or otherwise, yet, if the owner of a patent, instead of resorting to the courts to obtain redress for alleged infringements of his patent, threatens all who deal in the goods of a competitor with suits for infringement, thereby intimidating such customers from dealing with such competitor, and destroying his competitor's business, it would seem to make a widely different case from *Kidd v. Horry*, and that such acts of intimidation should fall within the preventive reach of a court of equity. It may not be libelous for the owner of a patent to charge that an article made by another manufacturer infringes his patent; and notice of an alleged infringement may, if given in good faith, be a considerate and kind act on the part of the owner of the patent; but the *gravamen* of this case is the attempted intimidation by defendants of complainant's customers by threatening them with suits which defendants did not intend to prosecute; and this feature was not involved in *Kidd v. Horry*. I cannot believe that a man is remediless against persistent and continued attacks upon his business, and property rights in his business, such as have been perpetrated by these defendants against the complainant, as shown by the proofs in this case. It shocks my sense of justice to say that a court of equity cannot restrain systematic and methodical outrages like this, by one man upon another's property rights. If a court of equity cannot restrain an attack like this upon a man's business, then the party is certainly remediless, because an action at law in most cases would do no good, and ruin would be accomplished before an adjudication would be reached. True, it may be said that the injured party has a remedy at law, but that might imply a multiplicity of suits which equity often interposes to relieve from; but the still more cogent reason seems to be

that a court of equity can, by its writ of injunction, restrain a wrongdoer, and thus prevent injuries which could not be fully redressed by a verdict and judgment for damages at law. Redress for a mere personal slander or libel may perhaps properly be left to the courts of law, because no falsehood, however gross and malicious, can wholly destroy a man's reputation with those who know him; but statements and charges intended to frighten away a man's customers, and intimidate them from dealing with him, may wholly break up and ruin him financially, with no adequate remedy if a court of equity cannot afford protection by its restraining writ.

The effect of the circulars sent out by the defendant Kane certainly must have been to intimidate dealers from buying of the complainant, or dealing in slates of his manufacture, because of the alleged infringement of the Goodrich patent. No business man wants to incur the dangers of a lawsuit for the profits which he may make as a jobber in handling goods charged to be an infringement of another man's patent. The inclination of most business men is to avoid litigation, and to forego even certain profits, if threatened with a lawsuit which would be embarrassing and vexatious, and might mulct them in damages far beyond their profits; and hence such persons, although having full faith in a man's integrity, and in the merit of his goods, would naturally avoid dealing with him for fear of possibly becoming involved in the threatened litigation. The complainant, as I have already stated, was engaged in the manufacture of school slates under the Butler and Mallett patents; the Butler patent being much older than the Goodrich, and the Mallett patent being nearly contemporaneous in issue with the Goodrich patent, under which the defendant was manufacturing. But the proof in this case shows a still older patent, granted to one Munger, in 1860, for a muffled or noiseless slate, which most clearly so far anticipates the patents of both complainant and defendants, as to limit them, respectively, to their specific devices. But I do not think the fact that complainant was the owner of these patents or operating under them, material to the questions in this case. The defendants claim that complainant's slates infringe the Goodrich reissue patent, and threaten complainant's customers with suits if they deal in complainant's slates. The state of the art to which the Goodrich patent pertains may be examined for the purpose of aiding the court in passing upon the question of defendants' good faith in making such threats, and the state of the art is only material, as it seems to me, for this purpose. The court will not attempt, in a collateral proceeding like this, to pass upon the validity of the Goodrich patent, but will consider, in the light of the proof as to the state of the art, and the proof as to defendant's conduct, whether the defendant made these threats against complainant's customers because he in good faith believed that complainant's slates infringed his patent, and intended to prosecute for such infringement, or whether such threats were made solely to intimidate and frighten customers away from complainant, and with no intention of vindicating the validity of his patent by a suit or suits. Instead of going into the courts to test the validity of the Butler patent, or the right

of complainant to make the kind of slates he was putting upon the market, the defendant, in a bullying and menacing style, asserts to the trade by these circulars that complainant is infringing the Goodrich patent, and threatens all who deal in complainant's slates with lawsuits, and all the perils and vexations which attend upon a patent suit. The average business man undoubtedly dreads, and avoids, if he can, a lawsuit of any kind, but a suit for infringement of a patent is so far outside of the common man's experience that he is terrorized by even a threat of such a suit. There seems to me certainly good grounds for doubting the validity of the Goodrich patent in the light of the state of the art at the time he entered the field; and that any lawyer well versed in the law of patents would surely hesitate to advise that the complainant's slates infringed the Goodrich patent, either before or after the reissue; and the conduct of the defendant in dismissing his suits for such alleged infringement without trial, shows that he did not believe that such infringement could be established.

I am, therefore, of opinion that the complainant has made a case entitling him to the interposition of a court of equity to prevent the issue of circulars, or other written or oral assertions, that the slates made by the complainant are an infringement upon the defendant's patent; and a decree may accordingly be entered as prayed in the bill.

THE SEA LARK.¹

HUDGINS *et al.* v. THE SEA LARK.

(District Court, E. D. Virginia. January 14, 1888.)

ADMIRALTY—DECREE—SUBSEQUENT CLAIM.

When the time fixed by the rules of court for making defense has elapsed, and the libel has been taken for confessed, but the formal decree of condemnation and sale has not been entered, on account of the absence of the judge, any maritime claimant who comes in by petition subsequent thereto, does so subject to the libel, and cannot be paid till the libelant is paid in full, although his claim was originally prior to the libel in dignity.

In Admiralty.

Libel by Hudgins and Hurst for the cost of sails furnished the sloop Sea Lark. The question at issue is whether the claim of libelants should have priority over the claim of one Mitchell, a seaman, for wages accruing prior to the claims of libelants.

Whitehurst & Hughes, for libelants.

W. A. Swank, for the seaman.

HUGHES, J. The libelants, having a claim of \$63 for sails furnished the Sea Lark in January, 1887, filed a libel and issued process of arrest on the twenty-second of December, last. The libel was duly served, and

¹Reported by Robert M. Hughes, Esq., of the Norfolk bar.

a sale of the vessel has been ordered. By admiralty rule 156 of this court, it is provided that under the requirements of general rule 29 in admiralty, prescribed by the supreme court of the United States, the answer of the claimant or of any respondent in a libel suit must be filed with the clerk at the return-day of the process, or within ten days thereafter. And rule 154 of this court provides that "in every libel *in rem* process of monition shall be made returnable on Tuesday of the week next after the filing of the libel." In the present case, process issued on the twenty-second of December, was duly served, and was returned on Tuesday, the twenty-seventh of the same month. All claims against the sloop, whether by answer, petition, or otherwise, should have been filed on the 27th, or within the next 10 days following, up to and including January the 6th. In point of fact, no answer or petition was filed, and the case matured as to the libelant; and if the judge of the court had been in Norfolk, a decree could have been taken as of right by the libelant. The judge, however, was absent on the sixth January, holding court at Alexandria; and the case which had matured stood over, under rule 32 of this court, until he should be in Norfolk. On the seventh January, one Mitchell, who had been an employe as cook on the Sea Lark, but had left her in August last, filed a petition in this cause, claiming wages for six months antecedent to his leaving the sloop, at \$20 per month. As the sloop will not sell for enough money to pay both claims, the question at this stage of the cause, before sale, is raised and argued by counsel, whether the claim of this Mitchell, who was once a seaman on the sloop, will have priority over the claim of the libelants, who supplied her with sails. To say nothing of the greater or less staleness of Mitchell's claim, I think the claim of the libelant against this sloop became vested as against those of all other creditors of the vessel on the sixth of January, when he became entitled to a decree. Before libels are filed, the claims against ships for maritime services of seamen or other classes of creditors are not of the nature of liens at common law. These creditors merely possess the privilege of proceeding against the vessel herself as a debtor, and of arresting and holding her for their claims. After the issuing of process, arrest of the vessel, and time given for claimants and other creditors to come forward and file their claims, and the libel suit thereby matures for hearing, then, and not before, do the rights of the libelant in the vessel become vested and operate as a lien for such amount as may be decreed by the court. If the claimant does not answer, and other creditors do not prefer their claims within the period of 10 days allowed by the court for that purpose, then the case matures in favor of the libelant as against all the world; and those having claims against the vessel who come in afterwards, come in, in every case, subject to the claim of the libelant. Their petitions filed subsequently to the maturing of the libel do not affect the lien of the libelant for the amount decreed. The rules of priority as between maritime claims, though binding as between other claimants, do not affect him. He is protected by his matured libel, and by the rule much respected in admiralty courts, *vigilantibus non dormientibus jura subveniunt*.

WHIPPLE v. MISSISSIPPI & YAZOO PACKET Co.

(District Court, S. D. Mississippi, W. D. January Term, 1888.)

1. SHIPPING—CHARTER-PARTY—SEAWORTHINESS—CONTINUING GUARANTY.

Libelant, the owner of a river steamer at Louisville, Kentucky, contracted with respondents that the master of the steamer should take her to Vicksburg, Mississippi, and employ her in respondents' service upon the Yazoo river for five months, guarantying that the vessel should have the necessary underwriters' certificate as to her seaworthiness. She was inspected at Louisville, and a certificate obtained from the secretary of the underwriters, but, upon a subsequent inspection, during her service, the certificate was withdrawn. The master charged the underwriters with fraud, threatened suit against them, settled up with respondents, took possession of the vessel, and respondents declared the contract at an end. *Held*, that, under all the circumstances, the guaranty must be construed as a continuing one, not limited to the time the vessel went into respondent's employment.

2. RELEASE AND DISCHARGE—EFFECT.

Respondents, in a suit for damages for breach of charter-party, filed a cross-libel for damages for false representations. It appeared that before the commencement of the suit the master of the vessel had settled with respondents, giving them a receipt and acquittance for moneys due from them, and had taken possession of the vessel. *Held*, that the settlement was conclusive, and the cross-libel should be dismissed.

In Admiralty. Libel and cross-libel for damages.

Lee & McKee, for libelant. *Miller, Smith & Hirsh*, for respondents.

HILL, J. This case is submitted upon libel, answer, and cross-libel, answer, and proofs. The libel, in substance, charges that the libelant was the owner of the steamer *Ed Foster*, and that on the 9th day of September, 1887, she, by J. W. Whipple, the master of said steamer, entered into a contract in writing with the defendant company, in the nature of a charter-party, by the terms of which said J. W. Whipple agreed, as master of said steamer, to take her to Vicksburg, Mississippi, and employ her in the service of the defendant company for a period of five months, and for the service of said master and said vessel the defendant company was to pay the sum of \$225 at the end of each month, and would also pay the expense of transporting said vessel from Louisville, Kentucky, to Vicksburg, Mississippi. That in fulfillment of said written contract,—a charter-party,—said master did transport said vessel to Vicksburg, where she was put into the Yazoo river trade, and so remained until the 26th day of October, 1887, when the defendant company declined to use her any longer under said charter-party, and declared said charter-party at an end, although libelant had, on her part, performed all the obligations on her part under said contract. That the master, acting for libelant, protested against the breach of said contract, upon the part of said defendant company, who absolutely refused to comply with their part of said contract, alleging that libelant had forfeited the same by reason of an alleged breach thereof by libelant of a guaranty in said charter-party touching the boat's underwriters' papers.

Libelant alleges that she did have said boat inspected, and obtained a certificate of her seaworthiness, and obtained from the secretary of the underwriters a certificate in proper form; that said certificate remained suspended in the cabin of said boat until taken down by one of the respondents, and returned to the underwriters, who had unjustly and wantonly, without the act, procurement, or fault of libelant or said master, or without any just or sufficient cause whatever, revoked the said certificate; that said steamer was inspected by the United States inspectors of hulls and boilers at Louisville, and received their certificate and license for the ensuing year, which said steamer still carries; that by reason of the facts stated she has fulfilled and performed her guaranty as aforesaid. The libelant, by her libel, claims a decree for the balance of charter-party money agreed to be paid, also for money alleged to have been paid out by the master for services by the crew, and for other expenses of the steamer. The answer of the respondents, which is made a cross-libel, admits the contract, or charter-party, as alleged; but, in substance, sets up as a defense to the prayer of libelant that, upon an inspection made by a duly-authorized inspector of the underwriters, said boat was declared unseaworthy, and said underwriters' certificate was withdrawn without any act on their part, and by means of which said boat could no longer be used by them for the purpose for which she was chartered, as no insurance could be had on the freight transported upon her, and by means of which said guaranty was broken and forfeited, and respondents were released from said contract. Respondents, by their answer, further aver that after said certificate of said underwriters was withdrawn, a final settlement was made between said master, acting for libelant, and respondents, by which all matters arising under said contract were adjusted and settled, and full payment was made to said master, and for which he executed a receipt, signed by said J. W. Whipple, as master of said steamer. Defendants further set up, by way of defense, and as a cross-libel, that as an inducement to respondents to make said contract, said J. W. Whipple, acting for libelant, falsely represented to respondents that he had then recently had repairs put upon said steamer, costing \$1,800; that she only drew light draught, 16 inches, and had on her a first-class steam capstan; that said steamer was chartered by them for the purpose of being employed in the Yazoo river trade in low water, which was well known to said master, that libelant had not expended anything like the sum of \$1,800 in the repair of said steamer; that her light draught was 20½ inches instead of 16, as stated by said master, and that said capstan was not first class, but was of inferior quality and unfit for the purposes intended; that by reason of said false and fraudulent representations said steamer was wholly worthless to respondents, and that by reason of the amount they expended in payment of part of the charter contract for payment of the crew, and other expenses of said steamer, they have suffered damages to the amount of \$1,000.75, for which sum they claim a decree against said steamer, with a lien upon her, her tackle, furniture, etc. The answer to the cross-libel denies the breach of the warranty as alleged, denies that there was a final

settlement of the matters arising out of the contract as alleged, also denies the fraudulent statements as charged, but admits that the master did state that her light draught was 16 inches, and that he did state that her capstan was first-class, and avers that said statements were true.

Quite a number of witnesses have testified as to the statements made by J. W. Whipple, and as to the draught of the boat, and as to the capstan, but, as there are two other points which must be decisive of the rights and liabilities of the respective parties, need not be considered. The first is as to the construction which ought to be put upon the contract of guaranty. While there may be some uncertainty as to the intention of the parties arising upon the face of the contract, when the relation of the parties and the action which they took in relation to it is considered, I do not find much difficulty in arriving at that intention and understanding, and what that was must govern in the construction of this as well as all other written contracts and agreements.

Secondly. It is contended upon the part of libelant that the guaranty was only to extend to the time the vessel went into the employment of the respondents, and upon the part of respondents that it was to continue until the end of the employment. By the terms of the contract Capt. Whipple, the son of the libelant and the master of the boat, was to continue in command of her; the service was to be a joint one of Capt. Whipple and the boat. The contract upon the part of Mrs. Whipple, the owner, was that she guarantied that the boat should have the necessary underwriters' certificate or papers to enable the respondents to obtain insurance upon the freight transported. When the inspector declared her unseaworthy, and crossed her, as it is called, and withdrew the certificate, Capt. Whipple, who made the contract, and knew its meaning, charged that the action of the underwriters' and the inspector was a gross fraud upon the rights of libelant; that he would sue them for damages; and that he would have the vessel reinstated. Had it not been the understanding that the guaranty was to continue, this claim for damages would have accrued to respondents instead of to libelant. Then, upon the withdrawal of the certificate and underwriters' papers, he settled up with respondents and gave a receipt and acquittance up to that date, and took possession of the boat, as I understand it from all the evidence, for the owner, and not for the respondents, who then declared that they could not use her for the want of the papers, which had been withdrawn, and declared the contract at an end. From all these circumstances I am satisfied that the understanding of the parties was that this guaranty should continue to the end of the service, and that by the withdrawal of the underwriters' papers, the guaranty was broken and forfeited, and the respondents released from it, as no immediate steps were taken by libelant to have the proper underwriters' papers restored.

I am satisfied, from all the proof, that the settlement made between Capt. Whipple and the respondents must be held as final and conclusive, as to all the claims set up in the cross-libel, and estops the respondents from the relief prayed for in the cross-libel.

The result is that both the libel and cross-libel must be dismissed.

and that libelant will be decreed to pay the costs, except the costs of summoning and the attendance of the witnesses, the testimony, except that of the parties themselves, being upon an immaterial issue.

THE DIRECTOR.

BALFOUR *et al.* v. THE DIRECTOR.

(District Court, D. Oregon. February 18, 1883.)

1. SHIPPING—CHARTER-PARTY—SEAWORTHINESS.

There is an implied warranty of seaworthiness or fitness for the contemplated voyage in every charter-party or contract of affreightment on the part of the ship-owner, and this is a condition precedent to performance by the shipper.¹

2. SAME.

The libelants chartered the Director to carry a cargo of wheat from Portland to Europe, and, when she was loaded, she commenced, from inherent weakness, to leak, so that her cargo had to be discharged. *Held*, that the vessel not being seaworthy at the date of the charter and the delivery of the cargo, there was a failure on the part of the ship-owner to perform the condition precedent of the contract, and the shipper was absolved therefrom, and was entitled to recover possession of his wheat, and such damages as he may have sustained by reason of such failure.

3. MARITIME LIENS—SALE OF VESSEL—ORDER OF PAYMENT.

Assuming that the proceeds of the sale of the vessel are not sufficient to satisfy the demand of the libelants and those of the intervenors, the stevedore who unloaded the cargo, having a lien on both cargo and vessel for his services, is entitled to be first paid; the claim for towage up the river to Portland, and the claim of the libelants for damages for breach of the contract, are to be paid *pro rata*, the costs incurred by the libelants in arresting and keeping the vessel to be first paid in full; the carpenter who recalced and coppered the vessel after the cargo was removed from her, his labor and material being of no benefit to the prior lienors, must be paid last.

4. ADMIRALTY—REFLEVIN—COSTS.

In a suit in admiralty for the possession of personal property, where the same is taken on process issued on the application of the libelants, the same should be delivered to them; and, therefore, if they procure the arrest of the property and leave it in the custody of the marshal, they cannot recover the cost and expense of such custody, either as damages or costs.

(*Syllabus by the Court.*)

¹Under the usual covenants of a charter-party, that the vessel is "tight, staunch, and strong," the owners are answerable for latent as well as visible defects whereby the cargo is damaged. *Hubert v. Recknagel*, 18 Fed. Rep. 812; *The Rover*, 33 Fed. Rep. 516.

The terms "tight, staunch, strong, and every way fitted for the voyage," include an implied warranty of the seaworthiness of the vessel at the time she sails for the particular voyage, and in respect to the cargo laden on board. *Sumner v. Caswell*, 20 Fed. Rep. 249; *The Vesta*, 6 Fed. Rep. 532.

The law places on the owner of the vessel the obligations of a warrantor. The charter-party declaring that the vessel was in good order and condition, the presumption is in favor of seaworthiness. *McCann v. Conery*, 11 Fed. Rep. 747; *Pyman v. Von Singen*, 3 Fed. Rep. 802.

The stoppage of a steamer for five hours at a port not out of her course, for the purpose of taking in a small additional quantity of coal, is not a violation of a provision of the charter-party representing that the steamer was in every way fitted for the voyage. *Von Singen v. Davidson*, 1 Fed. Rep. 178.

In Admiralty.

C. E. S. Wood and John W. Whalley, for libelants.

Frederick R. Strong, for claimants.

Robert L. McKee, for intervenors.

DEADY, J. This suit was brought by the libelants, Alexander Balfour, Stephen Williamson, Robert Balfour, Alexander Guthrie, and Robert B. Foreman, doing business in this port as Balfour, Guthrie & Co., against the British bark *Director*, her master, William D. Bogart, and 16,868 bags of wheat.

The libel prayed for process against said bark, wheat, and master, to the end that the first might be sold to pay the damages of the libelants; that the second "might be delivered to the libelants," free of all charges and liens; that the master may be restrained from interfering with the wheat during the pendency of the suit; and that he and all others claiming any interest in said vessel or wheat may be cited to appear and answer the libel.

On reading and filing the libel an order was made thereon, allowing process to issue, as prayed for in the libel, on the filing of a stipulation by the libelants, in the sum of \$50,000, as security to the adverse parties for costs and damages thereby incurred, on which the vessel and wheat were subsequently arrested, and all parties in interest cited to appear. Thereupon the master filed a claim of ownership of said vessel on behalf of William W. Turnbull and others, and, on the same day, said parties and the master appeared in the suit, by counsel, and claimed the possession of the wheat.

The libel alleges that on October 3, 1885, the master of the *Director* chartered her to the libelants to carry a cargo of wheat from this port to Europe, at 42s. 6d. a ton, stating therein that the vessel was "tight, stanch, strong, and in every way fitted for such voyage;" that the vessel was laden by the libelants, and, as soon as the cargo was on board, she commenced to leak so badly she could not proceed on her voyage, and the cargo was discharged.

On exceptions to the libel for misjoinder of causes of action, it was held—

"(1) In a suit by a shipper for the non-performance of a contract of affreightment, the facts which establish the liability of the master, also give the libellant a lien on the vessel for the amount of his claim, and, therefore, it is proper and expedient that the proceeding against the owner or master and the vessel should be joined in one libel;" and "(2) when the possession of personal property has been changed by means involving the breach of a maritime contract concerning the same, or such possession is wrongfully withheld contrary thereto, the owner or other person entitled, under the circumstances to the possession thereof, may maintain a suit in admiralty to obtain the same." *The Director*, 11 Sawy. 493, 26 Fed. Rep. 708.

An amended libel was subsequently filed, in which a sale of the wheat, on October 5, 1885, is alleged to have been made to Arthur Bald of Liverpool, at 36s. 9d. per 500 pounds, including freight and insurance,

to be shipped from this port during the month of October or November of that year by the Director, she being "a first-class wooden vessel" and fit to carry said cargo, and the loss of the same by reason of the inability of the Director to carry the wheat as per the terms of the sale and the stipulation of the charter-party, to the damage of the libelants \$3,036.

On May 31, 1887, the master and claimants answered the libel, admitting the making of the charter-party, and the loading and unloading of the cargo, as stated in the libel, and allege that the master, after discharging the cargo, had the Director hove down and repaired, so that she was ready to receive the wheat again before the expiration of November, and fit to carry the same to its destination, as per the charter-party.

In the course of the trial the claimants offered in evidence copies of the Bureau Veritas, or the French Lloyds, for the years 1884 and 1885, to show the character and construction of the Director, in connection with evidence tending to show that the libelants' agent at this port, Mr. Walter J. Burns, was familiar with these registers at and before the chartering of the Director, and was therefore chargeable with a knowledge of the facts therein stated concerning the Director. They were admitted, without objection, for whatever they might prove.

These registers, so far as the libelants are concerned, are mere hearsay, derived from local surveys and inspections made at the instance of the owners, and usually in their interest. Judging from what I have seen of such surveys in this case; they are of little or no value as evidence of the true condition of a vessel. Underwriters, from their vocation and business, may be presumed to have a knowledge of their contents. Whart. Ev. §§ 735, 1243. But as to others not so related to the subject, such presumption does not obtain. 1 Whart. Ev. § 639.

And, so far as these libelants are concerned, they are not evidence of any fact about which there is any doubt or controversy in the case.

Assuming, however, that the agent was familiar with these volumes of Veritas, the information imparted to him by them was to the effect that the Director was a first-class wooden vessel, built in 1873, in New Brunswick, principally of spruce, birch, pitch-pine, and hackmatack, with a character rated at 3 | 3, A 1. 1., and about five years of life before her, the last survey having been made at Liverpool in 1883. And this, of course, does not tend to show, as maintained by counsel for the claimants, that the agent of the libelants must or could have known that the Director was not a first-class wooden vessel, but the contrary.

Certain certificates of survey of the Director, made in this port, were also offered in evidence by the claimants to prove the seaworthiness of the vessel, as well as an authenticated copy of a survey purporting to have been made in Hong Kong, just prior to her departure from that port for this. Libelants objected, and they were admitted subject to the objection. The objection is well taken. The certificate of the survey of a vessel is *ex parte*,—mere hearsay,—and is not evidence of the facts contained in it in favor of the person procuring it, whatever it may be when offered against him. *Hall v. Insurance Co.*, 9 Pick. 476; *Watson v. Insurance Co.*, 2 Wash. C. C. 152; *Cort v. Insurance Co.*, Id. 375; *U.*

S. v. Mitchell, Id. 478; *Saltus v. Insurance Co.*, 10 Johns. 489; *Abbott v. Sebor*, 3 Johns. Cas. 46; 1 Whart. Ev. § 120.

Such certificate is evidence of the fact that a survey was made, and, when a question arises as to the propriety or necessity of a sale by the master of a stranded or injured vessel in pursuance of such a survey, it may be evidence of the facts contained therein, tending to justify the action of the master. But even then it is not conclusive, and may be contradicted. *Gordon v. Insurance Co.*, 2 Pick. 263.

In this case the proper proof of the facts ascertained on the surveys of the Director is the testimony of the surveyors. In the case of *The Fortitude*, 3 Sum. 262, the surveyors appear to have been examined as witnesses. But the certificate of the survey, dated November 25, 1885, and signed by Nathaniel Ingersoll and John E. Lombard, is competent evidence to qualify the testimony of said Lombard concerning the condition of the vessel at that time, as a statement made by him out of court.

The evidence on the point of unseaworthiness includes, among others, the master, the first and second mate, the carpenter, and one of the crew. The first mate left the vessel on October 7th, and is a witness for the libelants; the others remain with the ship, and testify for the claimants. A number of ship-masters, mostly British, testify as to what leakage will render a vessel unseaworthy. Most of them seem to think a vessel is seaworthy so long as her pumps can keep down the leak. "Seaworthy" is doubtless a relative term, depending on the voyage and cargo. Where the cargo is wheat, and the voyage from this port to Europe, around Cape Horn, a vessel, to be seaworthy, must be tight and strong, and not leak through any inherent weakness.

As usual, in this class of cases, the evidence is very conflicting. On a careful consideration of it, and the degree of credit to be given to the witnesses, I find the facts to be as follows:

The Director is a wooden vessel of 679 tons register, built principally of spruce, pine and hachmatack, at Moss Glen, New Brunswick, in 1873, and classed in Veritas 3 | 3 A 1. 1 for six years from July, 1883, and when she was docked and remetaled.

About the middle of March, 1885, she sailed from New Castle, New South Wales, to Amoy, China, with a cargo of coal. On May 17th she left the latter port, in ballast, for Hong Kong, from whence on June 30th she sailed for Portland with a cargo of China goods, principally rice, and reached here on September 11th of the same year.

On the voyage to Amoy she encountered a gale off the Solomon Islands, during which she leaked so that the pumps were used continuously. On the voyage from Hong Kong to Portland the weather was very good, except for a couple of days while in the Bashee channel, when there was an ordinary fresh gale, during which the vessel leaked not less than six inches per hour, and for the rest of the voyage not less than three inches per hour. On her arrival at Portland the master reported to his agents that the vessel was leaking, whereupon a survey was ordered, in pursuance of which, the cargo being discharged, she was first put by the head, and some small repairs made about her stern-post, and then by the stern, and similar work done about her stern-post; and on October 1st the surveyors reported her leak reduced to

9-100 of an inch per hour, and that she was "fit to carry a dry and perishable cargo to any part of the world."

On October 3d the Director was chartered to the libelants to carry a cargo of wheat from this port to Europe, at the rate of 42s. 6d. per ton. The charter stated that the vessel was "tight, stanch, strong, and every way fitted for such a voyage." And, among others, it contained the following stipulations: That the vessel would furnish the charterers a certificate from their surveyor "that she is satisfactory to him as regards general condition, stowage, dunnage, draft of water, and ventilation;" that, should she fail to pass satisfactory survey, or be unreasonably detained in consequence of having to dry-dock for repairs, this charter to be void at charterer's option;" that lay days shall commence 24 hours after discharge of inward cargo, and the master reports that he is ready to receive cargo, and "ten working lay days" be allowed for loading.

Between October 3d and 8th the vessel was loaded with wheat by libellant, the same weighing 985 long tons. The cargo was consigned to the order of libelants, and the usual bills of lading taken from the master in their own name, whereby the master admitted the receipt on board, in good condition, of 16,868 bags of wheat, to be delivered at a port in Europe in like condition.

On October 8th, Nathaniel Ingersoll, surveyor for the libelants, reported that "this cargo of wheat in sacks has been properly dunnaged under my direction," and "this vessel is properly ventilated, and is in good condition to carry a dry and perishable cargo to any port of the world."

On the morning of October the 9th as the vessel was about to leave her dock and proceed to sea, it was discovered that she was leaking, and had an unusual quantity of water in her hold, when a survey was had, on the request of the master. On the 10th the surveyors, Nathaniel Ingersoll and John E. Lombard, reported that she was making a little over an inch of water an hour, and advised that her cargo be partially discharged and "the upper course of copper be turned down and the ship's top sides be thoroughly calked to the plank sheer."

In consequence of this leak and survey, the cargo was wholly discharged and placed on the dock, and, on October 26th a contract was made with Robert McIntosh for the repair of the vessel, at a cost of \$4,485, the same to be braced, shored, and hove down on either side so as to expose the keel, and calked, coppered, and otherwise repaired as the surveyors might direct, so as to render her seaworthy.

On November 13th and 16th she was hove down, first on her starboard and then on her port side, and stripped of her sheathing, when it was found that her seams were slack, so that you could put your hand in them; the oakum was wet and sodden, coming away with the sheathing and dropping out of the seams. The keel was badly broomed and split, 35 feet by 9 inches of which was taken out at the center and replaced with Oregon fir. One butt was started on the starboard side, and, when she was hove down, the water came in under her covering boards, fore and aft, in great quantity. The vessel was recalced and recoppered, the butt fastened, and brought back to her loading berth, where her top sides were calked. On November 21st, on the request of the master, a survey was ordered, and on the 25th the surveyors last aforesaid reported that the vessel was then "tight, stanch, and in good order to carry a dry and perishable cargo to any part of the world."

Ingersoll died before the testimony was taken, and Lombard testified that he signed the report with much hesitation, and that he was then satisfied that the vessel was not seaworthy, or fit to carry this cargo of wheat to Europe; and, on November 27th, the master informed the libelants that he was ready to reload the cargo.

In the mean time the libelants on October 8th, had sold the cargo of wheat through their Liverpool house, to Arthur Bald of that place. The contract

of sale provided that the wheat was the average of the Walla Walla crop of 1885, and was "to be shipped per Director, 679 T. R., a first-class wooden vessel, classed not lower than A1, English or 8 | 8 1. 1, French Veritas, * * * as per bills of lading, to be dated during October and (or) November, 1885, * * * at the price of 36s. 9d. per 500 pounds."

On the delivery of the bills of lading October 8, 1885, the libelants drew on the purchaser for the price of the cargo, appending to the bill of exchange the bills of lading and the policy of insurance of the cargo,—the libelants being the underwriters,—and negotiated the same with the bank of British Columbia, in this city. After learning the condition of the vessel, and the unloading of the cargo, Mr. Bald repudiated the sale because of the breach of the condition precedent thereto—that the Director was seaworthy. This determination following, as it did, on some correspondence between the parties, was made known to the Liverpool house on October 28th, and by them to the Portland branch early in November, the bills of lading being remailed to the latter on November 14th.

On November 7th the Portland agent of the libelants wrote to the master, stating that he held him, his vessel, and his owners liable for all losses sustained on the cargo of wheat, on the ground of a breach of the warranty contained in the charter, that the Director was seaworthy.

Between October 9th and the date of this notice there was correspondence and conversation between the libelants and the ship's agents, Messrs. Taylor, Young & Co., as to the rights and obligations of the parties to the transaction,—the former claiming the return of the wheat free and clear of all liens and charges, while the latter was willing to cancel the charter-party if the libelants would bear the expense incident to the unloading and rescission of the contract.

The parties were unable to agree, and the master insisted on holding the cargo, and thereupon this suit was commenced, on November 23d, to obtain possession of the wheat and damages for the failure to perform the contract of affreightment, in which the vessel was arrested on November 25th, and the wheat on November 28th.

Afterwards the following persons intervened for their interests, and exhibited libels in the cause: Robert McIntosh, ship carpenter, on January 16, 1886, against the vessel, for the sum of \$4,537 for materials and labor expended in the repair of the same after the wheat was unladen, and prior to the survey of November 25th; Richard Lemon, stevedore, on January 23, 1886, against the vessel and cargo, for the sum of \$192.50, for unloading the latter from the vessel preparatory to the survey of October 10th, and the Vancouver Transportation Company, a corporation formed under the laws of Washington territory, on March 4, 1886, against the vessel, for the sum of \$405, for towage up the river on the inward-bound voyage.

On the arrest of the wheat the possession of the same was not claimed by the libelants, and it remained in the custody of the marshal. Neither did the claimants make any application for the delivery to them of the vessel, and it also remained in the custody of the marshal. On May 1, 1886, on the application of the libelants, and the consent of the claimants, an order was made for the sale of the wheat, and, at the same time, on the application of the claimants and the consent of the libelants, an order was made for the sale of the vessel; and, in pursuance thereof, on May 18th the vessel was sold to the agents of the claimants, Taylor, Young & Co., for the sum of \$3,000, and the wheat to C. Cæsar & Co. for \$1.17½ per cental, or the sum of \$26,282.76, which sum, less \$2,522.46, the marshal's costs and expenses, was paid into the registry of the court. On December 10, 1887, in pursuance of an order made on the application of the libelants, the clerk paid over to the latter \$24,032.76 of the amount, leaving in the registry of the court, as the representative of the vessel, the sum of \$2,727.54.

In considering the question of the seaworthiness of the vessel, but little, if any, weight has been given to the testimony of the master. His conduct throughout renders him, in my judgment, unworthy of credit. It is not necessary to go into details, and one transaction will suffice to show his want of integrity. Although he admits that the vessel made not less than three inches of water any hour between Hong Kong and this port, the log kept by the mate, under his special direction, does not refer to any leak. After the arrival in this port, however, he had the mate write up a new log, in which it was falsely represented that during the 2d, 3d, and 4th days of July the vessel was in a hurricane, with a cross-sea boarding her fore and aft, and making so much water, without stating the amount, that it was impossible, on the 2d, to keep her free with one pump, when the fact was that the vessel experienced no rough weather on the voyage, except a moderate gale in the Bashee channel, where she did not make more than seven inches of water an hour. This manufactured log was produced to the British consul as the true log, and was made under the apprehension that the cargo was more or less damaged, as a basis of protest against the vessel's liability therefor. However, the cargo came out dry, and no further use was made of it.

My conclusion is that the vessel, at the date of the charter, was altogether unseaworthy, considered with reference to the cargo she was to carry, and the voyage she was to make. She was structurally defective and inherently weak, was poorly fastened and leaked all over. Caulking did her but little good. She was repaired, according to Veritas, in 1883, and yet, when the copper was stripped off of her in 1885, the oakum in her seams was so loose and water-soaked that it came away without any apparent resistance. This shows that when the vessel was in motion with a cargo on board, her timbers were working, so as to open her seams, whereby the water passed through until the oakum became sodden and loose. The leakage was not the result of any local defect or injury, that could be stopped by some specific repair, and the flow of which was uniform in all weathers, and could be counted on with some degree of certainty, without reference to wind or wave, and provided against accordingly.

She must have worked more or less all over, like a crate or basket, when subject to a strain. The leak fluctuated, the amount depending on her depth in the water, and the state of the weather. Lying in still water, at her dock, in ballast, she might not leak over an inch an hour, but in fair weather, when loaded and under sail, the leak would be not less than three inches in the same time, while in tolerably rough weather it would increase to not less than six inches an hour, and to what volume it might reach, would simply depend on the condition of the wind and waves, and how much strain she would bear without filling or going to pieces.

Nor was the vessel seaworthy after the repairs made in this port. She was inherently weak, and this was a defect that calking and coppering would not cure. It was like patching old cloth with new. Nothing short of rebuilding would have made her fit to carry this cargo of wheat

round Cape Horn to Europe. To be seaworthy, the vessel should also have been properly officered and manned, so that insurance could have been effected on her cargo. The libelants were the underwriters of this cargo, and, on November 27th, when the vessel was tendered to them as repaired, they had reason to apprehend that it was unsafe to trust the master with this cargo. He might put in some port on the way, and falsely represent that his vessel had been injured at sea, and have her rebuilt at the expense of average on the cargo.

And the small price which the vessel brought when sold here, clear of all liens and claims, shows that she was not considered fit for the wheat trade. Shipping wheat to Europe is the principal business of this port, and many British subjects are engaged in it. The British port of Victoria is also near at hand. All the facts of her condition and career had become well known here, and still she only sold for \$3,000,—a sum considerably less than the cost of the repairs just put on her,—and her owners appear to have been the purchasers even at that price. She finally left this port in July with a cargo of lumber for Shanghai, and it is since understood that she was lost somewhere down that coast. The reasonable inference is that she at last went out with a cargo of lumber because she could not get one of wheat.

The representation in the charter that the Director was then "tight, staunch, strong, and every way fitted for such voyage," is a warranty to that effect; and if the charter was silent on the subject, the law would imply as much. Seaworthiness is a condition precedent to every charter or contract of affreightment, and, where there is no express warranty to that effect, the law implies one.

The authorities concur in holding that, where there is no express agreement to the contrary, the owner warrants the ship to be seaworthy, and at the time fit in all respects to carry the cargo described in the contract to the port or place therein specified. *Work v. Leathers*, 97 U. S. 379; *Wilson v. Griswold*, 9 Blatchf. 269; *The Vesta*, 6 Fed. Rep. 532; *Davison v. Von Lingen*, 113 U. S. 41, 5 Sup. Ct. Rep. 346; *The Northern Belle*, 9 Wall. 526; *The Tornado*, 108 U. S. 342, 2 Sup. Ct. Rep. 746.

In *Work v. Leathers*, *supra*, Mr. Justice SWAYNE, speaking for the court, says:

"Where the owner of a vessel charters her or offers her for freight, he is bound to see that she is seaworthy and suitable for the service in which she is to be employed. If there be defects, known or not known, he is not excused."

Therefore it makes no difference, so far as the libellant's right to repudiate this contract of affreightment and be restored to the possession of their wheat is concerned, whether the vessel was seaworthy on November 27th or not. The undertaking of the claimants was that she was seaworthy at the date of the charter and the commencement of the loading. This was a condition precedent to their right to the possession of the wheat for the purpose of earning freight in carrying it to its destination.

The clause in the charter, "should the vessel fail to pass satisfactory survey, or be unreasonably detained in consequence of having to dry-

dock for repairs, this charter to be void, at charterer's option," has been referred to as excusing the delay for repairs at this port. But certainly the detention contemplated in this clause must occur after the voyage has commenced. The survey, of course, was to take place in this port, and before loading, and, if unsatisfactory, the libelants might then have declared the contract off, and if, after the voyage had commenced, she had been detained for the cause mentioned, they might then have declared the contract void, and resumed the possession of their wheat.

Admitting, however, that the detention in this port after the unloading of the cargo was a detention within the purview of this clause, it is not apparent how this helps the case of the claimants, for the libelants, in their letter of November 7th, written after the contract for repairs was made, but before the work was commenced, in effect declared the contract off, and gave the claimants notice of their intention to hold them liable for the breach of warranty of seaworthiness.

The libel alleges, among other things, that the libelants were induced to enter into the charter-party by the fraud of the master, and they ask to have it declared void, on that account. The defense insists that the whole case of the libelants rests on this allegation, and contend that the proof of fraud is not sufficient, and, therefore, the libel must be dismissed. But the libelants are entitled to such relief as the facts stated in the pleadings and established by the proof will warrant.

In this case it is alleged and proved that the claimants failed to keep the condition precedent of their contract—to furnish a seaworthy vessel in all respects fitted to carry a cargo of wheat from this port to Europe, with reasonable safety and dispatch. This absolved the libelants from the performance of their part of the contract, and entitled them to the return of the cargo, and damages for the failure and delay. And it matters not whether the master or owners knew of the unseaworthiness of the vessel or not. They undertook absolutely to furnish in the Director, neither a soft or hardwood vessel, but one "tight, stanch, strong, and in in every way fitted" for the contemplated voyage—in other words, a first-class wooden vessel. Their ignorance of the fact of her unseaworthiness does not excuse them for a violation of such undertaking. Nor does the fact that any rumor or gossip in shipping circles in this port that may have come to the ears of the libelant's agent, to the effect that the Director was a leaky vessel, or any knowledge which he may have derived from Veritas that she was built principally of soft wood, qualify the claimant's warranty, or estop the libelants from claiming the benefit thereof.

Therefore I do not consider it necessary to go into the question of the fraudulent conduct of the master in the negotiation of this charter-party. But if I did, and the fact that he was aware of the condition of the vessel, and intended and endeavored to conceal the same from the charterers and the public, constitutes such conduct, there would be no difficulty in deciding the question in favor of the libelants.

A question is made by the claimants that the wheat belongs to Bald of Liverpool, and that the libelants have no property in it, and cannot,
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therefore, maintain any suit about it. My conclusion, as already expressed, is that the sale to Bald fell through because the Director was not a first-class wooden vessel—that being a condition precedent of the contract of sale. Bald testified that he repudiated the sale, as in my judgment he had a right to do. Then, by an arrangement between the parties in Liverpool, the bills of lading were returned here to the agent of the libelants for the purpose of enabling him to take such action in regard to the wheat as he might think best. And the agent, who appears to have become a partner with the libelants since the date of this transaction, swears positively that the wheat belongs to the libelants.

It is true that Guthrie, one of the partners in the Liverpool house, testifies that he had never formally released Bald from the contract of sale, and if he had any claim against him on that account, he expected to enforce it. And it is on this expression of what Guthrie would, rather than what he could, the argument against the right of the libelants to maintain this suit is based.

Admitting, however, that the general property in the wheat is in Bald, the libelants hold the bills of lading with his consent, and for his interests, if he has any. In *Houseman v. The North Carolina*, 15 Pet. 49, Chief Justice TANEY, delivering the opinion of the court, said: "We consider it well settled, in admiralty proceedings, that the agent of absent owners may libel either in his own name as an agent, or in the name of his principals, as he thinks best." And the holder or indorsee of a bill of lading, though not the beneficial owner of the property, may sue for the non-delivery thereof in his own name. *The Thames*, 14 Wall. 108; *The Vaughan*, Id. 266.

The libelants are entitled to recover the possession of the wheat, or its money representative, in the registry of the court, with damages for the violation of the contract of affreightment. The damages claimed by the libelants are as follows: For the difference between the price brought by the marshal's sale and that for which it was sold to Bald, \$2,981.05; insurance, \$350; and wharfage, \$1,100.

These claims cannot be allowed to this extent. In my judgment the libelants, on filing their bond, as they did, for the arrest of the wheat, could have had the immediate possession of the same if they desired it. At least they might have specially applied for the delivery of the same or for the sale of the property, as they did later on, and have saved the greater part of the insurance and wharfage. I know that it is said that the claimants played the dog in the manger policy, and would not consent to a sale until they wanted an order for the sale of the ship. But it is none the less certain that if application had been made by the libelants the court would have ordered the marshal to turn over the property or to sell the same, and deposit the proceeds in the registry of the court. The damages must be therefore reckoned on the base (1) of the difference in the price of wheat at the date of arrest and that to be paid by Bald; and (2) the amount of insurance and wharfage incurred on account of the wheat from the time it was delivered to the master and replevined by the marshal. There is no proof as to what was the price of wheat at this

date, or what was the amount incurred for insurance and wharfage. And, unless the parties can agree as to these facts, the case must be referred to a commissioner to take testimony on these points. For whatever may be found due the libelants under these heads, within the limitation suggested, they are entitled to a decree against the vessel or its proceeds.

Assuming that the fund in the registry of the court is not sufficient to pay the claims of the intervenors and libelants in full, what are the priorities, if any, between them. The claims all rank as maritime liens, but the time and circumstances under which they arose may affect their priority. The claim of the stevedore is for a maritime service rendered to both cargo and vessel, and therefore he has a lien on the proceeds of both for the amount thereof. *The Canada*, 7 Sawy. 173, 7 Fed. Rep. 119. As between the vessel and the cargo the former is primarily liable for the claim. It is not an expense incurred during the voyage, which might be the subject of average between the vessel and the cargo. It arose before the vessel had left her dock, and, by reason of her unseaworthiness, at the date of the charter. The claim must be first paid out of the proceeds of the vessel, and I think it ought to bear interest.

The claims of the transportation company and the carpenter are not made against the cargo.

The only objection that can be made to the payment of the former *pro rata* with that of the libelants is that the service was rendered on a prior voyage,—the inward bound one,—and it is therefore stale and ought to be deferred to the liens accruing since. I think it would be a harsh application of the rule which prefers a claim arising during a later voyage to one arising during an earlier one, to treat the towage of a vessel up the river to this port as a service rendered on an earlier and different voyage from the return one down the river. I think the coming up and going down the river, so far as towage is concerned, where there is only the usual delay in getting and taking on cargo, ought to be considered one voyage. This claim will be paid *pro rata* with the damages found for the libelants. Taxable costs and disbursements will be allowed on each of the claims as a part of it; but the costs made by the libelants in arresting and keeping the vessel, having been incurred for the benefit of all the claims, must first be paid in full.

The claim of the carpenter must be deferred to the last. He was employed by the agents of the vessel, and doubtless looked through them to the owners for his pay. The repairs were made after the other liens had attached. They were made to enable the vessel to commence her voyage, and not to continue it after it had been commenced. Nor were they made for the benefit of the prior lienors.

The claim made by the claimants for demurrage while the vessel was in the custody of the law, at four pence per ton per day, the rate prescribed in the charter in case the vessel was detained by the fault of the libelants, is not supported by either the pleadings or proof. The detention was not caused by the default of the libelants, but that of the claimants. And if this were otherwise, I doubt if the claimants could leave the vessel in the custody of the law, when she might have been delivered

to them on bond or sold, and then claim demurrage for such detention. This, it seems, would be taking advantage of their own wrong or negligence.

A decree will be entered in accordance with this opinion.

THE SEACAUCUS.¹

THE EDWIN HAWLEY.

VAN WIE v. THE SEACAUCUS.

HOBOKEN LAND & IMP. CO. v. THE EDWIN HAWLEY.

(District Court, S. D. New York. February 11, 1888.)

1. COLLISION—COLORED LIGHTS—ASSUMING POSITION IN WHICH LIGHTS OBSCURED.

The law that requires the colored lights of a vessel to be visible for 10 points around the horizon is not complied with when a vessel voluntarily puts herself in a situation in which her lights will continue for some time obscured over a considerable part of the area in which other vessels are liable to be moving.

2. SAME—FERRY-BOAT AND TUGS—LIGHTS OBSCURED BY INTERVENING VESSELS—SPECIAL DISTINGUISHING LIGHTS.

The ferry-boat S., bound to Hoboken, was about one-third of the distance from the New York shore, headed nearly up river, and moving about 11 knots an hour. A large Erie ferry-boat was a length ahead of her, and a little on her port bow. The small tug H., bound for New York, and making about 10 knots, came suddenly around the stern of the Erie boat, across the course of the S., and was run into and sunk by the latter. Neither vessel had observed the colored lights of the other until within a few seconds of the collision, and when it was unavoidable; the reason given by each being that the lights of the other were hidden by the Erie boat. *Held*, both in fault for navigating voluntarily at a high rate of speed, in such a position, as regards the Erie boat, that their lights were obscured to vessels on the other side; and as the evidence indicated that the high, special distinguishing lights of each might have been seen by the other over the Erie boat, *held*, that the failure to perceive them was a further fault in each.

In Admiralty. Libel for damages.

Two libels to recover damages sustained in consequence of a collision, brought by Van Wie, owner of the steam-tug Edwin Hawley, against the ferry-boat Seacaucus, and by the Hoboken Land & Improvement Company, owner of the Seacaucus, against the Edwin Hawley.

Carpenter & Mosher, for the Edwin Hawley.

Abbott & Fuller, for the Seacaucus.

BROWN, J. At about half past 6 P. M. on October 21, 1887, a collision occurred between the steam tug Hawley, bound from Hoboken to North Moore street, New York, and the ferry-boat Seacaucus, on her trip from Barclay street to Hoboken. The night was dark, but clear, and

¹Reported by Edward G. Benedict, Esq., of the New York bar.

good for seeing lights; the tide strong ebb; the wind fresh from the north-west. The Hawley, at the moment of collision, was headed nearly directly across the river towards the New York shore; the Seacaucus nearly up river. The port bow and guard of the latter ran over the Hawley's starboard side, knocking off her pilot-house, and breaking a hole in her side, from which she shortly afterwards sank. The ferry-boat was somewhat damaged; she was crowded with passengers, but none were injured. The collision was about one-third across from the New York shore. Each ascribed the collision to the fault of the other, and the above cross-claims were filed to recover their respective damages.

On the Hawley there was no lookout, other than the pilot, who was at the wheel; on the Seacaucus there were two,—one at the bow, who, upon his own testimony, I must find was paying little attention; the other was on the upper deck, near the pilot-house. Neither boat, nor the lights of either, were seen by the other until within a distance of only one or two lengths apart, the reason assigned on each side being that a large Erie ferry-boat had been previously going between the other two, so as to hide each from the other until a few seconds before the collision, when each came into view of the other. If, at that moment, the courses of the Hawley and the Seacaucus were nearly at right angles, as the witnesses of the former state, and which is not very clearly negatived by the witnesses of the Seacaucus, collision was, in my judgment, clearly unavoidable, since the Seacaucus was going at a speed of about 11 knots, through the water against the tide; the Hawley, at a speed of about 10 knots, crossing the tide. In that situation, I think, the best efforts of both combined would not have averted collision. There is no question that the regulation colored lights were properly burning on each. In addition to those the Hawley carried a white head-light forward, and a white staff-light about 33 feet above the water. The Seacaucus, besides her side lights, carried a special distinguishing green light about 40 feet above the water, visible, as her pilot says, about half a mile off. As the regulation lights of the two boats were not seen by the other, I must assume the truth of what both sides affirm, that the Erie boat, for a considerable time, hid each from the other until just before the collision. There is, however, a singular contradiction; three witnesses on the part of the Hawley affirming that she came down on the westward side of the Erie boat, and rounded to the eastward under the latter's port quarter as she was sheering to the westward; while four witnesses on the part of the Seacaucus assert that the Hawley did not go to the westward of the Erie boat, but to the northward and eastward of her, along her starboard side, coming into view as she emerged from the Erie boat's starboard quarter. The Erie boat had left Chambers street for Pavonia ferry, on the Jersey shore, some distance up the river, about the same time that the Seacaucus left Barclay street. After getting out a little in the river both boats hauled up on nearly parallel courses, heading nearly up river, but a little across. Both were going at about the same speed; the Seacaucus one length, or possibly two lengths, astern of the Erie boat, which was larger and higher. The pilot of the Seacaucus testifies that the Erie boat bore

a little on his port bow; other witnesses from the Seacaucus say that she was running a little on their starboard bow. They continued going upon nearly parallel courses until the Erie boat had reached the proper place for her to begin to make her turn for the Jersey shore, when she swung towards the westward, and very shortly thereafter the Hawley and the Seacaucus were for the first time disclosed to each other's view. The testimony of the pilot of the Hawley, as he is not otherwise discredited, must be taken as controlling, as respects the course of his own boat. He shaped his course, as he testifies, to the westward from the time he saw the Erie boat half a mile distant, and passed her upon her westward or port side. I adopt this view, therefore, though it would make little difference, as to the question of the fault of either, upon which side of the Erie boat he went.

The causes of the collision rest equally, as it seems to me, with both vessels. The acts of each, which brought the collision about, are almost precisely analogous. The Seacaucus was going within a couple of hundred feet of the Erie boat, a much larger one, so close that her own colored lights were thereby kept obscured over a considerable space of the river to the northward and westward. The tug likewise came down on the opposite side of the ferry-boat, and rounded her stern suddenly, and within 40 feet of it, so that the collision could not be avoided. Both were navigating so near to the large Erie boat that their lights were obscured to vessels on the other side, and both were going at a high rate of speed. This mode of navigation was voluntary on the part of each; each is therefore chargeable with the risk incident to it. The tug had abundant room for keeping off from the Erie boat, so as not to endanger any other boat that might be found near her when she turned and crossed under the Erie boat's stern. The Seacaucus could just as easily have gone at a reasonable distance away from the Erie boat. The law that requires the colored lights to be visible for 10 points around the horizon is not complied with when a vessel voluntarily puts herself in a situation in which her lights will continue for some time obscured over a considerable part of the area in which other vessels are liable to be moving. *The G. F. Young*, 25 Fed. Rep. 457, 461; *The Howard*, 30 Fed. Rep. 280.

Upon the testimony I must find also that the special distinguishing lights authorized by the inspectors to be carried on each of these vessels, in addition to the ordinary colored lights, and which were carried by each, were visible; and might, and should, have been seen by each. The navigation of the boats so close to the larger Erie boat, which must have been known to hide their own colored lights from a part of the field in which, by law, they were required to be visible, made it incumbent upon each vessel to observe carefully what lights might have been seen over the Erie boat. Had sufficient attention been given, each, I am satisfied, would have seen the special and distinguishing light of the other, and thus would have been apprised of the other's near presence. Both vessels, therefore, are chargeable with similar faults, and the damages and costs of each must be divided, with a reference to ascertain the damages, if not agreed upon.

THE MARTELLO.¹

THE FRED A. WILLEY.

WILLEY v. THE MARTELLO.

WILSON *et al.* v. THE FRED A. WILLEY.

(District Court, S. D. New York. February 24, 1888.)

1. COLLISION—FOG—RATE OF SPEED—STEAMER NEAR PORT OF NEW YORK.

For a steamer whose full speed is twelve knots, and which is near the entrance to the harbor of New York, in a thick fog, a speed of about five knots is not the "moderate speed" required by article 18 of the new international rules; and she is bound to stop at once on hearing a fog-horn *near*, and nearly ahead.

2. SAME—SAILING.

A sailing vessel in a fog, and in a situation where many other vessels are likely to be met, is bound to moderate her speed to the limits of fair steerage-way. *Held*, in this case, that four knots was immoderate speed in a sail-vessel approaching New York harbor in a thick fog.

3. SAME—BETWEEN STEAM AND SAIL—FOG—"MODERATE SPEED"—SIGNAL WHISTLES OPTIONAL—APPORTIONMENT.

In the midst of a thick fog the steamer *M.*, outward bound from New York, and a few miles outside of Sandy Hook, was steaming about five knots an hour, headed E. S. E. The barkentine *W.*, headed north, and bound into the port of New York, was sailing about four knots, with the wind E. by N. The fog-horn of the *W.* was first heard by the steamer off her starboard bow, and afterwards, and as soon as the barkentine came in sight, which was at a distance of from 250 to 700 feet, according to the steamer's witnesses, the steamer was stopped and backed. The sailing vessel had about three-fourths of her canvas set; she made no effort to slacken her speed or do anything to avoid collision, at any time, though the whistles of the steamer were heard coming nearer. The barkentine was struck by the steamer on her port bow. *Held*, both in fault, for the rate at which they were moving in the fog, under the special circumstance of the immediate vicinity of the entrance to New York harbor, where other vessels were to be expected. *Held, further*, that the barkentine was in additional fault for failure to check her speed on hearing the approaching whistles of the steamer; and the steamer in additional fault for not stopping as soon as the sailing vessel's horn was heard; but not in fault for not indicating her course by whistles.

In Admiralty. Libels for damages.

Foster & Thompson, for the Martello.

Goodrich, Deady & Goodrich, for the Willey.

BROWN, J. On the 8th of May, 1887, the steamer Martello of the Wilson line, 370 feet long, and 2,439 net tons, bound from New York to Hull, came into collision, a little before 8 o'clock in the morning, a few miles outside of Sandy Hook, with the barkentine F. A. Willey, bound from Pensacola into the harbor of New York. At the time of the collision, a thick fog prevailed. The wind was about east by north, and the barkentine headed north, on her starboard tack. The steamer was heading E. S. E., and struck the barkentine on her port bow, crushing in her timbers, and bringing up against the keel and bowsprit,

¹Reported by Edward G. Benedict, Esq., of the New York bar.

which were knocked to starboard. The injuries to the Martello were comparatively slight. The above cross-claims were filed by the respective owners to recover their damages, each alleging that the other was going at too great speed in a fog, and did not maintain a proper lookout. The Willey also charges as a fault against the Martello that she did not indicate by her whistles which way she would turn, and the steamer also charges that the Willey did not properly sound her fog-horn.

It is impossible to hold the collision in this case the result of inevitable accident. The circumstances are not sufficient to show that it could not have been avoided by the use of reasonable prudence, diligence, and nautical skill. *The Morning Light*, 2 Wall. 550, 558. The case is, however, somewhat peculiar, in that both vessels were going at a comparatively low rate of speed; less than has usually, in cases of collision in a fog, been found to have been the speed of one or the other of the vessels. Each side accordingly claims that the speed of its own vessel was within the limit required by the rules of navigation; and each, no doubt, in this respect, makes a somewhat close case. Upon repeated consideration, however, I am satisfied that neither vessel discharged her whole duty in this respect, having reference to the special circumstances of the situation. The speed of the Martello is to be deduced partly from the direct testimony, and partly from the distance run, and the time that elapsed after discharging the pilot a little to the westward of the perch and ball buoy until the collision. On this subject there is a great amount of testimony; and in the latter stages of the cause an endeavor was made on the part of the steamer to weaken the force of the previous evidence of her officers, and of the entries in the engineer's log, as well as the private entries of Maider, the second engineer. There is nothing that I can find, however, in this later evidence, that deserves any greater confidence than the testimony previously given, and the entries referred to, which are verified with perfect clearness and positiveness by the witness who made them at the time. The case, on the part of the steamer, is, in many respects—such as the alleged errors of the log, the alleged dead slow speed, the need of keeping steerage-way, and her being nearly stopped at the collision—similar to that of *The Dordogne*, 10 Prob. Div. 6, in which the steamer was held liable. In that case, however, there were some circumstances favorable to the steamer that are not found here. Without discussing the details of the evidence, the most reliable testimony, including that of the master, satisfies me that the pilot was discharged at least half a mile to the westward of the perch and ball buoy, i. e., about north from the black buoy No. 1; that the engine was stopped at 7:03 A. M., for the purpose of slowing the vessel until the pilot could be discharged; that the pilot left, and the engines were again moved slow ahead, at 7:10; that the place of collision, best fixed by the pilot Wolff, was one and three-fourths miles from N. to N. N. E.,—say about N. by E. from Sandy Hook light-ship,—and upwards of four knots from the point where the pilot was discharged; that at 7:50—40 minutes after the pilot was discharged—the engines were ordered full speed astern, when the barkentine was first

seen from 600 to 1,500 feet distant; and that the engines continued full speed astern till about 7:56, soon after the collision; were then slowed, and were stopped at 7:58. This would make the speed of the steamer, when first seen, from five and a half to six knots. Again, the full speed of the steamer was about 12 knots, with about 58 revolutions. The engineer testifies that at 7:10, when moving slowly ahead, she was put at 28 revolutions, and at 7:20, when ordered to go as slow as possible, the engines were put at 24 revolutions. As the "slip" is less when the vessel is running at slow speed than when running at high speed, 24 revolutions should, I think, give a little over 5 knots. White, Nav. Arch. 548. From the second engineer's entries, moreover, and from the estimates of the witnesses, it would appear that the engine must have been backing full speed for about two minutes before the collision. The estimated time from the order to reverse to the collision is put at not less than from two and a half to three and a half minutes. As this was a new steamer with all the modern appliances, "her gear working quick," no such length of time for getting the engine reversed after the order to reverse was given, can be admitted, as was estimated upon the evidence in the case of *The Lepanto*, 21 Fed. Rep. 651, 653. One-third of a minute is more than sufficient in a steamer having the modern appliances, assuming a reasonably prompt obedience to orders, and that the vessel was running "slow." No delay in reversing fully and at once is in that case necessary. Had the steamer not been going over four knots when the order to reverse was given, and if that order was properly obeyed, she would have been very near if not quite at a dead stop at the time of collision. See *The Aurania*, 29 Fed. Rep. 121, note. It is not claimed that she was wholly stopped, and the depth of the wound in the bow of the Willey, and the great swing of the Willey's bows to the southward, are sufficient evidence to the contrary. Mr. Wolff, the expert and mechanical engineer, estimated the speed of the Martello at the collision at not over two knots. Upon all the other testimony, I should arrive at about the same conclusion, and such is the first officer's estimate. I do not regard that speed as insufficient to cause the injuries proved to have been inflicted upon the Willey. The length of time that she was backing without reducing her speed below two knots at the moment of collision is strong corroboration of what is to be inferred from the other testimony, that she was going from five to five and a half knots when the order to reverse was given. The pilot, Wolff, who was acquainted with the handling of the steamer, testifies that if previously going only five knots, and if her full speed were twelve knots, she would be stopped dead on reversing the engines full speed in going from 200 to 250 feet. If this estimate is accurate, the steamer would have been backing full speed only about one minute. I think the estimate too small, and that she was backing from a minute and a half to two minutes, reducing her speed from about five or five and a half knots to about two knots in going from one to two lengths. I cannot hold a speed of about five knots under the special circumstances of this case to be such "moderate speed" as to free the steamer from blame. There was special need of very great

caution; because the steamer's course in that vicinity, only a short distance outside of the bar, was likely to encounter incoming vessels, and because the lightening up on the morning of the 8th of the fog which had prevailed the previous day, was likely to bring many vessels near the entrance of the harbor; and the horns of other vessels were in fact heard. It had been clear in the morning, but had again shut down thick soon after the pilot left, about 40 minutes before the collision. The engineer, indeed, says that the Martello had only steerage-way, but he was not the proper officer to testify to such a fact; and from his own testimony it appears that the engine could have been run more slowly than 24 revolutions. If the fog was so thick that the Willey could not be seen more than from 250 to 700 feet, as most of the Martello's witnesses testify, her speed was not "moderate," within the decisions; because she could go slower, and it was impossible, with that speed, to avoid any approaching vessel within that distance. *The Colorado*, 91 U. S. 692; *The Pennsylvania*, 19 Wall. 133; *The Nacoochee*, 22 Fed. Rep. 855, 28 Fed. Rep. 462; *The Pottsville*, 12 Fed. Rep. 633; *McCabe v. Steam-Ship Co.*, 31 Fed. Rep. 234.

In the thick fog that prevailed, and in the expectation of vessels approaching New York harbor, which ought to have been anticipated, it was the further duty of the steamer to stop her engines at once when the fog-horn of the Willey was first heard off her starboard bow. From the direction of the wind it was to be inferred that the sailing vessel whose horn was heard was probably crossing the steamer's course. It was plain that the horn could not be far off. Until the position and course of the vessel whose fog-horn was heard near were definitely known, it was incumbent on the steamer to stop her engines, and to do so at once. *The Lepanto*, 21 Fed. Rep. 651, 659; *The George D. Fisher*, 21 How. 1, 6; *The City of Atlanta*, 26 Fed. Rep. 461, 462, and cases there cited; *The Ebor*, 11 Prob. Div. 25; *The Frankland*, L. R. 4 P. C. 529, 533, 534; *The Dordogne*, 10 Prob. Div. 6. In the case of *The Ebor*, the steamer, though going at the rate of from three to three and a half knots only, was held in fault because she did not stop at once on hearing the first signal from the other vessel. According to the testimony of the witnesses for the Martello, the time was doubtless quite short between hearing the first horn from the Willey and her coming into view. But it is evident that there was some interval. The lookout of the Martello in the crow's nest, and one of the men on the forecastle estimate it at least one minute. The master, and the first mate who was on the forecastle, both heard the horn; but it is clear that the orders "hard a-port," and "reverse the engine," were not given until after the mate had seen the Willey on the starboard bow, and ordered hard a-port. Both were asked what they did upon hearing the horn; and the answer is only as to what was done after the Willey was seen, when the mate's order was given immediately. In another place the mate says: "I sung out the fog-horn first; and, as she came in sight, I sung out, 'hard a-port.'" All these circumstances point to a very appreciable interval after the fog-horn was heard near and "nearly ahead," as one of the witnesses says, and before the order to stop was given. It

appears further on cross-examination that the two men on the fore-castle with the mate were more or less engaged in overhauling the chain and anchor, which the first officer was superintending. This circumstance, together with the very much less distance at which they estimate the Willey when first seen, than the estimate testified to by all the Willey's witnesses, afford ground to doubt whether as sharp a lookout was kept as was required. Upon these various considerations, the Martello must be held to blame.

2. The Willey's speed was estimated by the Martello's witnesses at five knots, but by her own witnesses at only four. The latter are sustained by the rate given by the patent log. The breeze, it is true, was estimated as a five or six knot breeze; but the Willey was well loaded, and had only about three-fourths of her canvas set, it having been reduced by hauling up the foresail as the breeze freshened. I think that she was not making much, if any, over four knots. By article 13 of the new international rules, the duty to go at "moderate speed" in a fog is imposed equally upon sailing ships and on steam-ships. "Every ship," says the rule, "whether a sailing ship or a steam-ship, shall, in a fog, mist, or falling snow, go at moderate speed." Prior to the adoption of this article the duty of sail-vessels to slacken speed in a fog or in thick weather had been recognized and enforced as a rule of prudent navigation. In the case of *The Johns Hopkins*, 13 Fed. Rep. 185, where, upon a collision in a fog between a steamer going at three and one-half knots and a sailing vessel going twice as fast, the collision was held solely the fault of the sailing vessel. It was also applied in this court in the case of *The Rhode Island*, 17 Fed. Rep. 554, where the schooner was held in fault for sailing in Long Island sound in a fog at the rate of seven knots. In navigation in the open sea or on the lakes, where other vessels are not to be specially looked for, a rate of four knots for a sail-vessel has been held not a fault. *The Colorado*, 91 U. S. 692; *The Leland*, 19 Fed. Rep. 771. In *The Elysia*, 4 Asp. 540, a speed of five and one-half knots in a fog, it is said, would not be moderate. In *The Zadok*, 9. Prob. Div. 114, a speed of five knots was held not moderate speed in a fog in the English channel. In *The Victoria*, 3 W. Rob. 49, a speed of six knots in a dark night without fog was held immoderate. The same in *The Pepperell*, Swab. 12. In all these cases the sailing vessel was held bound to heed all the special circumstances of danger, and to moderate her speed accordingly. In the case of *The Zadok*, *supra*, Sir JAMES HANNEN, the president of the admiralty division, held it the duty of the sailing vessel in a thick fog to moderate her speed down to the standard of sufficient way to control her movements,—“to as low a rate as is consistent with keeping a good steerage-way.” This duty was affirmed by Lord ESCHER in the court of appeal in the case of *The Dordogne*, 10 Prob. Div. 6, 12, where he says: “As the steamer, by her whistles, is perceived to be coming nearer in a fog, the sailing vessel ought, if she is under full sail, to take sail off, until she brings herself as nearly to a stand-still as is possible whilst being under command.” In *The Ebor* and other cases, *supra*, similar language is used as to the duty of steamers.

In the present case the circumstances above referred to required special caution on the part of the sailing vessel as well as of the steamer. The speed which would have been moderate and justifiable farther out at sea, was imprudent in a thick fog, just outside of New York harbor, at a time and place when many other sailing vessels were to be expected to be approaching, and steamers to be departing upon courses crossing the Willey's at nearly right angles. The Willey had about three-fourths of all her canvas set. She had by no means brought her speed "down to the standard of good steerage-way." On the contrary, she was going at nearly full speed. She hauled up her foresail a while before, not to diminish her speed, but to avoid increasing it, as the breeze was freshening. Four knots for her was equivalent to eight knots for the steamer, relatively to her maximum speed, as well as to her ability to keep out of the way of other vessels that she might be bound to avoid. Two such sail-vessels crossing at her speed in such a fog would be likely to come in collision in spite of anything that either or both could do after they had sighted each other. Such navigation was not prudent or reasonable, and therefore not "moderate" in a situation where many other ships,—sail-vessels as well as steamers,—were likely to be met, some of which it might be her duty to avoid. She was bound, in such a place, to moderate her speed within the limits of fair steerage-way, so that she could do her share in avoiding collision after the danger of it was perceived. As observed in the case of *The Rhode Island*, 17 Fed. Rep. 554, 559, if the speed of the sailing vessel would not be prudent or justifiable or moderate, as respects other sailing vessels that she was likely to meet, and out of whose way she would be bound to keep, the same rule must be applied, and her speed be held not moderate, though the other vessel be a steamer. Though she may have the right of way, she has no right to increase the burden that falls on the steamer to keep out of the way.

It was a fault in the Willey that, after hearing the steamer's several whistles coming nearer, she did not even then take any steps to check her speed or do anything to avoid collision. In the case of *The Zadok*, 9 Prob. Div. 117, Sir JAMES HANNEN says:

"Though the whistle of the *Iduna* was heard once, and twice, and thrice, yet no precaution whatever was taken on board the *Zadok* to guard against a contingency which she was warned might happen of a steamer being in a position which required caution. I am advised that what ought to have been done was this: that men should have been stationed so as to work on the braces, and put the foresail aback, by letting them fly; they would come at once aback, and would tend to throw off the ship's head, by putting the helm to starboard; and, when the vessel was seen, * * * there would have been time for them to effectuate that maneuver, which might have had the effect of avoiding the collision altogether. Instead of that, no preparation was made to do anything on board the *Zadok*. Those on board seem to have thought that she, being a sailing vessel, and the other being a steamer, the former had a right to keep her course, and do nothing. That is not the view I take, nor the view which I am advised should be taken."

These observations are in the main applicable to the present case; and as respects the right of the sail-vessel to hold her course, as against a

steamer, the supreme court in *Peck v. Sanderson*, 17 How. 178, 182, say:

"Where, as in the present case, they are brought suddenly and unexpectedly close to each other, and the ordinary rules of navigation will not prevent a collision, it is the duty of each to act according to the emergency, and to take any measure that will be most likely to attain the object."

The master states that he would have ported his helm, and could have avoided this collision, if the steamer had given him their signal whistles to indicate that she was backing; and it is charged as a fault against the steamer that she did not give these signals. But, as article 19 of the new regulations expressly declares that the "use of these signals is optional," it is not in itself, independently considered, a fault that they were not given. Notwithstanding the fact, however, that the signals are made optional, when their great utility in promoting a mutual understanding between a steamer and a sailing vessel comes to be better understood, it may then be a legal duty on the part of the steamer, as one of the obligations of reasonable prudence, to give those signals, whenever the situation is such that the steamer cannot alone avoid collision, and when the steamer knows, or ought to know, that the other vessel, guided by such signals, but not without them, might safely change her course so as to avoid disaster. I do not need to pass on that question now. In the situation of these two vessels, the master of the *Willey*, without knowing whether the steamer intended to go ahead of him or astern, or even whether she had reversed her engines, (in which latter case the steamer could not materially change her course,) could not prudently change his own course in time to be of any service. I cannot, therefore, hold the *Willey* in fault on that ground. The cases in which steamers fail to hear the fog-horns of sailing vessels until quite near are too frequent to warrant the inference that the horn was not properly blown, because not sooner heard. For the *Willey's* speed, however, in that situation, and for her failure to attempt to check it after the approaching whistles of the steamer were several times heard near in the thick fog, I must hold her to blame; and the damages and costs must, therefore, in both cases be divided.

THE JAMES H. BREWSTER.

THE CHAMPION.

THE LAWTELLE.

THE JAMES H. BREWSTER v. THE CHAMPION *et al.*

(District Court, E. D. Pennsylvania. February 7, 1888.)

1. TOWAGE—GROUNDING OF TOW—BURDEN OF PROOF.

A barge was grounded, while in charge of a tug, without any fault of her own. If the accident occurred where the libellant's witnesses say that it did, it was at a place which was known to be dangerous. The defense claimed that it occurred in the customary channel, and in consequence of extraordi-

narily low water. There was nothing in the evidence to sustain the allegation of extraordinarily low water, except the fact of the grounding; no evidence that any other such vessel grounded in the channel about the same time, nor that any such vessel ever grounded at the point where respondents claim that this occurred. *Held*, that the burden of proof was on the defense, and that the evidence was insufficient to sustain their position.

2. SAME—GROUNDING OF TOW—DAMAGES—REPAIR.

When, through the negligence of the tug, a tow is run aground and damaged, and subsequently the owners of the tug put the tow in as good condition as she was in before the accident, damages can be recovered only for the unnecessary delay caused thereby.

In Admiralty. Libel for damages.

Flanders & Pugh, for libellant.

Driver & Coulston, for respondents.

BUTLER, J. The Brewster was injured by grounding, while in charge or the respondents, without any fault of her own. The defense is inevitable accident; that she grounded in the customary channel, in consequence of extraordinary low water. The witnesses on the one side and the other disagree respecting the point at which she grounded. If it is where the libellant's witnesses say, the defense fails. The barge should not have been taken there. The place was dangerous, and known to be so. If it occurred elsewhere, the result must be the same. There is nothing in the evidence to justify the allegation of extraordinarily low water, except the fact of grounding; no evidence that any other such vessel grounded in the channel about the same time, or that such a vessel ever grounded at the point where the respondents assert that this occurred. No reason is shown or suggested for the extraordinary shallowness of the water set up. The burden is on respondents, and the evidence is insufficient to sustain their position. The weight of the evidence justifies a belief that the respondents' witnesses are mistaken respecting the point where the grounding occurred. After the injury the respondents took charge of the vessel, and had her repaired. They showed a commendable desire to discharge their duty towards her. If the repairs put her in as good condition as she was before the accident, the libellant is entitled to nothing, unless it be for delay. The case must go to a commissioner on this question.

PLATT and others v. THE GEORGIA.¹

(District Court, E. D. New York. November 4, 1887.)

MARITIME LIEN—QUARANTINE COMMISSIONERS—CARE OF SICK SEAMEN.

The services of the quarantine commissioners, in the care and treatment of sick seamen in the quarantine hospitals, are maritime in their character, and the lien of the commissioners on the vessel, arising out of such services, required by state statute, can consequently be enforced by a proceeding in admiralty.

Goodrich, Deady & Goodrich, for libelants.

Sidney Chubb, for claimant.

R. D. Benedict, for libelant in another suit.

BENEDICT, J. This is a proceeding *in rem* against the brig Georgia, by certain officers of the state of New York, designated "commissioners of quarantine," to enforce a lien for the care and treatment of some sick members of the crew of that vessel, who, by direction of the health officers of the port of New York, were sent to one of the quarantine hospitals in New York harbor, and there treated and maintained; the vessel having arrived with contagious sickness on board. There is no question as to the facts, and upon the facts a lien upon the vessel in favor of the libelants is created by a provision in the statute of the state of New York. The only question in this case is whether a lien of the character in question, created by the state statute, can be enforced by a proceeding in the admiralty. It can be so enforced if the subject-matter—in this case the services rendered—are maritime in character; otherwise not. I see no reason to doubt the propriety of holding these services to be maritime. They are services rendered in the care and medical treatment of seamen attached to the vessel. The seamen were so cared for and treated by reason of sickness incurred in the course of the voyage. Their care and treatment, therefore, devolved on the vessel by the maritime law; and for that reason their cure by the libelants should be considered a maritime service. Moreover, these particular services were required by the quarantine laws of the state to be rendered before the vessel could be allowed to complete her voyage. Such charges might well be deemed port charges, necessarily incurred by the vessel in the due course of her voyage, and for that reason maritime in their character.

My opinion, therefore, is that the libelants have a lien upon the vessel which may be enforced by this proceeding.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

THE ROTHEMAY.¹

MORTON v. THE ROTHEMAY.

(District Court, S. D. New York. February 6, 1898.)

SEAMAN—CLAIM FOR WAGES—DESERTION—CRUEL TREATMENT.

As against libellant's claim for wages, the defense set up was desertion. Libellant claimed that he left the vessel on account of cruel treatment by the master. As the cruelty alleged by libellant rested solely on his own evidence, was denied by the master, mate, and steward, their evidence not being rebutted by libellant, and none of his shipmates being called to corroborate him, *held*, that his claim, resting on such testimony, was too uncertain, and too much open to suspicion as to his good faith, to be allowed, and the libel should be dismissed.

In Admiralty. Libel for wages.

Willis B. Dowd, for libellant.

J. R. Walker, for claimant.

BROWN, J. The libellant sues for a balance of wages due from the British vessel *Rothemay*, on board of which he shipped for three years. On arrival at New York, after being two months abroad, he left the ship, and most of the crew did the same. His wages by the articles were £2 10s., per month. The current rate at New York was \$30. The defense is desertion. The libellant was not regularly discharged. The excuse for leaving is alleged cruel treatment, viz., that he was triced up by the master for a comparatively trifling offense, his hands being handcuffed behind him, a rope rove through, and carried over some skids, and then lifted up so that he rested only upon his toes, causing great suffering.

If the punishment to the extent alleged by the seaman were proved, I should hesitate to regard the case as one of desertion. The captain, mate, and steward, however, all testify that the libellant was not at all lifted up, but stood firmly upon his feet. The steward testified that part of the time he was dancing a jig. The libellant was present when this testimony was given, and had opportunity to deny or rebut it, but did not do so; and his story is not confirmed by any other witnesses among his many companions, who must have been fully cognizant of the facts. After two or three weeks ashore he shipped on board another vessel, presumably at much higher wages. There is too much uncertainty as to the libellant's claim of excessive punishment, resting upon such uncorroborated statements of his own, and too much room for suspicion as to his good faith, in the various circumstances of the case, to warrant a decree in his favor, and the libel must, therefore, be dismissed.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

BANK OF WINONA v. AVERY *et al.**(District Court, N. D. Mississippi, W. D. December 27, 1887.)*

COURTS—FEDERAL JURISDICTION—CITIZENSHIP—ACT OF MARCH 3, 1887.

Where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit may be brought in the district of the residence of either the plaintiff or defendant.

(Syllabus by the Court.)

On Motion to Dismiss.

W. V. Sullivan, for plaintiff.

Calhoun & Green, for defendants.

HILL, J. The question now presented for decision arises upon defendant's motion to dismiss the suit, for want of jurisdiction, as provided in the first section of the act of congress, approved March, 3, 1887, amending the act of 1875, in relation to the jurisdiction of the circuit and district courts of the United States as to the district in which suits shall be brought, which section reads as follows as to where suits shall be brought: "No person shall be arrested in one district for trial in another, in any civil action before a circuit or district court, and no civil suit shall be brought before either of said courts, against any person, by any original process or proceeding, in any other district, than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of the plaintiff or defendant." The plaintiff in this action is a citizen and resident of this district, and the defendants are citizens and residents of the state of Louisiana, but sued in this district. This provision of this section has not yet been construed by the supreme court of the United States, which, when done, will settle the question for all the courts. I am not aware of but two decisions of the circuit courts of the United States, so far undertaking to construe this provision, of this section,—the first of which is, the case of *Yuba Co. v. Mining Co.*, 32 Fed. Rep. 183. The opinion in this case was delivered by Judge SAWYER, circuit judge, and concurred in by Justice FIELD, of the supreme court, and Judge SABIN, district judge of California, holding that under this provision of this section of the act of March 3, 1887, suit can only be brought in the district of the residence of the defendant. The other case is that of *Fules v. Railway Co.*, 32 Fed. Rep. 673, decided by Judge SHIRAS, district judge of Iowa, in the circuit court of the Northern district of Iowa. The high regard I entertain for the judicial opinions of the judges who decided the case in California, would cause me to hesitate long before coming to a conclusion differing from them, were it not that I am satisfied they overlooked the last clause of this portion of this section, which, it appears to me, contains an exception, or modification, of the first clause, where the jurisdiction is founded alone upon the fact that parties are citizens

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of different states; it is either this, or the last clause is without meaning, and we are not to presume that congress would put in a statute a clause without intending to mean something by it. The argument in the opinion of Judge SHIRAS, in the Iowa case, which reviews the decision in the California case, is so conclusive, to my mind, that suit may be brought in the district of the residence of either the plaintiff or defendant, when the jurisdiction is only founded upon the citizenship of parties to the action, that I do not believe it can be successfully controverted, and therefore feel constrained to adopt this construction of this provision of the act of 1887. The result is that the defendants' motion to dismiss the cause must be overruled.

EVERHART *et al.* v. EVERHART.

(Circuit Court, S. D. Mississippi, W. D. February 10, 1888.)

1. COURTS—FEDERAL JURISDICTION—ACTION TO ANNUL WILL.

A suit to annul a will as a muniment of title, and to restrain the enforcement of a decree admitting it to probate, is in essential particulars a suit in equity, and if by the law obtaining in the state, customary or statutory, such a suit can be maintained in one of its courts, whatever designation that court may bear, it may be maintained by original process in the circuit court of the United States, if the parties are citizens of different states, and the amount in controversy is sufficient to give the circuit court of the United States jurisdiction.

2. SAME.

Jurisdiction as to wills, and their probate as such, is neither included nor excepted out of the grant of judicial powers to the courts of the United States. So far as it is *ex parte*, and merely administrative, it is not conferred, and it cannot be exercised by them at all, until in a case at law or in equity its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties.

3. WILLS—VALIDITY AND REQUISITES—MISSISSIPPI STATUTES.

By the statutes of the state of Mississippi, a will, to pass title to real estate to the devisee, must be made in writing, and signed by the testator or testatrix, or by some other person in his or her presence, and by his or her express direction, and, if not wholly written and subscribed by the testator or testatrix, it must be attested by two or more credible witnesses, in the presence of the testator or testatrix.

(Syllabus by the Court.)

In Equity. On demurrer to bill.

Frank Johnston and Yerger & Yerger, for complainants.

Calhoun & Green and McCabe & Anderson, for defendants.

HILL, J. The questions now presented for decision arise upon the demurrer of the defendant to complainants' bill, and, by request of both parties, upon the sufficiency of the proof to establish the will upon the *ex parte* evidence of the subscribing witnesses exhibited with the paper writing purporting to be the will of the decedent, exhibited with the bill. The bill in substance alleges that M. Everhart died in Issaquena county

in this state, possessed and seized of the real estate described in the bill; that he left surviving him no wife or children or descendants; that complainants are his brother and sisters, and heirs at law, and entitled to an undivided interest in the lands of which decedent died seized and possessed, and for the recovery of which they have brought their action of ejectment in this court, which is now pending, they being citizens of the state of Indiana and the defendant a citizen of this state and division of this district, and the value of the land in controversy, of a greater sum than \$2,000; that the defendant claims title to said lands under a pretended last will and testament of said M. Everhart, which paper writing claimed to be such last will was presented to the clerk of the chancery court of said county of Issaquena, and upon the *ex parte* sworn statements taken in writing and exhibited with this bill, was admitted to probate by said clerk in common form; that complainants had no notice actual or constructive, of said proceedings had before said clerk. The bill further alleges that said M. Everhart never did sign said paper writing, nor did any one else sign it in his presence, and at his special direction; and further, that he was not at the time said paper writing was prepared of sound and disposing mind and memory, and capable of making a last will and testament; and further avers that said paper writing is not the last will and testament of said M. Everhart, and prays that the same be so declared by the decree of this court, and that the defendant be enjoined from setting the same up as a muniment of title as against the just claims and rights of complainants to their undivided interest in the lands described in the bill. The defendant, who is the sole legatee and distributee under the will, except the nominal sum of one dollar given to each of the complainants, by his demurrer admits the facts stated in the bill as true, but insists that this court has no jurisdiction to grant the relief prayed for in the bill; that jurisdiction to determine whether the paper writing presented to the clerk of the chancery court of Issaquena county, and so admitted to probate by him in common form, is not the will of said M. Everhart, is alone vested in the said chancery court, with the right of appeal as in other cases. That the demurrer is not well taken, aside from the jurisdictional question thus raised, is admitted, consequently the only question that need be considered arising upon the demurrer is as to whether or not this court has jurisdiction to determine whether or not the paper writing so admitted to probate by the clerk of said chancery court is the last will and testament of said decedent, and conveys to the defendant the title to the lands described therein as against the title of complainants to an undivided interest in said lands as the heirs at law of decedent, and to enjoin defendant from setting up said paper writing as a muniment of title to said lands in said ejectment suit, and as against complainants' rights as heirs at law of said M. Everhart. The power in the owner of real or personal property to dispose of the same by last will and testament, and the mode in which the same may be done, and the proceedings for the establishment of such will, is derived wholly from the statutes of the state. It is well settled that the circuit courts of the United States have no power

to take proof and admit wills to probate, so far as it is *ex parte* and merely administrative, and, if this bill were filed for that purpose, it is clear that this court would be without jurisdiction, and the demurrer should be sustained, and the bill dismissed. It is equally clear that any decree this court can make can only settle the rights of the parties to the suit, and to the property embraced in it. Section 1960, Code 1880, gives to the chancery court of the county in which the testator had a mansion or residence at the time of his death the jurisdiction to admit wills to probate, and by section 1961 provides that when any last will and testament is exhibited to be proved, the court may take the probate thereof, but that any person interested may at any time within two years, by petition or bill, contest the validity of such will, and an issue shall be made up and tried, as other issues, to determine whether the writing produced be the will of the testator or not; but if no party shall appear within two years to contest the will, the probate shall be final, and forever binding, save to infants and persons *non compos mentis*, who have two years to contest the will after the removal of their respective disabilities. Section 1962 provides that any one interested in a will may propound it for probate, and the clerk may issue summons for the attendance of the witnesses. Section 1963 provides that the will must be proven by one of the subscribing witnesses, if alive, and resident in the state, and competent to testify; otherwise the handwriting of the testator and witnesses may be proven. Section 1964 provides that the affidavits of the subscribing witnesses may be substituted for the attendance of the witnesses. Section 1965 provides that the testimony shall be reduced to writing, when, if it shall appear that the will was duly executed, it shall be admitted to probate. Section 1967 provides that any proponent of a will for probate may, in the first instance, make all interested persons parties to his application to probate the will, and in such case all who are made parties shall be concluded by the probate of the will, but at the request of either party to the proceedings an issue shall be made up, and tried by a jury, as to whether the writing propounded be the will of the alleged testator or not. The defendant did not proceed under this last section, and consequently the complainants have the right to contest the will under the provisions of section 1961, and might have filed their petition or bill to set aside the probate in the chancery court of Issaquena county, but, being citizens of another state, have seen proper to file their bill in this court, in aid of their action of ejectment, of which this court has undisputed jurisdiction. The provision made in section 1961 is a special provision made for those desiring to contest a will to probate of which they were not made parties, and not to establish a will, and provides that the same shall be by petition or bill,—as I understand it, sitting as a court of equity proper, and not in the capacity of a probate court; and provides that an issue shall be made, and tried by a jury; but the jury may be waived, and the question tried by the chancellor. I am of opinion that under the rule announced by the supreme court of the United States in the case of *Gaines v. Fuentes*, 92 U. S. 18, and *Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. Rep. 327, that this court has jurisdic-

tion to try and determine the question as to whether or not the paper writing propounded as the will of said M. Everhart, and probated in common form, is the last will of decedent or not. It is held in the last-named case that jurisdiction of wills, and their probate as such, is neither included or excepted out of the grant of judicial power to the courts of the United States; so far as it is *ex parte* and merely administrative it is confined, and cannot be exercised by them at all, until in a case at law or in equity its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties. It is also held in the same case that the circuit courts of the United States will take jurisdiction of rights created by the statute of the state, and special remedies given by the statute of the state in which circuit court of the United States is held. This rule is sustained by numerous decisions of the same court, and is not now an open question. The result is that defendant's demurrer must be overruled, with leave to the defendant to answer within 30 days, and, if an issue shall be made, it will be submitted to a jury, as provided in section 1961.

With the purpose of settling the rights of the parties without further litigation, as I suppose, both parties request me to determine whether or not the proof of the subscribing witnesses taken before the clerk of the chancery court of Issaquena county, and upon which the paper writing was admitted to probate by the clerk in common form, is sufficient to establish the validity of the paper writing as the last will and testament of said M. Everhart, so as to vest the title to the lands in controversy in the defendant. The testimony is quite brief, and is in substance as follows: That said M. Everhart requested one of the witnesses to write his will, which he did, as dictated by said Everhart; that when it was written said Everhart attempted to sign it, but from physical debility was unable to do so, but in the attempt made a small mark or scratch on the paper, and failed to do more; that he said he made and published the paper as his last will and testament. The paper writing shows a small mark or scratch on the left-hand corner, but no name attached to it. There are also two small marks or dots on another part of the paper, very dim, and look as though made with the point of a pencil, and not at the usual place for signing such a paper, by the party executing it. The name of M. Everhart only appears in the commencement of the paper, which it is evident was not intended as a signature of the testator. The draughtsman was not requested to sign the testator's name, and the testator's effort to sign the paper himself shows that he did not recognize the signature made in the commencement of the writing by the draughtsman as his signature. The place where made, and the character of the small marks and dots, furnish no evidence that they were made as a substitute for the signature of the testator. It is true that a testator may sign his will by making a mark, but he must intend the mark as a substitute for his name; and when there is no name written, or anything indicating who made the mark, and especially when the mark is made at an unusual place for the signature, it ought to require very satisfac-

tory evidence that the mark was intended by the testator as his signature, or as a substitute for it. As already stated, to make a will valid to pass the title to real estate, under the laws of this state, it must be in writing and signed by the testator, or by some other person in his presence, and by his special direction. This paper writing was not signed by any other person. I am satisfied that the proof exhibited with the paper writing as the proof upon which it was admitted to probate by the clerk of the chancery court, fails to show that the testator intended the marks made by him to be a substitute for his signature, if indeed he knew that he had made them at all. I am satisfied, looking at the face of the paper propounded as the last will of said M. Everhart, and the proof of the subscribing witnesses exhibited with it, that this paper cannot be held a valid will, so as to vest the defendant with the title to the lands described in the bill. But if the defendant desires so to do, he can answer the bill, when an issue will be made up to be tried by a jury upon the evidence produced by both parties; and upon such trial what is here said will have no influence with either court or jury, but the cause will be determined as though these remarks had never been made, or even conceived.

UNITED STATES *v.* BATEMAN.

(*Circuit Court, N. D. California.* March 5, 1888.)

1. COURTS—FEDERAL—JURISDICTION—HOMICIDE—WITHIN PRESIDIO MILITARY RESERVATION.

The Presidio military reservation, in the city and county of San Francisco, is not a place "under the exclusive jurisdiction of the United States;" and a homicide committed within the reservation is not an offense against the United States, within the meaning of section 5339, Rev. St.

2. SAME.

A homicide committed within said Presidio military reservation is not an offense over which the courts of the United States have jurisdiction.

(*Syllabus by the Court.*)

Indictment of Thomas N. Bateman for the murder of Samuel M. Soper, first sergeant of troop A, Second cavalry, U. S. A., stationed at the Presidio military reservation.

J. T. Carey, U. S. Atty., for the United States.

Mitchell & Donnelly, for defendant.

Before SAWYER, Circuit Judge, and HOFFMAN, District Judge.

SAWYER, J., (HOFFMAN, J., *concurring.*) The defendant is indicted for the murder of Samuel M. Soper, alleged to have been committed on July 5, 1887, within the limits of the military reservation situate within the city and county of San Francisco, and known as the "Presidio." The indictment is found under section 5339, Rev. St., which provides for punishing a murder committed "within any fort, arsenal, dock-yard,

magazine, or in any other place, or district of country, under the exclusive jurisdiction of the United States." The defendant pleads that the place where the murder is alleged to have been committed, is not within the exclusive jurisdiction of the United States; or within the jurisdiction of the United States; and that the offense charged is not an offense against the laws of the United States, within the meaning of the statute; or an offense over which the circuit court has jurisdiction. The admitted facts upon which the decision must depend are as follows: The place where the offense is alleged to have been committed, is within the limits of a military reservation of the United States, situate within the city and county of San Francisco, known as the "Presidio," as it was at the time of the commission of the offense, bounded, surveyed, and established, and actually occupied, by the United States for military purposes, having upon it garrisons, officers' and soldiers' quarters, forts, fortifications, etc., in actual use and occupation for military purposes by officers and soldiers of the regular army of the United States. For 35 years prior to the treaty between Mexico and the United States, by which California, including the land in question, was ceded to the United States, and up to the time of their occupation by the United States, the lands within this reservation had been occupied by Mexico as a military reserve, having upon it forts, garrisons, and appurtenances, occupied by Mexican troops for military purposes; and, continuously, from the surrender of these premises by the Mexican forces to the United States down to the present time, they have in like manner been occupied for like purposes by the military forces of the United States. These lands, with all other lands of the state of California, were ceded to the United States by Mexico by the treaty of Guadalupe Hidalgo, of February 2, 1848. On June 23, 1848, prior to the organization of the state government of California, and while under the exclusive sovereignty and jurisdiction of the United States, Capt. J. L. Folsom, assistant quartermaster U. S. A., in compliance with instructions given by B. Riley, brigadier general U. S. A., and military governor of California, dated March 29, 1848, established the boundaries of the said military reservation, which boundaries included the point where the homicide is alleged to have been committed. Afterwards, on November 30, 1848, on the recommendation of the president, a joint commission of navy and engineer officers was appointed for the purpose of examining the coast, with a view to selecting military reservations. Said commissioners, on March 31, 1850, recommended the reservation of the Presidio, with boundaries including the point where the homicide is alleged to have been committed. Thereafter, on November 6, 1850, Millard Fillmore, president of the United States, by an executive order, exempted and reserved from sale, for public services, the last-mentioned tract. Afterwards, by an executive order issued by Millard Fillmore, president of the United States, dated December 31, 1851, which order was confirmed by an act of congress approved May 9, 1876, the boundaries of said reservation were somewhat modified, but they still, and at all times, included the point at which said homicide is alleged to have been committed. On September 9, 1850, California was,

by act of congress, admitted as a state into the Union, "on an equal footing with the original states in all respects whatever." There was no reservation of sovereignty over any part of the public lands. The only condition was that there should be no "interferences with the primary disposal of the public lands within its limits," and that the state "shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned; and that they shall never lay any tax or assessment of any description whatsoever upon the public domain of the United States." 9 St. 452. The only act of the legislature of California brought to the attention of the court, that can possibly be regarded as affecting the question is the act of April 27, 1852, which provides "that the consent of the legislature of California be and the same is hereby given to the purchase by the government of the United States, or under the authority of the same, of any tract, piece, or parcel of land from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the purpose of erecting thereon armories, arsenals, forts, fortifications, navy-yards, or dock-yards, magazines, custom-houses, light-houses, and other needful public buildings or establishments whatsoever; and all deeds, conveyances, or title papers for the same shall be recorded as in other cases, upon the land records of the county in which the land so conveyed may lie; and in like manner may be recorded a sufficient description, by metes and bounds, courses and distances, of any tract or tracts, legal divisions or subdivisions, of any public land belonging to the United States, which may be set apart by the general government, for any or either of the purposes before mentioned, by an order, patent, or other official document or paper so describing such land. The consent herein and hereby given being in accordance with the seventeenth clause of the eighth section of the first article of the constitution of the United States, and with the acts of congress in such cases made and provided." St. 1852, p. 149. 1 Hitt. Code, § 4215. At the time the homicide is alleged to have been committed, no description by metes and bounds, or otherwise, had been recorded upon the land records of the city and county of San Francisco, as provided for in the latter part of the section quoted. The deceased, Samuel M. Soper, was at the time of his death, and he had been for some time prior thereto, first sergeant of troop A, Second cavalry, U. S. A., stationed at the Presidio. The defendant was at the same time a private in the same troop, stationed at the same place.

Upon the foregoing state of facts, is the point where the homicide is alleged to have been committed "a place * * * under the exclusive jurisdiction of the United States?" We do not think it is, and not being so, the act is not an offense against the United States, within the meaning of section 5339, Rev. St., or an offense over which the United States courts have jurisdiction. This point is authoritatively determined by the supreme court of the United States in the late case of *Railroad Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. Rep. 995. In that case the reservation at Fort Leavenworth was situate precisely like that at the Presidio, at the time of the admission of Kansas into the Union. Says the court:

"The land constituting the reservation was part of the territory acquired in 1803 by cession from France, and, until the formation of the state of Kansas, and her admission into the Union, the United States possessed the rights of a proprietor, and had political dominion and sovereignty over it. For many years before that admission it had been reserved from sale by the proper authorities of the United States, for military purposes, and occupied by them as a military post. The jurisdiction of the United States over it during this time was necessarily paramount. But in 1861 Kansas was admitted into the Union upon an equal footing with the original states; that is, with the same rights of political dominion and sovereignty, subject like them only to the constitution of the United States. Congress might undoubtedly, upon such admission, have stipulated for the retention of the political authority, dominion, and legislative power of the United States over the reservation, so long as it should be used for military purposes by the government; that is, it could have excepted the place from the jurisdiction of Kansas, as one needed for the uses of the general government. But from some cause,—inadvertence perhaps or over confidence that a recession of such jurisdiction could be had whenever desired,—no such stipulation or exception was made. The United States therefore retained, after the admission of the state, only the rights of an ordinary proprietor."

These observations are as applicable to the Presidio as to the Fort Leavenworth reservation, as will be seen by reference to the act admitting California. The only reservation relating to the public land affected the proprietary interest of the United States in the lands. That interest was to be in no way interfered with. There was no reservation whatever as to sovereignty, or governmental powers or jurisdiction. There was no distinction made in the act of admission between these lands and other lands constituting the public domain in California. There being no reservation of governmental powers or jurisdiction over the Presidio lands in the act admitting California into the Union, in the language of the supreme court in the case cited, "the United States, therefore, retained, after the admission of the state, only the rights of an ordinary proprietor." And again, says the court:

"The consent of the states to the purchase of lands within them for the special purposes named is, however, essential, under the constitution, to the transfer to the general government, with the title, of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor."

The United States were both proprietors and sovereigns of the Presidio lands till the admission of the state of California into the Union. By the act of admission, reserving only their proprietary right over these lands, they relinquished to the state their governmental or local sovereign right, and jurisdiction, and were thenceforth only proprietors in the sense that any natural person owning land is a proprietor. Having so relinquished their sovereign rights, that condition remains to this day, unless the state has in some way, either directly or by implication, receded to the United States its sovereign jurisdiction. This could be done by direct cession, or by consenting through its legislature to the purchase of land for such governmental purposes, and a purchase for such purposes in pursuance of such consent. Neither has been done in this in-

stance. There is no act directly ceding the jurisdiction. By the act of 1852, as we have seen, the legislature in the proper form consented that the United States might purchase lands for certain specific purposes, including military purposes. But these lands were not so purchased. They were owned by the United States before California became a state, and by her admission into the Union the sovereignty was relinquished. That sovereignty was not receded by the consent of the state to the purchase of other lands for similar purposes. The cession of exclusive jurisdiction over these lands is not within the purview of the act. The act, it is true, in another provision, authorizes the recording of a description by metes and bounds, or other definite description in the land records of the county "of any public lands belonging to the United States, which may be set apart by the general government, for any or either of the purposes before mentioned, by an order, patent, or other official document or paper so describing such land." But the purpose or effect of such recording is not prescribed. It may have been intended only for the purpose of affording record evidence of title, as in the case of records of title in parties. There is no statement of a purpose, direct or by implication, to divest the state of its sovereignty over the lands so described and recorded by such record. It is doubtful, at least, whether such a record under this act would have that effect. Such effect should not be given the record, unless that be clearly the purpose of the legislature. But it is unnecessary to determine the effect of such a record now, as none whatever had been made at the time of the alleged commission of the homicide charged. Nothing had then been done under any provision of this act. A subsequent record could not have the effect to now make that act an offense against the United States which was not an offense at the time the act was performed.

We know of no other act of the state of California, through its legislature or otherwise, by which a retrocession of its sovereign jurisdiction over the Presidio military reservation has been made to the United States. The result is, the Presidio reservation is not within the exclusive jurisdiction of the United States, and the acts charged do not constitute an offense against the United States under section 5339, Rev. St., or of which this court has jurisdiction. The indictment must, therefore, be quashed on that ground, and it is so ordered.

ROLLINS v. CHAFFEE COUNTY.

BARNUM v. CUSTER COUNTY.

(Circuit Court, D. Colorado. March 26, 1888.)

COURTS—FEDERAL JURISDICTION—ACTIONS ON COUNTY WARRANTS.

Under act Cong. 1887, (24 St. 553,) § 1, providing that the federal courts shall not have jurisdiction of any action on any promissory note or chose in action, except on negotiable securities payable to bearer, and made by a corporation, by an assignee, or a subsequent holder, if the instrument be payable to bearer, unless such suit might have been brought in such court if no assignment or transfer had been made, the circuit court has no jurisdiction of an action by an assignee on a county warrant payable to the order of a person named therein, and passing only by indorsement, in the absence of averment that the assignor was qualified to sue in this court, but has jurisdiction of an action by the holder on one payable to bearer, such being a negotiable security made by a corporation.

At Law. On demurrer to complaint.

Teller & Orahood, for plaintiffs.

G. H. Hartinstim, for Chaffee county.

Hugh Butler, for Custer county.

HALLETT, J. A question of jurisdiction under the act of 1887 arises on demurrer to the complaint in each of these actions. The warrants on which plaintiffs seek to recover are in the usual form of such instruments, signed by the chairman of the board of commissioners, attested by the clerk, and directed to the treasurer of the county. In the *Chaffee County Case* they are payable to a person named therein or to his order, and in the other case they are payable to a person named or to bearer. The names of the payees are not given, nor is anything alleged as to their citizenship; and the question is whether the action can be maintained without showing that they, as well as the plaintiffs, were qualified to sue in this court. The meaning of that clause of the first section of the act of 1887, (24 St. 553,) which relates to suits by assignees of promissory notes and other choses in action, is not very clear, but it seems to be well stated in *Newgass v. City of New Orleans*, 33 Fed. Rep. 196. When it came from the house of representatives the clause referred to was as follows:

"Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of bills of exchange." 18 Cong. Rec. 646.

The senate amendment was probably intended to retain jurisdiction over a large class of securities made by corporations, railroad companies, and the like, which are sold in open market and negotiable by delivery. Certainly it was not intended to give jurisdiction in all actions by assignees on promissory notes and other contracts excepting those last mentioned, and that seems to be the alternative if we reject the proposed construction. Accordingly, I am constrained to follow the interpreta-

tion of the act in the *New Orleans Case* cited above, and hold jurisdiction of actions by assignees, when the assignor was not competent to sue in this court only in cases of foreign bills of exchange and negotiable securities payable to bearer, and made by a corporation. In *Jerome v. Commissioners*, 18 Fed. Rep. 873, county warrants payable to a person named, or bearer, were regarded as of this class of securities. That case was decided under the act of 1875, but the opinion is of equal force under the act of 1887; and it is a full answer to the remarks of counsel and the authorities cited in support of the demurrer in the *Custer County Case*, except on the point, not before raised in this court, that an action cannot be maintained on a county warrant until after such reasonable time from its date, as may be evidence of a refusal to pay on the part of the county. In support of that position a recent decision of the supreme court in *Manufacturing Co. v. County of Otoe*, 8 Sup. Ct. Rep. 582, is cited, from which it appears that some rule of that kind is established in Nebraska. If any such rule obtains in this state, the demurrer in the *Custer County Case* does not call for its application. Some of the warrants are of long standing, and the demurrer is directed against them as well as those of more recent date. In the *Chaffee County Case* the warrants being payable to the order of a person named therein, and passing only by indorsement, in the absence of averment that the assignors were qualified to sue in this court we are without jurisdiction, and the demurrer will be sustained and the suit dismissed at plaintiff's cost. In the *Custer County Case* the warrants being payable to bearer, and made by a corporation, appear to be within the exception of the statute. In that case the demurrer will be overruled, and the defendant will be required to answer.

MISSOURI PAC. RY. CO. v. TEXAS & P. RY. CO. (CARTER, Intervenor.)

(Circuit Court, E. D. Louisiana. February 25, 1888.)

CARRIERS—OF PASSENGERS—CONTRIBUTORY NEGLIGENCE.

Where in an action for damages by one alleging that he had been jolted off a railroad train on which he was a passenger so as to strike a moving freight train and be thrown with his feet under the wheels of the freight train and thus received the injuries complained of, the evidence shows that claimant was injured in attempting without right to mount the freight train while in motion, he is not entitled to recover.

On Exceptions to Master's Report.

The intervenor sought to recover damages for injuries received by being run over by a freight train operated by the receivers of the defendant railroad. The master reported adversely on the claim and intervenor excepted.

E. D. Craig and *B. K. Miller*, for intervenor.

Howe & Prentiss, for receivers.

PARDEE, J. The finding of the master is adverse to the intervenor in several aspects of his case, and is very elaborate, and seems, as to facts, to be supported by the evidence, and, as to law, to be in accord with many adjudged cases. I have given the evidence careful examination and consideration, and my conclusion on one of the findings of fact of the master renders it unnecessary to review any of the authorities cited by the master or by the learned counsel in argument. The master finds that the intervenor was not injured in being jerked off the passenger train on which he was a passenger, but was injured in attempting, without right, to mount the freight train while in motion, and, of course, if this be true, intervenor was injured by his own negligence. That the intervenor was injured by the freight train is undisputed. At the time, between the passenger train and the freight train, there was an open interval of at least seven feet, and between the tracks on which the respective trains stood, the distance was eleven feet. That the intervenor was jerked or jolted off from the steps of the passenger car so as to strike the freight train with his hands, and be thrown backwards, with his feet on the main track under the wheels of the freight train, is sworn to by the intervenor only. No one saw it. It is controverted by the distance apart of the trains and the tracks rendering it extremely improbable, if not impossible; by his statements made to the section hands immediately after the injury to the effect that he was injured in attempting to climb on the freight train; and by the evidence tending to show that the intervenor went to Winchester to get work with a contractor; that he learned before leaving the passenger train that the contractor was not at Winchester, but further east; that he then expressed the determination to return to Donaldsonville, and that for the latter purpose, the moving freight train offered the convenient transportation. That the intervenor was injured while attempting to climb on the moving freight train is in harmony with all the evidence in the case, excepting only the intervenor's own testimony, and this excepted testimony is so opposed by the circumstances and surroundings of the case, and by the testimony of other witnesses that it cannot be taken as true.

The exceptions to the master's report will be overruled, and the said report confirmed.

UNITED STATES BUNG MANUF'G CO. v. ARMSTRONG.

*(Circuit Court, S. D. Ohio, W. D. February 29, 1888.)***EQUITY—EQUITABLE SET-OFFS—INDEPENDENT DEBTS—WAIVER.**

The voluntary payment by the maker of a promissory note, with a full knowledge of all the facts, operates as an abandonment and waiver of all right to set off cross-demands or independent debts, and a bill disclosing such facts presents no case for equitable relief by way of equitable set-off.

In Equity. On demurrer to bill.

The United States Bung Manufacturing Company, as maker, paid David Armstrong as receiver of the Fidelity National Bank a certain promissory note, and afterwards filed their bill in equity to secure right of offset. The defendants demurred to plaintiff's bill.

M. B. Hagans, for complainant.

E. W. Kittredge and *W. B. Burnet*, for respondent.

JACKSON, J. The demurrer to this bill is well taken, and must be sustained. The complainant's right of offset was waived or abandoned by its payment of the note described in the bill. That payment was made voluntarily, with full knowledge of all the facts. It was made by the maker of the note,—the party legally bound to pay. Such payment does not operate as an equitable assignment of the collecting bank's rights as against the Fidelity Bank or its receiver. If the complainant had intended to rely upon its debts against the Fidelity National Bank as a set-off against its note, it should have declined payment of the note, stood suit thereon, and set up its counter-claim as a set-off. This was not done, but it paid its note voluntarily, and now invokes the aid of this court to enforce what is called its "equitable right of set-off." The facts presented by the bill do not raise any such equitable right.

It is well settled that the mere existence of cross-demands or independent debts does not create any right to an equitable set-off. There must exist a mutual credit between the parties, founded at the time upon the existence of some debt, due by the crediting party to the other. "By mutual credit," says Story, Eq. Jur. § 1435, "in the sense in which the terms are here used, we are to understand a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on and trusting to such debt as a means of discharging it." Mutual credit means something different from mutual debts. Mutual credit, such as will give rise to an equitable set-off, applies only to that class of cases where there has been mutual trust or understanding that an existing debt should be discharged by a credit given upon the ground of such debt. The bill presents no such case. It discloses nothing more than the existence of cross-demands or independent debts, which could have been set off at law, if complainant had asserted its right to do so at the proper time, and in the proper mode. Having voluntarily waived or abandoned this legal right and remedy by paying the note to avoid

being sued thereon, it presents no case for equitable relief by way of equitable set-off under the authorities.

This demurrer is accordingly sustained, and the bill is dismissed with costs.

FAZENDE *et al.* v. CITY OF HOUSTON.¹

(Circuit Court, E. D. Texas. March 1, 1888.)

1. MUNICIPAL CORPORATIONS—BONDS—DIVERSION OF FUNDS—INJUNCTION.

A municipal corporation, under an ordinance authorized by its charter, issued some bonds to provide a fund for building a market-house. By the terms of the bonds the revenue of the market was to be devoted to the payment of the interest on the bonds and to form a sinking fund to redeem them. After the issuance of the bonds, the corporation obtained a new charter, authorized by which they devoted the revenue of the market to other purposes than that provided for in the ordinance authorizing the bonds. Plaintiffs, holders of some of these bonds, brought a bill in equity to compel specific performance, and asked for an injunction to prevent further diversion of the market-house revenues. *Held*, the facts being admitted, that an injunction *pendente lite*, as prayed for, should issue.

2. SAME—ORDINANCES—CONSTITUTIONAL LAW—IMPAIRING OBLIGATIONS OF CONTRACTS.

A municipal corporation, under an ordinance authorized by their charter, issued some bonds to provide a fund for building a market-house. By the terms of the bonds the revenue of the market was to be devoted to the payment of the interest on the bonds, and to form a sinking fund to redeem them. *Held*, that as the ordinance was authorized by the charter, and therefore valid, it constituted a contract between the holders of the bonds and the city, and that subsequent ordinances of the city making any other disposition of the market revenue were void, and that so much of a charter granted the city after the issue of the bonds as authorized the city council to divert any of such revenue from the special fund as contracted in the ordinance under which the bonds were issued was inoperative, as impairing the obligations of a contract in violation of Const. U. S. art. 1, § 10.²

In Equity. Bill for specific performance and injunction.

The city of Houston, authorized by its charter, passed an ordinance providing for the issuance of bonds to raise a fund for building a market. Under the terms of the ordinance the revenue from the market was to be devoted to the payment of the interest on the bonds, and to constitute

¹ Reported by Chas. B. Stafford, Esq., of the New Orleans bar.

² By the obligation of a contract is meant the means which, at the time of its creation, the law affords for its enforcement. Where a contract is made upon the faith that taxes will be levied, legislation repealing or modifying the taxing power of a corporation so as to deprive the holder of the contract of his remedy, is unconstitutional, because impairing the obligation of a contract. *State v. Police Jury*, 4 Sup. Ct. Rep. 648.

Respecting other legislation, considered with respect to the constitutional inhibition against impairing the obligation of contracts, see *Seibert v. U. S.*, 7 Sup. Ct. Rep. 1190; *Water Co. v. Borough of Easton*, Id. 916; *Water-Works Co. v. Water-Works Co.*, Id. 405; *Fiak v. Police Jury*, 6 Sup. Ct. Rep. 831, and note; *Bridge Co. v. Railway Co.*, (Pa.) 8 Atl. Rep. 253; *State v. Jersey City*, (N. J.) Id. 123; *State v. Railroad Co.*, (N. J.) 7 Atl. Rep. 826, note; *Railroad Co. v. City of Savannah*, 30 Fed. Rep. 646; *Willis v. Miller*, 29 Fed. Rep. 238; *Gas-Light Co. v. City of Saginaw*, 28 Fed. Rep. 529, and note; *Com. v. Maury*, (Va.) 1 S. E. Rep. 135; *Com. v. Weller*, Id. 102; *Com. v. Jones*, Id. 84, and note; *Bockover v. Superintendent*, (Mo.) 3 S. W. Rep. 833; *Tait's Ex'r v. Asylum*, (Va.) 4 S. E. Rep. 697.

a sinking fund to cancel them. Subsequently the city obtained a new charter. Under its authority the revenue of the market was used for other purposes than provided for in the bond ordinance. Plaintiffs, holders of these bonds to the amount of \$78,000, filed a bill in equity to prevent further diversion of the market fund, and praying for specific performance and for a receiver.

E. H. Farrar, for plaintiffs.

Brady & Ring, for defendant.

PARDEE, J. There can be no question that the ordinance of the city of Houston passed November 13, 1871, authorized the issuance of bonds for the purpose of defraying the expenses of improving the public market by building a new market-house; nor that, by the same ordinance, if words have any meaning, the said bonds were agreed to be secured by the appropriation setting apart and pledging, as a special fund, to pay the interest and to create a sinking fund to pay the principal, of all the money and other revenues accruing after the 1st day of January, 1872, in any manner from the public market, market-house, and market-houses, by renting, leasing, or otherwise conducting or managing the same. As the contemplated bonds were issued and the money raised and expended under said ordinance, there can in law be no doubt that the said ordinance constituted a valid, binding contract between the holders of said bonds and the city of Houston, if the mayor, aldermen, and inhabitants of the city of Houston had authority under their legislative charter to pass the said ordinance and enter into said contract. The charter of the city of Houston, in force at the time, was passed by the legislature of the state of Texas August 2, 1870. See chapter 38 of the Laws of Texas, 1870, p. 68. The twenty-second section of that charter reads as follows:

"That the mayor and aldermen of the city of Houston shall have power to appropriate so much of the revenues of the city, emanating from whatever source, to the improvement of the public market, roads, and bayou, within or without the corporation, leading to the city, as they in their wisdom may from time to time deem expedient; and for the furtherance of these objects, they shall have power to borrow money upon the credit of the city, and issue the bonds of the city therefor; but no sum of money shall be borrowed at a higher rate of interest than 10 per cent. All bonds shall specify for what purpose they were issued, and shall not be invalid if sold for less than their par value; and when any bonds are issued by the city, a fund shall be provided to pay the interest and create a sinking fund to redeem the bonds, which fund shall not be diverted nor drawn upon for any other purpose, and the city treasurer shall honor no draft drawn on said fund, except to pay interest upon or redeem the bonds for which it was provided."

And section 39 of said charter reads:

"That the city council of Houston shall have power to make contracts with any person or corporation for the improvement of the streets, bayou, or roads leading to the same, or to lease the market or other revenues of the city for any term of years, and to do and perform all acts that they may deem advisable for the interests of the city."

Here is authority to appropriate the revenues of the city, emanating from whatever source, to the improvement of the public market, to borrow money upon the credit of the city therefor, to issue bonds, to provide a fund to pay the interest, and create a sinking fund to redeem the bonds, and to lease the market or other revenues of the city for any term of years. The authority seems full and complete. That some of the revenues of the public market are derived from rents and charges in the nature of "occupation taxes," and to that extent are within the legislative control of the city council, does not affect the validity of the ordinance nor of the legislative authority to pass the ordinance. As the ordinance was authorized by the charter, and therefore valid, it constitutes a contract between the holders of the market-house bonds and the city of Houston, and it follows as settled jurisprudence that the ordinances of the city of Houston making any other disposition or appropriation of the market revenues than as specified in the ordinance under which the bonds were issued are void and have no legal effect, and that so much of the present charter of the city of Houston as authorizes the city council of the city of Houston to divert any of the market-house rents or revenues from the special fund, as contracted for in said ordinance under which said bonds were issued, is inoperative as impairing the obligations of the said ordinance and contract, because in violation of article 1, § 10, of the Constitution of the United States.

The showing made on this hearing—and the facts are undisputed—is that the defendants are not applying the revenues of the market in accordance with the terms of said ordinance and contract, but have been and are diverting the same to other purposes, such as paving streets, paying salaries, insurance, repairs, grocery bills, interest on other bonds, and for other purposes, all in violation of said contract; that none of said revenues have been devoted for many years to the payment of the interest to which they are pledged, save when ordered by judgment of court, or when the funds on hand could be used to purchase coupons at a large discount; that there is now a fund on hand derived from said revenues which the defendants refuse to apply to the payment of interest on said market-house bonds, but which is held for other purposes; and that complainants are the holders of a large number of said bonds, amounting in principal to the sum of \$78,000, on which the interest has not been paid since 1874, although duly demanded and judgments obtained thereon. The scope and object of the bill in this cause is to prevent further diversion of the market-house revenues, and to enforce a specific performance of the ordinance passed November 13, 1871. The jurisdiction is undisputed, and the occasion for its exercise seems clear. The pending application is for an injunction *pendente* and a receiver. The appointment of a receiver is not at present insisted on, and may well wait further proceedings in the premises. The injunction on the showing, made on the authority of *Maenhaut v. New Orleans*, 2 Woods, 108, and the adjudicated cases there cited, and on general equity principles, should issue substantially as moved for, that the fund now in hand and to ac-

crue should be preserved until final decree. The following order may be entered on the minutes, and process issue accordingly:

This cause came on to be heard before DON A. PARDEE, Esq., circuit judge in chambers, on the motion of the complainants for an injunction pending the suit and for a receiver, after due notice to the defendants, and was argued by E. H. Farrar, Esq., for the complainants, and by Messrs. Brady & Ring for the defendants; when, considering the evidence offered and the reasons filed, it is ordered that an injunction *pendente lite* issue herein, commanding and enjoining the defendants, the mayor, aldermen, and inhabitants of the city of Houston, and George R. Bringham, secretary and treasurer of said city of Houston, and each of them, from diverting directly or indirectly any portion of the rents, revenues, tolls, income, and receipts of the market-house and market-houses of the city of Houston from the market-house bond fund, as constituted and provided for in the ordinance passed November 11, 1871, and approved by the mayor November 13, 1871, authorizing and providing for the issue of bonds for improving the public market, and from using or setting apart said rents and revenues, tolls and income for any other fund or purpose than the market-house bond fund as provided in said ordinance, and from using or applying said market-house bond fund accrued and to accrue in any other way or manner than for the payment of interest, and to create a sinking fund as provided in the aforesaid ordinance, any ordinance or ordinances of the city of Houston to the contrary notwithstanding. This injunction to take the place of the restraining order heretofore issued in this cause. The matter of appointing a receiver in this cause is continued indefinitely.

YOUNG v. WHEELER *et al.*

(Circuit Court, D. Colorado. March 16, 1888.)

1. FRAUDS, STATUTE OF—AGREEMENTS RELATING TO LAND—PARTNERSHIP.

A bill in equity, by one claiming to be a partner, to obtain a conveyance of an interest in lands on the ground that they belonged to a partnership formed for buying and selling real estate, which alleges that the partnership was formed both by means of personal conversations and by letters, is demurrable, as such partnership cannot be formed by parol.

2. PARTNERSHIP—POWER OF PARTNER TO BIND THE FIRM.

A bill by one claiming to be a partner, to obtain conveyance of an interest in land claimed to be partnership land, which alleges that the partnership was formed for the purpose of buying and selling land, does not state a cause of action against a vendee of one of the alleged partners, since, if the vendor was a partner, he had authority to sell the land.

In Equity. On demurrer to bill.

V. D. Markham and L. M. Cuthbert, for complainant.

Geo. J. Boal, for defendant Wheeler.

L. S. Dixon, for defendant company.

HALLETT, J. Suit was brought by Harvey Young against Jerome B. Wheeler to obtain a conveyance of an interest in certain lands. Plaintiff alleges that in the latter part of the year 1882, and the early part of the

year 1883, he entered into an agreement with the defendant for a partnership, the object of which was to secure title to lands, and to dispose of such lands. He states that "your orator is unable to state the exact date of the making of the said agreement of partnership, for the reason that the subject of said partnership agreement was not embodied in any formal partnership agreement in writing, but was discussed and agreed upon by your orator and the said defendant from time to time during said period, both from and by means of personal conversations held between your orator, and by letters written and interchanged between your orator and the said defendant during said period; but that the terms and conditions of said partnership agreement were fully settled and agreed upon by and between your orator and the said defendant from and during said interviews and letters as aforesaid." From this statement it appears that the agreement was formed by a conversation between the parties, and to some extent by letters passing between them. How much of it may be shown in writing, and how much expressed in the acts and words of the parties, without writing, does not appear. After this bill was filed, and Mr. Wheeler, the defendant therein, answered, the Grand River Coal & Coke Company was brought into the case by supplemental bill, as the grantee of Mr. Wheeler of certain lands, the plaintiff seeking the same relief against the company as against Mr. Wheeler. That company has filed a demurrer to the bill, the principal point in which is that the agreement, as stated in the bill, is within the statute of frauds, as not being in writing; and the fact appears to be as contended by the defendant in respect to that matter.

From the clause which I have read from the bill it may be that the greater part of the agreement is dependent upon the parol understanding and agreement of the parties, and very little of it can be shown in the letters to which reference is made. If it be taken to be a partnership as alleged by the plaintiff, for buying lands, in which the plaintiff was to have an interest, although the title thereto should be taken in the name of the defendant Wheeler, the agreement would, if shown, tend to establish a trust on the part of Wheeler in respect to these lands for the plaintiff; and that cannot rest in parol under the statute. It is unnecessary to comment upon the statute or upon the point made in the demurrer at any length, because this is a question which is considered in the books, in several cases, and in the text-books. *Smith v. Burnham*, 3 Sum. 435, is a leading authority upon the question, and fully in point in respect to the agreement here stated.

It is to be observed also that if this was, as alleged by the plaintiff, a partnership for buying and selling lands, that the sale of these lands to the Grand River Coal & Coke Company—the defendant making this demurrer—was apparently within the terms of the agreement; and Mr. Wheeler having authority to make sale of the lands, and having done so to defendant company, the plaintiff would be in no position to demand anything from the company itself. Upon the terms of the agreement, if it be valid, he may claim an accounting from Mr. Wheeler in respect to the proceeds of the land, but for the land itself, if the partnership con-

templated a sale of the lands as well as a purchase of them, he could make no claim upon the vendee.

Upon these grounds the demurrer of this defendant to the bill is sustained.

TEN CASES, etc., (GUIET, Claimant,) v. UNITED STATES.

(Circuit Court, S. D. New York. December 29, 1887.)

INTERNAL REVENUE—SEIZURE OF LAND—WRIT OF ERROR—PROCEDURE ABOVE.

Upon a writ of error to the circuit court from a judgment of the district court, dismissing a seizure made upon land for want of prosecution, the circuit court, under Rev. St. U. S. § 686, has only power to reverse, affirm, or modify the judgment of the district court, and a judgment by the circuit court, affirming the district court and dismissing the action, will be set aside.

At Law. Motion to vacate judgment.

Edward K. Jones, for the motion.

Abram J. Rose, Asst. U. S. Atty., opposed.

WALLACE, J. The writ of error in this suit was dismissed for want of prosecution, and thereupon a judgment of condemnation and forfeiture, affirming the judgment of the district court, was entered in this court. The present motion to vacate the judgment is made in the interests of the sureties of the claimant, and it is insisted that the judgment is irregular, if not void, because, upon a writ of error in such a suit, the record is not removed from the district court, and, upon an affirmance or reversal of the judgment by this court, the proceedings should be remitted to the district court, with instructions to render the proper judgment. The point is well taken. In seizures made upon land the district court proceeds as a court of common law, according to the course of the exchequer on information *in rem*, and the trial of issues of fact is to be by jury. In seizures made upon navigable waters the court sits as a court of admiralty and the trial is to be by the court. *The Sarah*, 8 Wheat. 391. While the form of information and of the judgment is the same in both classes of cases, the mode of review and the incidents of the review are wholly distinct. In the former the mode of review is by writ of error, and the case is presented by bill of exceptions. In the latter the mode of review is by appeal. Upon an appeal the decree from which the appeal is taken is superseded and vacated, and a new trial had in the appellate court; and the *res* forming the subject-matter in dispute, the funds in the court below, and the stipulations of the sureties, are transmitted to the appellate court; and the judgment pronounced by that court is practically an original judgment in which the court awards process to execute its decree. Upon such an appeal, prior to the act of 1872, the circuit court had no power to remit its proceedings to the court below. Since the act of June 1, 1872, (17 St. at

Large, 196; Rev. St. § 636,) the circuit court may now affirm, modify, or reverse admiralty appeals. Upon reviews by writ of error to the district court the circuit court is to re-examine and reverse or affirm the judgment, (Rev. St. § 636;) and by section 636 may also modify or direct such judgment to be rendered by the district court as the justice of the case may require. The latter section is not to be construed as intended to make an unnecessary and inappropriate innovation upon the existing practice.

The present judgment seems to have been entered upon the theory that the record has been removed out of the district court, and is now in this court. This is a misapprehension. Upon the removal of a cause by a writ of error, the record, the fund, the stipulations, and the *res* remain in the district court, and this court acts upon an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party. Rev. St. § 907.

The right of the sureties for the claimant to have a judgment, to which, upon payment of their stipulation, they may be entitled to become subrogated, entered by the proper courts, and in the proper form, is a matter of substance. It is by no means clear that the party causing an execution to be levied upon the judgment as it now stands would be protected. The motion is therefore granted.

HENRY v. BOND.

(Circuit Court, S. D. Mississippi, W. D. January Term, 1888.)

MASTER AND SERVANT—RISKS OF EMPLOYMENT—CONTRIBUTORY NEGLIGENCE.

Plaintiff had been for five years foreman in charge of the switch-engine in the yard of the defendant railroad. For two years previous to the injury complained of the railroad had used cars with what are called "aprons" on the sides and ends of flat or platform cars. These apron cars have a plank of some inches wide projecting over the ends and sides so that when the ends come together the floors meet, or nearly so, and to enable them to be coupled a space is left over the coupling appliance instead of on the sides. The coupling is not so convenient, and, when done by getting under the cars, is attended with more risk than in ordinary cars. On the day of the injury complained of, in obedience to the orders of the yard-master, plaintiff proceeded, after dark, to shift the cars. The first car approached was one of those apron cars. His lantern not giving a good light he did not distinguish this from an ordinary flat car, and was standing on the apron of the engine, as he usually did in coupling an ordinary flat car, when he was struck by the apron and severely injured. *Held*, that it was his duty to use all necessary caution to ascertain the kind of car he was coupling, and, having failed to do so, he could not recover.¹

At Law. In action for damages.

Action by appellant, William Henry, employe of Vicksburg & Meridian Railroad, to recover for injuries received while in the employ of railroad against F. S. Bond, receiver.

¹ See note at end of case.

Wade R. Young, for petitioner.
Birchett and Gilland, for receiver.

HILL, J. The questions now presented for decision arise upon the petition of *William Henry v. F. S. Bond, Receiver*, answer and proof, from which the following facts appear: The petitioner was, and had been for five years, the foreman in charge of the switch-engine in the yard of said railroad in Vicksburg, in moving cars, making up trains, etc. For two years previous to May 13, 1887, said receiver, by his employes, had used on said railroad and the railroads connected with it, cars with what are called "aprons" on the sides and ends of flat or platform cars, used mostly in construction trains, for moving earth and other materials, but when not so used, were used for the transportation of lumber, cotton, and other freight transported on the ordinary flat cars, as the latter cars are used. These "apron cars," as they are called, have a plank of some inches wide projecting over the ends and sides of the car, so that when the cars come together the floors meet, or nearly so, but, to enable them to be coupled, a space is left over the coupling appliance, instead of on the sides, as in ordinary flat cars. They may also be coupled by getting under them. The coupling is not so convenient, and is, when getting under the cars, attended by some more risk than in ordinary flat cars. On the 13th of May, 1887, the freight train was one hour late in arriving in Vicksburg. The yard-master, under whose orders the petitioner was acting, directed the petitioner to shift the cars in the train so as to prepare those going over the river to the Vicksburg, Shreveport & Pacific Railroad, to move soon in the morning. To perform this service, the petitioner proceeded, after dark, to shift the cars in the train, and proceeded with the switch-engine to the train. The first car approached was one of these apron cars. His lantern not giving a good light, he did not distinguish this car from an ordinary flat car, and was standing upon the apron of the engine, as he usually does in coupling to an ordinary flat car, when he struck the apron or projecting plank, and was severely injured, and it is to recover for these injuries he filed his petition, alleging that it was through the negligence and wrongful conduct of the defendant and his employes that he received these injuries. Whether this is so or not, is the question to be determined.

The service in which the petitioner was engaged is recognized as a very dangerous one, and for which extra compensation is demanded and paid. Those who engage in it are presumed to know the risk and to assume it. They are also presumed to know that cars of various construction and mode of coupling will pass over the road, and be coupled and handled by them, and that it will be their duty to understand the risk, and take upon themselves the responsibility of performing this service, and taking care of themselves in its performance. The petitioner knew that these cars were being used on these trains, and also knew the mode and appliances for their being coupled with each other, or with the engine, or with other cars. It was his duty to use all necessary caution to ascertain the kind of car with which the coupling on this occasion was to be

made. This, I am of opinion, the proof shows he failed to do, hence the injuries which he received, which are to be regretted; but I cannot find from the proof that the receiver or his employes are in any way responsible for it. If the petitioner supposed these cars were too dangerous to be used on these trains, he should have so notified the receiver, or other proper officer of the road, and if they were continued, should have left the employment; but no such complaint is shown. Even when the machinery and appliances are defective, if the defect is known to the employe, and he continues in the employment, and takes the risk, and especially when he makes no complaint, he cannot recover for injuries received in consequence of such defect; but in this case no defect is shown or complained of.

The decided cases referred to by the learned counsel for the petitioner, when examined, are found not to be applicable to the facts in this case. The questions here presented under similar circumstances have often been before the courts, state and federal, and, so far as I am informed, have been decided against the claim of the employe, and was perhaps never more exhaustively considered than by Judge COOLEY in the case of the *Railroad v. Smithson*, 45 Mich. 212, 7 N. W. Rep. 791, since considered the settled rule on this question.

The result is that the prayer of the petitioner must be denied, and petition dismissed.

NOTE.

MASTER AND SERVANT—RISKS OF EMPLOYMENT. As between a railroad company and its employes, the company is required to exercise only reasonable and ordinary care and diligence in the selection of machinery and instrumentalities for the operation of its railroad. It is not necessarily negligent in the use of defective machinery, which is not obviously defective. *Railroad Co. v. Wagner*, (Kan.) 7 Pac. Rep. 204; *Railroad Co. v. Ledbetter*, (Kan.) 8 Pac. Rep. 411. An employer is not bound to furnish the safest machinery, nor to provide the safest means for its operation, in order to escape liability for injuries resulting from its use. If the machinery be of an ordinary character, and such as, with reasonable care, can be used with no more danger than is reasonably incident to the business, it is all that can be required. *Rummell v. Dillworth*, (Pa.) 2 Atl. Rep. 355, and note. The fact that cars, which a brakeman is required to connect, have draw-heads different in make, style, and construction, which fact contributes to an injury received by the brakeman, is held not to constitute negligence on the part of the company. The increased risk arising from the use of cars with draw-heads of different makes is one which the employe assumes on entering the service. *Woodworth v. Railway Co.*, 18 Fed. Rep. 282; *Kelly v. Railroad Co.*, (Wis.) 23 N. W. Rep. 890. In general, as to the rules which determine the risks assumed by a servant on entering the service of his employer, and what have been held to be such risks, see *Hewitt v. Railroad Co.*, (Mich.) 84 N. W. Rep. 659, and note; *Brown v. Railroad Co.*, (Iowa,) 21 N. W. Rep. 198; *Piquegno v. Railroad Co.*, (Mich.) 17 N. W. Rep. 232; *Railroad Co. v. Bradford*, (Tex.) 2 S. W. Rep. 595; *Scott v. Railroad Co.*, (Or.) 13 Pac. Rep. 98; *Hickey v. Taaffe*, (N. Y.) 13 N. E. Rep. 286; *Wuotilla v. Lumber Co.*, (Minn.) 38 N. W. Rep. 551.

HALL *et al.* v. WEAVER.

(Circuit Court, D. Oregon. February 29, 1888.)

1. PRINCIPAL AND SURETY—SURETY OR GUARANTOR—BOND TO SECURE ADVANCES.

A person who executes a bond with another as his surety, conditioned for the payment of moneys advanced to the principal by the obligee therein, is a surety, and not a mere guarantor, and is not entitled to notice of the acceptance of the bond by the obligee.

2. SAME—ALTERATION OF INSTRUMENT—PROCURING ATTESTATION TO SIGNATURE OF SURETY.

When a person executes a bond as surety, and leaves it with his principal for delivery to the obligee, and before doing so the former procures a person to attest the signature of the surety, who is not authorized to do so, such attestation is not an alteration of the instrument that impairs or affects its value as an instrument of evidence in the hands of the obligee, because it was made before delivery.¹

(Syllabus by the Court.)

At Law. On motion for new trial.

L. B. Cox, for plaintiffs.

Edward B. Watson, for defendant.

DEADY, J. On December 23, 1886, the plaintiffs, citizens of the state of Illinois, and doing business in Chicago, under the firm name of T. W. Hall & Co., commenced this action against the defendant, George Weaver, a citizen of Oregon, as administrator of Hans Weaver, deceased, to recover the sum of \$8,503.09, with interest from said date, as and for money theretofore advanced to W. F. Owens on the security of the bond of said Hans Weaver.

On the trial it was admitted that since the commencement of the action the plaintiffs had received from parties to said bond the sum of \$3,663.10 on said demand, and the jury found a verdict for the plaintiffs for the remainder, \$4,839.99, for which sum, with \$171.20 costs and disbursements, the plaintiffs had judgment.

The defendant now moves for a new trial, and it will be necessary to a proper understanding of the matter to make a brief statement of the case.

It is alleged in the complaint that on January 7, 1886, the plaintiffs and W. F. Owens entered into an agreement whereby Owens was to purchase wool in Oregon, and consign the same to the plaintiffs for sale at Chicago, and on the receipt of a consignment of wool or an agreement to consign, together with a note equal to 10 cents a pound of said wool, the plaintiffs were to advance money to Owens on his drafts, to enable him to purchase wool; that in consideration of said undertaking on the part of the plaintiffs, said Owens as principal, and Robert Phipps, Noah Cornutt, and Hans Weaver as sureties, all of the county of Douglas and

¹On the subject of the alteration of written instruments, see *Davis v. Eppler*, (Kan.) 16 Pac. Rep. 798, and note.

state of Oregon, on January 7, 1886, executed and delivered to the plaintiffs their certain writing obligatory, in and by which they acknowledge themselves "held and firmly bound unto T. W. Hall & Co. in the full sum of \$20,000 gold coin of the United States, to be paid to said Hall & Co., their assigns or legal representatives, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents;" conditioned as follows: "That if the above bounden W. F. Owens shall well and truly pay unto the said Hall & Co., upon usual and proper demand, the sum or sums of money paid by said Hall & Co., or honored, so as to be paid on orders, checks, or drafts, overdrafts, notes, and demands, or any of them whatsoever, by or from said W. F. Owens, principal aforesaid, to the said Hall & Co., in course of business properly directed, then, and in that event, this bond shall become null and void, and of no effect; otherwise the same shall be, remain, and continue in full force, virtue, and effect."

It is also provided that "this bond shall not be construed so as to require the said Hall & Co. to advance any sum or sums of money except as they may see fit;" and that "the duration and existence of this bond and obligation may be terminated at the wish of the principal or any obligor," after due notice to Hall & Co., "and then only after all obligations and legal liabilities thereby assumed or arising therefrom have been fully and completely and in every respect legally discharged."

The writing purported to be signed and sealed by said Owens, Phipps, Cornutt, and Weaver, "in presence of C. M. Stephens and J. C. Simmons." Thereafter, on March 2 and April 9, 1886, and on four different days between said dates, the plaintiffs advanced Owens on his six promissory notes the sum of \$8,000, of which only \$322.11 was repaid by Owens; and the balance due thereon, with interest, amounted at the commencement of this action to \$8,503.09.

On September 25, 1886, Owens died intestate and insolvent; and the claim has since been presented to the administrator of his estate, and allowed, but not paid for want of funds.

On May 26, 1886, Hans Weaver died, leaving a will, and on June 22, 1886, the defendant was appointed administrator with the will annexed, to whom the claim of the plaintiffs was duly presented for allowance, and by him rejected. The answer of the defendant consists of denials of any knowledge or information concerning the alleged agreement, bond, notes, and advances sufficient to form a belief.

On the trial the plaintiffs called the subscribing witness, C. M. Stephens, who testified that he signed the bond as a witness at the request of Owens, but that the other persons whose names appeared signed to the bond, as the makers thereof, were not present, and he did not see them or either of them sign the same. The plaintiffs then read in evidence the return of the marshal on a subpoena commanding him to summon J. C. Simmons, the other subscribing witness to the bond, to testify in this case, to the effect that said Simmons could not be found in the state. And thereupon, after the plaintiffs had given evidence tend-

ing to prove that the signature of Hans Weaver, appended to the bond, was his genuine signature, the same was admitted in evidence. In the course of the trial the court ruled that, (1) the addition of Stephens' name to the bond as a subscribing witness, after its execution by the makers thereof, under the circumstances disclosed in his evidence, did not affect it as an instrument of evidence in the hands of the plaintiff, and instructed the jury that if Weaver signed the bond, as alleged, he was bound by it, notwithstanding the subsequent attestation by Stephens; and (2) the writing in question is not a simple guaranty, but a direct and absolute undertaking by the makers thereof, to pay Hall & Co. the advances made by them to Owens in the course of the business in which he was engaged, and instructed the jury it was not necessary that the plaintiffs should have given Weaver notice of the acceptance of the bond.

The motion for a new trial is based on some eight grounds, but those that were noticed in the argument may be condensed into two: (1) The bond or instrument sued on is a guaranty, and unless notice of the acceptance thereof by the plaintiffs was given to the obligors or makers, they are not liable thereon; (2) the alteration of the instrument by the addition of the name of a subscribing witness, C. M. Stephens, rendered it void.

In deference to the strenuous contention of counsel for the motion for new trial I have re-examined the question whether the writing signed by Owens and Weaver on January 7, 1886, made the latter a surety for or only a guarantor of the former, and I find neither reason nor authority for holding Weaver's undertaking to be anything different from or less than that of a surety. The terms "surety" and "guarantor" are often used in the books loosely and indiscriminately. They occupy certain ground in common, but there is a marked distinction, both in the form and effect of the undertakings.

This distinction is nowhere more clearly stated than in Brandt on Suretyship and Guaranty. The author says (section 1:)

"A surety or guarantor is one who becomes responsible for the debt, default, or miscarriage of another person. The words 'surety' and 'guarantor' are often used indiscriminately as synonymous terms; but, while a surety and guarantor have this in common, that they are both bound for another person, yet there are points of difference between them which should be carefully noted. A surety is usually bound with his principal in the same instrument, executed at the same time, and on the same consideration. He is an original promisor and debtor from the beginning, and is held, ordinarily, to know every default of his principal. Usually he will not be protected, either by the mere indulgence of the creditor to the principal, or by want of notice of the default of the principal, no matter how much he may be injured thereby. On the other hand, the contract of the guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often founded on a separate consideration from that supporting the contract of the principal. The original contract of the principal is not his contract, and he is not bound to take notice of its non-performance. He is often discharged by the mere indulgence of the creditor to the principal, and is usually not liable unless notified of the default of the

principal. * * * The principal and surety, being directly and equally bound, may be sued jointly in the same suit; while the guarantor, being bound by a separate contract, and only collaterally liable, cannot usually be joined in the same suit with the principal."

In *Kearnes v. Montgomery*, 4 W. Va. 29, it is said:

"The contract of a guarantor is collateral and secondary. It differs in that respect from the contract of a surety, which is direct; and in general the guarantor contracts to pay it, by the use of due diligence, the debt cannot be made out of the principal debtor; while the surety undertakes directly for the payment, and so is responsible at once if the principal debtor makes default."

In *Courtis v. Dennis*, 7 Metc. 518, it was said:

"The terms 'sureties' and 'guarantors' are often confounded, from the fact that a guarantor is, in common acceptation, a surety for another. The rules, however, of the common law as to sureties, are not strictly applied to guarantors, but rather the rules of the law merchant; and the true distinction seems to be this: That a surety is in the first instance answerable for the debt for which he makes himself responsible; and his contracts are often specialties, while a guarantor is only liable where default is made by the party whose undertaking is guaranteed; and his agreement is one of simple contract."

Now, the undertaking of Weaver, within all these definitions and distinctions, is that of a surety. He became absolutely bound in the same writing and on the same consideration with his principal, Owens, to pay the plaintiffs whatever sums of money they might advance for him, concerning which he might make default. In other words, his contract and liability are the same as his principal's. He bound himself to do exactly what Owens did; and whatever was a breach of the bond as to Owens, was so as to Weaver. His undertaking was an original one, joint and several with Owens, and in no sense collateral to it.

On the other hand, this contract differs from that of a guarantor, which is separate from and collateral to that of the principal, and founded on a distinct consideration.

Cox v. Machine Co., 57 Miss. 350, is a case on all fours with this. Cox became bound in the same instrument with Gibson to the sewing-machine company, that the latter would pay all indebtedness that he might incur to the company. Gibson made default, and in an action on the bond against Cox he insisted that he was a guarantor, and not a surety, and was not liable as such, because he had not received notice of the acceptance of the bond. The court held that Cox was liable as a surety, and not entitled to notice of acceptance of the bond. In the course of his opinion Mr. Chief Justice GEORGE cited with approbation Mr. Brandt's definition of a surety, and his statement of the difference between that and a guarantor.

The contention of counsel for the motion for new trial is largely based on the authority of three cases from the state of Michigan, namely, *Bank v. Kercheval*, 2 Mich. 508; *Locke v. McVean*, 33 Mich. 473, and *Jeudevine v. Rose*, 36 Mich. 54. In each of these cases a bond was signed by a person as surety with a principal, conditioned for the due performance of some act—as the payment of money—by the latter. In actions

brought on these several bonds against the sureties therein, the court held the defendants not liable on grounds which in no way involved the question whether the writings were mere guaranties or absolute undertakings for the debt or default of the principal. In the course of the opinions the terms "surety" and "guarantor" are used interchangeably and indiscriminately, without any reference to the technical distinction between them.

They are all cases of surety, and not guaranty, and were evidently decided on that assumption, no question being made as to the character or effect of the writings in this respect.

For instance, in *Bank v. Kercheval*, *supra*, the court holds that the bond given to the bank to secure future advances, not exceeding \$3,000 at any one time, is a continuing guaranty, and cites *Douglass v. Reynolds*, 7 Pet. 113, which was a case of simple guaranty, in support of this conclusion, but refuses to follow that case so far as to hold that notice of the acceptance of the guaranty must have been given to the surety therein, because the facts of the two cases in this respect are not similar, and said, "We think no notice of acceptance other than that which the law implies was necessary in the case before us."

The latest statement of the rule requiring notice of the acceptance of a guaranty is found in *Machine Co. v. Richards*, 115 U. S. 527, 6 Sup. Ct. Rep. 173. In speaking for the court, Mr. Justice GRAY, after referring to *Davis v. Wells*, 104 U. S. 159, wherein the cases on the subject in that court from *Douglass v. Reynolds*, 7 Pet. 113, to *Adams v. Jones*, 12 Pet. 213, are reviewed, and, as I think, limited and straightened out, sums up the rules there laid down as follows:

"A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But, if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract."

It is apparent from this summary of the rules governing the contract of guaranty that the contract sued on in this case, by which Weaver undertook directly, with and as surety for Owens, for the payment of advances made by the plaintiffs to the latter, is not such a contract.

As to the second point. The rule of the common law concerning the alteration or spoliation of writings was very strict. It was indiscriminately punitive, and did not attempt to adjust the consequences of the act according to the justice and propriety of each particular case. Accordingly, not only a material alteration made by a party to the writing without the consent of the other, but one made by a stranger without the consent of the party in whose control the instrument was, would avoid it as to the party making the alteration or having the control

thereof; and even an immaterial alteration by a party without the consent of the other would have the same effect.

Gradually the rule became relaxed or questioned as to alterations made by a stranger without the agency of the party, and even alterations made by a party, when immaterial. *Adams v. Frye*, 3 Metc. 104; 1 Whart. Ev. § 622 *et seq.*

Finally, a reasonable and comprehensive rule was declared in the New York Code of Civil Procedure, (§ 1794,) which is section 778 of the Code of Civil Procedure of this state. It provides:

"The party producing a writing as genuine, which has been altered, or appears to have been altered, after its execution or making, in a part material to the question in dispute, shall account for the appearance or alteration. He may show that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise."

As there is no evidence when or under what circumstances the name of J. C. Simmons was signed to the bond as a witness to its execution, the presumption is that it was duly done, and before the delivery of the instrument. 1 Whart. Ev. § 629. The effect of signing the name of Stephens to the instrument as a witness to its execution is to require the party offering it to call him as a witness thereto, if he be living or within the state; otherwise his handwriting, as well as that of the party, must be proved. Code Civil Proc. Or. § 751.

Does it then appear how this alleged alteration is material, or is of any advantage to the plaintiffs? The party offering the bond with this signature upon it is bound to produce the subscribing witness, and examine him as to the execution thereof by Weaver, or account for his absence by showing that he is dead or without the state; and even then he must prove the handwriting of the absent witness, as well as that of the party himself; whereas, if the name of the witness was not on the bond, proof of the handwriting of the party would be sufficient. And, as was said in the case of a similar alteration, (*Adams v. Frye*, *supra*, 105:)

"The terms and stipulations originally contained in the body of the bond have not been altered in substance, nor even in letter. The attestation by one or more witnesses of the due execution of a bond is not requisite to its validity, either by common law or by statute. It is a perfect instrument, and may be enforced in a court of law without any such attestation. The change produced in the character of the instrument by this alteration is not one which thus affects in any degree the validity or construction of the contract of the parties. At most, it only operates on the course of the proceeding in a trial at law, as to the nature and kind of evidence required to prove the execution of the instrument."

It is true that, notwithstanding these suggestions, the court in *Adams v. Frye* held that the procurement by the obligee in a bond of the signature thereto of a person as a witness, after the delivery of the same, if done fraudulently, with a view to gain any improper advantage, would avoid the instrument as to such obligee, and that the act of procuring such sig-

nature to a bond by a person who was not present at its execution nor authorized to attest it, is *prima facie* evidence of a fraudulent intent; but this conclusion was reached under the rule of the common law, which makes the proof of the handwriting of an absent witness sufficient evidence of the execution of the instrument. *Valentine v. Piper*, 22 Pick. 85; 1 Whart. Ev. § 726.

This is evident from the reasons given by the court for the ruling. After stating that by this alteration a material change was made as to the nature and kind of evidence which might be relied on to prove the plaintiff's case, the court says:

"By adding to the bond the name of an attesting witness, the obligee became entitled to show the due execution of the same by proving the handwriting of the supposed attesting witness, if the witness was out of the jurisdiction of the court. It is quite obvious, therefore, that a fraudulent party might, by means of such an alteration of a contract, furnish the legal proof of the due execution thereof, by honest witnesses swearing truly as to the genuineness of the handwriting of the supposed attesting witness; and yet the attestation might be wholly unauthorized and fraudulent."

But under the statute of this state proof of the handwriting of the absent witness is not enough. The handwriting of the party must also be proved; and the result is, the alteration would, in case of the absence of the witness, cast on the plaintiffs the burden of proving his signature, as well as that of Weaver's.

On the other hand, it may be said that in the case of such an alteration with a fraudulent purpose, the party would likely be prepared to prove the signature of the conveniently absent witness beyond a peradventure, which circumstance might have weight with a jury, and induce them to find, on otherwise light and unsatisfactory evidence, that the signature of the party to the instrument is genuine, because it had been attested by a subscribing witness. And on this view of the case I am inclined, on the whole, to say with the court in *Adams v. Frye*, *supra*, 107: "It seems to us that we ought not to sanction a principle which would permit the holder of an obligation thus to tamper with it with entire impunity."

And therefore it may be safer to hold, even under the law of this state, that the procurement by the holder of a writing or an obligee in a bond of the signature of a person as a subscribing witness thereto, who is not authorized to attest the same, is *prima facie* a fraudulent alteration thereof, and unless shown to be otherwise, will avoid the instrument as to him, or prevent his use of it as evidence in an action thereon. So far I have been considering the case as made in the argument of counsel for the defendant, and insisted on by them at the trial.

But the real case is a very different one. No alteration of a writing before execution, which includes delivery, affects its character or value as an instrument of evidence. Alterations before delivery are presumed to be made with mutual consent. The very act of delivering and receiving the writing implies so much. This is the doctrine of the common law. "The period after which alterations not mutual are fatal is that of the final

delivery of the document." 1 Whart. Ev. § 625; and Code Civil Proc. (§ 778) says the same: "The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution or making, in a part material to the question in dispute, shall account for the appearance or alteration."

The attestation of Stephens was made at the request of Owens, and this authorized him to attest the same, so far as Owens' signature is concerned. But the attestation being unqualified, the reasonable inference is that it included the signature of the other obligors, as well as Owens, and so it was doubtless intended.

Weaver and his co-obligors who signed this bond and left it with the principal therein to deliver to the plaintiffs, thereby constituted the latter their agent for that purpose. *Belloni v. Freeborn*, 63 N. Y. 389. Before the delivery was made this alteration took place. It consisted of an attestation which, for aught that appeared, was authorized and genuine. So far as the plaintiffs are concerned it was the act of Weaver and his co-sureties acting through the agent and co-obligor, Owens, prior to the delivery to them of the writing.

To hold that the value or admissibility of the writing as an item of proof or an instrument of evidence is thereby impaired or affected in the hands of the plaintiffs, would be simply monstrous.

The motion for a new trial is denied.

HECHT *et al.* v. WEAVER.

(Circuit Court, D. Oregon. February 19, 1888.)

PRINCIPAL AND SURETY—BOND TO SECURE ADVANCES—DEATH OF SURETY.

The death of a surety in a bond conditioned for the repayment of money advanced to the principal within a definite period or before notice to the obligee of withdrawal therefrom, does not terminate his liability, and his estate in the hands of his administrator is liable for advances made after his decease.

(*Syllabus by the Court.*)

At Law. On motion for new trial.

L. B. Cox, for plaintiffs.

Edward B. Watson, for defendant.

DEADY, J. A motion for a new trial in this case was argued and submitted with the one in the foregoing case.

The action was commenced by the plaintiffs, who are citizens of Massachusetts, against the defendant, as administrator of the estate of Hans Weaver, deceased, to recover the sum of \$4,475.90 on a bond executed to the plaintiffs by Philip Peters, Hans Weaver, Robert Phipps, as sureties, and W. F. Owens, as principal, on October 24, 1884, in the penal sum of \$15,000, conditioned that if Owens shall pay on demand the

sums of money advanced to him by the plaintiffs, then the obligation to be void, and otherwise to remain in full force. The bond also contains a stipulation to the effect that its duration might be terminated on notice to the obligee, after all liabilities thereunder were discharged. The bond purported to be signed by the obligors, "in the presence of Lafayette Owens and T. C. Stearns," and the former, when called as a witness by the plaintiffs, testified that he signed the bond as a witness at the request of Owens, but the other parties thereto were not present, nor did he see them sign the same. Stearns was not called.

Weaver and Owens died, as stated in the foregoing case, and due demand was made upon their administrators for the balance due the plaintiffs, with similar results. The answer of the defendant was confined to a denial of any knowledge or information of the matters in controversy. On the trial the jury found a verdict for the plaintiffs for the sum of \$3,975.90, on which they had judgment.

The motion for a new trial is based on the same grounds as the one in the *Hall Case*, ante, 104, with the addition of the following:

It appears that some of the advances to Owens were made after the death of Weaver, and that no notice was given by the administrator to terminate the undertaking of the deceased. The court instructed the jury that Weaver's estate was liable in the hands of his administrator for these advances, and this instruction is claimed to be erroneous, and a new trial asked therefor.

On a careful examination of the authorities I have concluded that whenever the undertaking of the surety is for a definite period, as for the conduct of an officer during his term of office, or for the repayment of advances made to the principal in the bond until notice is given the obligee that the liability is terminated, the estate of the surety in the hands of his administrator is answerable for any default of the principal occurring after his death; and this is especially so where, as in this case, the surety bound himself, his "heirs, executors and administrators" for the performance of his undertaking. *Insurance Co. v. Davies*, 40 Iowa, 469; *Green v. Young*, 8 Greenl. 14; *Knotts v. Butler*, 10 Rich. Eq. 143; *Moore v. Wallis*, 18 Ala. 458; *Hightower v. Moore*, 46 Ala. 387; *Monbray v. State*, 88 Ind. 327. The motion is denied.

BEALL *et al.* v. CITY OF LEAVENWORTH.*(Circuit Court, D. Kansas. February 29, 1888.)*

JUDGMENT—ACTIONS ON—DEATH OF OWNER—LIMITATIONS.

In Kansas a judgment does not become dormant at the death of the owner, and an action brought thereon by his executor, more than one year after his death, but within one year after it became dormant, is not barred by Code Civil Proc. § 440, which provides that a judgment can only be revived, or made the basis of an action, within one year after it becomes dormant.

At Law. Action on judgment.

Rossington, Smith & Dallas, for plaintiffs.

Wm. C. Hook, for defendant.

FOSTER, J. This is an action brought by John A. Beall and Charles W. Sloane, executors of Henry W. Benham's estate, on two judgments recovered by their testator in this court against the city of Leavenworth. The first judgment was recovered on the 1st day of December, 1877, for \$586.20 and costs, which judgment was revived on the 29th day of November, 1882. The second judgment was recovered on the 30th day of November, 1880, for \$3,159.11 and costs. Benham died about the 9th day of June, 1884, and shortly thereafter letters testamentary were issued to his executors, and they brought this suit on the 18th day of December, 1885. Defendant sets up as answer to plaintiffs' claim that it is barred by the limitation of the statute for reviving or instituting suit on a judgment.

At the time of Benham's death, neither judgment had become dormant, under section 445 of the Civil Code of Kansas, but it seems the latter judgment had become dormant 20 days before this suit was brought, unless proceedings in *mandamus* had the effect to save it, as would the issuing of an execution. However that is not material. If the testator were alive, and had instituted this suit, there could be no question but he could maintain it. *Burnes v. Simpson*, 9 Kan. 658; *Kothman v. Skaggs*, 29 Kan. 6; *Baker v. Hummer*, 31 Kan. 325, 2 Pac. Rep. 808. In the cases above cited, the supreme court has repeatedly held that a judgment creditor may, if he choose, make his judgment the basis of an action, (within the time limited for a reviver of the same,) instead of reviving by motion and notice under the Code. It appears from the terms of the statute, as well as decided cases, that this can only be done within a year, without the consent of the opposite party. *Scroggs v. Tutt*, 23 Kan. 181; *Angell v. Martin*, 24 Kan. 334. Now, let us see what may be done in case of the death of a party to a judgment. Section 439, Civil Code, reads as follows:

"If either or both parties die after the judgment and before satisfaction thereof, their representatives, real or personal, or both, as the case may require, may be made parties to the same in the same manner as prescribed for reviving actions before judgment, and such judgment may be rendered and execution awarded, as might or ought to be given or awarded against the representatives, real or personal, or both, of such deceased party."

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The judgment does not become dormant, within the meaning of section 445, by the death of the judgment creditor. It does not cease to be a lien on the estate of the judgment debtor. It is not necessary to revive it as a dormant judgment under section 440. It comes to the hands of the executor or administrator as an asset of the estate; and the statute provides that he may be made a *party to the same*. It comes to his hands clothed with higher attributes than a mere chose in action, like a note or account. He is given a year in which he may apply to the court rendering the judgment and be substituted or made a party plaintiff, in the place and stead of his testator or intestate. That being done, he may issue execution; or, if it becomes dormant, he may revive it. But if he fails within the year to be made a party to the judgment record, he has lost his right in that behalf, and the judgment can only be made the basis of an action under the common law, and that within the time prescribed by the statute,—the same time within which the judgment creditor could have brought the action. In *Burnes v. Simpson*, 9 Kan. 658, it is forcibly implied, to say the least, that the sixth subdivision of section 18 of the Code would fix the period of limitation, which would have been five years from the time the right of action accrued, *i. e.*, from the date of the judgment; but in the later decisions of the supreme court of Kansas, it has been decided that the statute referred to does not fix the time within which the judgment creditor may bring his action. He may bring his suit at any time within the year after the judgment becomes dormant by a failure to issue execution. That might be within six years or sixty years from the rendition of the judgment. The date of the judgment is immaterial, but the date of its becoming dormant is all-important. *Kothman v. Skaggs*, 29 Kan. 6; *Baker v. Hummer*, 31 Kan. 325, 2 Pac. Rep. 808.

It cannot be necessary to cite authority to the point that the representative of a deceased person has the same period in which to bring suit that his testator or intestate would have had. It therefore necessarily follows that, as the first judgment had not become dormant, and the second judgment had been dormant but a few days, this suit is not barred, and judgment must go for plaintiffs.

DOWS v. TOWN OF ELMWOOD.

(Circuit Court, N. D. Illinois. February 29, 1888.)

1. CONSTITUTIONAL LAW—TITLES OF LAWS—RAILROAD COMPANIES—MUNICIPAL AID.

Act III. April 17, 1869, (8 Priv. Laws 26th Gen. Assem. 873,) had for its object the legalization of an election held in the town of Elmwood, in Peoria county, on March 16, 1869, at which it was voted to subscribe for and take \$40,000 of the capital stock of a certain railroad over and above the \$35,000 which was on the same day subscribed for and taken in accordance with the provisions of the charter of the said company. These facts all appeared in the body of the statute, but the title was simply "An act to legalize a certain

election therein named." *Held*, in the absence of any decision by the courts of Illinois to the contrary effect, that the act was not in contravention of the constitutional provision of 1848, that every local or private law shall embrace but one subject, and that subject shall be expressed in the title.

2. RAILROAD COMPANIES—MUNICIPAL AID—DURATION OF BONDS.

Act III. March 9, 1869, (8 Priv. Laws, 26th Gen. Assem. 283,) amending the charter of the Dixon, Peoria & Hannibal Railroad Company, (2 Priv. Laws 25th Gen. Assem. 604,) authorized the counties, towns, etc., on the line of its proposed extension, to subscribe for stock in the bonds of such county, town, etc., said bonds to be payable at any time specified, "not exceeding 20 years from date," with interest, etc. The bonds issued under this act by the town of Elmwood, in Peoria county, bore date April 27, 1869, and were delivered on that day; but it was set out on their face that they ran 20 years from July 1, 1869, and drew interest from that date. *Held*, that the bonds were not void as in excess of the authority conferred by the act of March 9, 1869; the interval between April 27, 1869, and July 1, 1869, being only a reasonable time for issuing and delivering the bonds, and putting them on the market.

3. SAME—UNAUTHORIZED ISSUE—POWER OF LEGISLATURE TO RATIFY.

An issue of municipal bonds in aid of a railroad, not originally authorized, but which the legislature of the state might have authorized, and did in fact subsequently ratify, will be held valid in the federal courts, upon the well-settled doctrine of the United States supreme court as to the power of a state legislature, in the absence of any constitutional provision to the contrary, to ratify acts of a municipal corporation which it might originally have authorized, notwithstanding decisions of the state supreme court adverse to such doctrine, rendered after the issue of the bonds and the passage of the curative act. Following *Bolles v. Town of Brimfield*, 120 U. S. 759, 7 Sup. Ct. Rep. 786.

At Law. Action upon coupons of certain bonds issued by the town of Elmwood, Peoria county, in aid of the Dixon, Peoria & Hannibal Railroad Company.

Thomas S. McClelland and G. A. Sanders, for plaintiff.

Lyman Trumbull and H. B. Hopkins, for defendant.

BUNN, J., (*orally*.) The two objections in this case which seem to have most substance are—*First*, that the bonds of the town of Elmwood, issued to the railroad company in the month of April, 1869, are void for the reason that there was a failure to comply with the Illinois constitutional provision of 1848, that every local or private law shall embrace but one subject, and that subject shall be expressed in the title; and, *second*, that the bonds issued by the town exceeded the authority contained in the law of Illinois under which they were issued, in that they run over 20 years, which is the limit provided by the law. The court will consider these objections in their order. There are other objections made and discussed; but I desire only to notice these two objections to the validity of the bonds. The bonds are legal in form, and recite that they are issued in pursuance of certain statutes of the state of Illinois, under and by virtue of which the town bonds were voted by the legal electors of the town of Elmwood; and there are no questions of fact in the case to be submitted to the jury; and it becomes the duty of the court to decide the questions of law, and direct a verdict in the case, either for the plaintiff or defendant.

First, in regard to the objection, which has been strenuously urged and ably argued in behalf of the defendant, that the law of April 17,

1869, which legalized the town meeting held in the town of Elmwood in the month of March preceding, was not legally or constitutionally passed by the legislature of Illinois, because the provision before referred to of the constitution of Illinois was not complied with. The title of the act is, "An act to legalize a certain election therein named," and it is insisted on the part of the defendant that this is too general and indefinite to be a substantial compliance with the constitution. Many cases have been cited upon this subject which seem to be not wholly in point; but I am of opinion that the case of *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. Rep. 391, should rule the case at bar, there being no decision of the supreme court of Illinois holding the act, or any similar act, invalid for such a reason. In that case Justice HARLAN, delivering the opinion of the court, quotes with approval the language of the supreme court of New Jersey in *State v. Town of Union*, 33 N. J. Law, 350, as follows:

"The purpose of this constitutional provision was to prevent surprise upon legislators by the passage of bills the object of which is not indicated by their titles, and also to prevent the combination of two or more distinct and unconnected matters in the same bill."

Further said the court:

"It is not intended to prohibit the uniting in one bill of any number of provisions having one general object fairly indicated by its title. The unity of the object must be sought in the end which the legislative act proposes to accomplish. The degree of particularity which must be used in the title of an act rests in legislative discretion, and is not defined by the constitution."

I think the principle enunciated in that case, which is cited with approval by the supreme court of the United States, is applicable to the case at bar. The title to the act is, "An act to legalize a certain election named therein." There is but one subject embraced in the act, and that subject is expressed in the title. It is true, it is not given with so great particularity as was possible. But it is not misleading; the description of the subject of the act as stated in the title is apt and accurate; and the only possible objection is that it is too general, in that it does not locate the election by designating the time and place, and the question is whether this court, in advance of any decision on the subject by the Illinois courts, ought to say that the act is unconstitutional and void. Now, this court will not undertake to decide that the act of the legislature of a state is unconstitutional and void, unless it is clearly and palpably so. So long as the title of the act states the purpose or subject which is embodied in the act itself, although in very general terms, I think it is a substantial compliance with the provisions of the constitution. Mr. Justice HARLAN, in *Montclair v. Ramsdell*, *supra*, in commenting upon this and other cases, says:

"Upon the authority of these decisions, and upon the soundest principles of constitutional construction, we are of opinion that the objection taken to the act of April 15, 1868, as being (when construed as we have indicated) in conflict with the constitution of New Jersey, cannot be sustained. The powers which the township of Montclair is authorized to exert, however varied or extended, constitute, within the meaning of the constitution, one object, which

is fairly expressed in a title showing the legislative purpose to establish a new or independent township. It is not intended by the constitution of New Jersey that the title to an act should embody a detailed statement, nor be an index or abstract of its contents. The one general object—the creation of an independent municipality—being expressed in the title, the act in question properly embraced all the means or instrumentalities to be employed in accomplishing that object. As the state constitution has not indicated the degree of particularity necessary to express in its title the one object of an act, the courts should not embarrass legislation by technical interpretations based upon mere form or phraseology. The objection should be grave, and the conflict between the statute and the constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or, if but one object, that it was not sufficiently expressed by the title."

I think the case at bar comes within the reasoning and spirit of this case.

Upon the other point, that the bonds are not in compliance with the law in this, that they run longer than 20 years, which was the limit fixed by the act of March, 1869, I am of opinion upon that question also that the objection made by the defendant should be overruled. I think the bonds are in substantial compliance with the law, and that this case should be ruled by *Township of Rock Creek v. Strong*, 96 U. S. 271. The facts in that case were about the same as in this, the only difference being that the supreme court in the former say it does not appear from the record whether the bonds were issued and delivered on the day of their date or not. In the case at bar it appears from the declaration of the plaintiff that the bonds were dated April 27, 1869, and that they were issued and delivered on that day. It also appears in the evidence that they ran 20 years from July 1st following, and drew interest from that date, so that there was a lapse of about two months between the time of the issue and delivery of the bonds, and the time when they went into effect so as to draw interest. It is natural enough that a town and railroad company, in a transaction of that kind, should have a little time to get the bonds issued and delivered and put on the market, and the transaction perfected for which the vote of the town-meeting was taken, before the bonds should begin to draw interest in the hands of the holder; and it would not seem that two months was an unreasonable time for that purpose. It is true, they might have been dated ahead. Suppose they had been dated on the 1st of July, instead of the 27th of April, the case would not be different, in my judgment, from what it is now. They did not draw interest until that time, and only ran 20 years from the time they commenced to draw interest. I do not think the issuing and delivering of the bonds two months previous to the time the 20 years began to run, when they began to draw interest, is a material fact in the case.

In the case referred to in 96 U. S., the bonds were issued and dated September 10, 1872, and made payable 30 years from October 15, 1872, with interest from that time. They were not registered in the office of the auditor of state until October 17, 1872. So in that case

there was one month and five days between the date of the issue of the bonds and the time when the 30 years commenced to run, when they began to draw interest. In this case the interval was a little longer, but the cases, it seems to me, rest upon the same general principles. It is true, the court says it did not appear when they were issued and delivered. In this case they were issued on the day of their date; and in the case referred to, in the absence of evidence of the time of delivery, the presumption would have been that they were issued and delivered on the day of their date. If that be so, the cases are mainly the same. But however that may be, I do not think two months and three days between the date of the bonds and the time they commenced to draw interest in the hands of the persons purchasing them, is a material fact in the case. How it would have been if the bonds had been drawn so as to run and draw interest for any number of years more than the time specified in the act, the court is not called upon to determine.

As to the general question of the validity of these bonds, I think the case is ruled by *Bolles v. Brimfield*, 120 U. S. 759, 7 Sup. Ct. Rep. 736. That is the latest expression of the supreme court upon the question of the validity of a law of Illinois identical with this; and my judgment is it should be decisive of the validity of these bonds, and I have no doubt of the correctness of the principle which the supreme court has adopted in that and other cases. It seems to me very clear, on principle as well as upon the authorities, that wherever the legislature has power to authorize the different municipalities of the state to vote and issue bonds under authority of an act of the legislature, if the people vote those bonds voluntarily, and the action of the electors is afterwards confirmed and approved by the legislature, and their acts made binding upon the town by an express act ratifying their action, it stands precisely on the same footing as though there had been an enabling act in advance. I do not see why the vote of the town at a regular meeting, and subsequent ratification of the legislature, does not cover the whole question of power just as fully to all intents and purposes, and in the same manner substantially, as though the act had been authorized by the legislature in the first instance. That is what the supreme court decides in this case in 120 U. S. It is true, in some other cases the supreme court follow the decisions of the state courts upon those questions, where those courts have held a law unconstitutional before rights have become vested; but as far as anything appears to the court now, that case is decisive of the one at bar, and I think it is the duty of the court to direct the jury to find a verdict for the plaintiff for the amount of the coupons of which he was the owner at the time of the commencement of this suit.

WITTERS v. SOWLES *et al.**(Circuit Court, D. Vermont. March 1, 1888.)*

NEGOTIABLE INSTRUMENTS—ASSUMPSIT—COMMON COUNTS AGAINST MAKER AND INDORSER—JUDGMENT—EFFECT.

Under Rev. Laws Vt. § 938, which provides for a judgment against the defendants found liable in an action founded on contract, and in favor of those who are not liable, a judgment in favor of one of the defendants, upon the report of a referee, in an action brought upon the common counts in *assumpsit*, in which plaintiff sought to hold the defendants as makers of a company note, given to one of the defendants and indorsed to plaintiff, is not a bar to a judgment, in the same suit against the indorser, the indorsement being within the scope of the cause referred, since a common count may be amended so as to cover a count upon an indorsement of a note.

Exceptions to Report of Referee.

Chester W. Witters, pro se.

Edward A. Sowles, pro se.

WHEELER, J. This action was brought upon the common counts in *assumpsit*. By agreement of the parties it was referred to a referee, who has made report. It has now been heard on exceptions of the defendant Sowles to the report. From the report it appears that the Glens Falls Shirt Company made a note payable to defendant Sowles or order, which was indorsed by him to the bank of which the plaintiff is receiver. The plaintiff claimed that the defendants were the Glens Falls Shirt Company, and that they were liable as makers of the note. The referee has found against this claim, and that they were not so liable. On that finding the defendant Burton has judgment in his favor.

The plaintiff claims to hold the defendant Sowles as indorser. The defendant Sowles claims that he is not liable as indorser upon the common counts, and that the judgment in favor of the other defendant is a bar to any judgment against him in this suit. By the statutes of the state provision is made for judgment against the defendants found liable in an action founded on contract, and in favor of those who are not. R. L. Vt. § 938. The procedure of the state courts is adopted in common-law cases in the United States courts. Rev. St. U. S. § 914. Therefore that judgment in favor of defendant Burton was proper, and has no effect upon the liability of the defendant Sowles. Also, by that procedure, when a cause is referred, all is referred that belongs to it, and which might be brought into it by any proper amendment of the pleadings. *Eddy v. Sprague*, 10 Vt. 216; *Granite Co. v. Farrar*, 53 Vt. 585. The common counts may be so amended as to cover a count upon an indorsement of a note. *Austin v. Burlington*, 34 Vt. 506. Therefore this indorsement was within the scope of the cause referred to the referee. The exceptions to the report merely raise these questions.

Exceptions overruled, and judgment on report for the plaintiff against the defendant Sowles, for the amount of the note, \$5,736.44, ordered.

ROSENSTEIN v. MAGONE, Collector.

(Circuit Court, S. D. New York. March 3, 1888.)

CUSTOM DUTIES—COVERINGS—MATCH-BOXES—ACT CONG. MARCH 3, 1883, § 7.

Boxes containing matches, and being of use in the *bona fide* transportation of the matches to the United States, are free of duty under the seventh section of the tariff act of March 3, 1883, although the boxes are put to a use otherwise than in the *bona fide* transportation. The case of *Oberleuffer v. Robertson*, 116 U. S. 499, 6 Sup. Ct. Rep. 462, criticised, but followed.

At Law. Action to recover back custom duties.

This action was brought to recover duties alleged to have been exacted unlawfully upon boxes containing matches imported from Sweden. The matches were of two kinds. Some were known as "safety matches," and could be ignited only on a specially prepared surface; and the boxes containing them had on their edges a piece of such prepared surface. The others were known as "parlor matches," and could be ignited on any rough dry surface; and the boxes containing them had on their edges a piece of sand-paper. The boxes of both kinds were taxed at 100 per cent. *ad valorem*, under the proviso to section 7 of the tariff act of March 3, 1883, whereas the plaintiff claimed that both were properly duty free, under section 7 itself. It appeared on the trial that the boxes performed a function in the *bona fide* transportation of the matches into this country, though this function was slight, since these boxes were themselves packed several times in stronger packages and boxes. It also appeared that the boxes performed a function during the use of the matches in this country, and that the matches would have no appreciable commercial value in the markets of this country if not contained in such boxes.

Nelson Smith and *H. Applington*, for plaintiff.

Stephen A. Walker, U. S. Atty., and *Macgrane Coxe*, Asst. U. S. Atty., for defendant.

LACOMBE, J., (*orally*.) This case lies within a narrow compass, both as to the law and as to the facts. It calls for a construction only of section 7 of the act of 1883. The facts are few in number, and there is no dispute about them. The method in which these matches are packed; the method in which they are conveyed to this country, and how they are used when they are here; what happens to the boxes during use and afterwards,—is all proved in the case. It is a matter of common knowledge, without proof, and it is proved here, that while there may be no use of the box disconnected from the matches, there is a use made of the box disconnected from the transportation. Now, section 7, in its latter part, contains a proviso under one branch of which the government claims that these goods come. The proviso is as follows: "Provided that if any packages, sacks, crates, boxes, or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the *bona fide* transportation of goods to the United States, the same shall be subject to a duty of one hundred

per cent. *ad valorem*, upon the actual value of the same." If there were nothing here but this statute to be interpreted, I should feel no hesitancy whatever in holding that this phraseology imports that when these boxes or coverings are constructed upon a plan which facilitates and contemplates other use in connection with their contents while such contents are being themselves used, they are designed for a use other than in transportation to the United States. Under such a construction, if I did not direct a verdict for the defendant, he would certainly be entitled to go to the jury as to whether they found these particular articles fairly within the test of a double use. But that is not all that there is here. The supreme court, upon most elaborate argument, and with great care, have considered this entire subject, and have delivered an opinion in *Oberteuffer v. Robertson*, 116 U. S. 499, 6 Sup. Ct. Rep. 462. They there interpret or paraphrase this proviso which I have read as follows: "This," says the court, meaning the proviso, "implies that if the boxes or coverings of any kind are not of a material or form designed to evade duty thereon, and are designed to be used in the *bona fide* transportation of the goods to the United States, they are not subject to duty." With all due respect to the learned judge who wrote this opinion, I think that his paraphrase goes beyond the text or the intent of the statute; for while the statute provided that if there was a use for these boxes designed otherwise than for transportation, although the use for transportation was also designed, they should pay duty, the paraphrase would relieve them from the payment of duty, although they might be, and were, generally, put to an incidental use in connection with their contents other than that of transportation, provided they were *bona fide* used for the purpose of transporting goods. Still, that is the opinion of the supreme court, and it is controlling here, and I shall follow it.

The jury will render a verdict for the plaintiff, pursuant to the direction of the court, for \$407.27, with interest.

COLLINS v. WHITEHEAD *et al.*

(Circuit Court, D. Colorado. March 5, 1898.)

LIBEL AND SLANDER—SLANDER OF TITLE—DAMAGES—WEIGHT AND SUFFICIENCY OF EVIDENCE.

In an action for defaming one's title to land caused by filing for record a claim to have it conveyed, evidence that the plaintiff was thereby prevented from selling the land, and using the proceeds in his business, is sufficient to support a verdict for substantial damages, without further proof of special damages.

At Law. Motion for new trial
R. D. Thompson, for plaintiff.
B. F. Montgomery, for defendant.

HALLETT, J. Defendants are real-estate brokers in Denver. Plaintiff resides at Kansas City, in the state of Missouri, and owns a tract of land

near Denver. In the early part of last year defendants applied to plaintiff to purchase the land, and negotiations followed, which resulted in a proposition by the plaintiff to sell the land for \$15,000. To complete the transaction, plaintiff sent to the Union Bank of Denver a deed to be delivered to defendants on payment of the \$15,000, provided such payment should be made on the 5th day of March, 1887. Defendants claimed to have discovered some defect in the title, and did not take the deed on that day, but applied to plaintiff for further time in which to examine the title, and this request was refused. On the 7th day of March, 1887, defendants filed in the office of the recorder of deeds a paper which was duly recorded, as follows:

"Know all men by these presents, that whereas, on or about the 28th day of February, A. D. 1886, Andrew W. Whitehead and Edwin K. Whitehead, constituting the firm of Whitehead Brothers, of Arapahoe county, Colorado, bargained for and bought of Sewell G. Collins the undivided half of the east half of the north-east quarter, and the undivided half of the north-west quarter of the north-east quarter, all of section 23, township 4 south, of range 68 west, Arapahoe county, Colorado, for the sum and price of \$15,000, which sum and price said Sewell G. Collins agreed to accept in payment in full for said above-described land, and to convey the same by good and sufficient warranty deed to said Whitehead Brothers, or assigns, and whereas said Whitehead Brothers are ready and willing to comply with their part of said contract, and accept warranty deed to said land upon the terms agreed upon, and pay therefor the said sum agreed upon, and have made tender thereof to said Sewell T. Collins, and demanded conveyance of said lands as aforesaid: Now, therefore, this will give notice that said Whitehead Brothers claim the right to enforce said contract to convey said lands as aforesaid, and for damages for failure of said Collins to carry out said contract; and this statement of claim is filed for record in the office of the county clerk and recorder of said county to the end that a claim and lien may be created, and exist upon and against said lands hereinbefore described for the enforcement of said contract, or for damages, or for both.

ANDREW WHITEHEAD. [Seal.]

"EDWIN K. WHITEHEAD. [Seal.]

"WHITEHEAD BROTHERS.

"*State of Colorado, County of Arapahoe—ss.:* Personally appeared before me this 7th day of March, A. D. 1887, Andrew Whitehead and Edwin K. Whitehead, and acknowledge that they executed the foregoing instrument as their free act and deed, and as the free act and deed of said firm of Whitehead Brothers.

"Given under my hand and notarial seal this 7th day of March, A. D. 1887. [Notarial Seal.]

"ELMER W. MERRITT, Notary Public."

Upon demand by plaintiff afterwards made, defendants refused to revoke or cancel the paper, and plaintiff brought suit in the district court of Arapahoe county for such relief. He also brought this suit in the nature of an action for defamation of title, to recover damages for putting the paper on record. The theory of the case is that the paper marks a cloud on plaintiff's title which, until it was removed by the district court of Arapahoe county, hindered and prevented plaintiff from selling or otherwise disposing of the land.

On the trial plaintiff obtained a verdict for \$1,550 damages. Several questions were raised at the trial, and now again on motion for new trial,

of which we think that but one is worthy of consideration. That touches the measure of damages, and is beset with difficulties. At the trial plaintiff sought to show that the land depreciated in value after the paper was put on record; and if he had succeeded in that, his right to recover to the extent of the depreciation would be clear enough. But the evidence tended more to prove that the land had risen in value since the paper was filed than to the theory of depreciation; and so the jury was advised not to rely on that ground. It was thought also that malice was not sufficiently charged in the complaint to support a verdict for exemplary damages, although the evidence seemed to prove that the act of filing the paper was willful and without cause. Still the plaintiff was allowed substantial damages, without proof of such, except in so far as they might be disclosed in the transaction itself. Evidence was given to the effect that plaintiff was anxious to sell the property in order to obtain money for other enterprises, but not disclosing the nature of such enterprises. And the jury was told that every man may dispose of his own as he thinks fit; and, by way of illustration, that it often happens that men need money in their business affairs, and are compelled to sell property which they may wish to keep, in order to obtain it; and that any one who shall wrongfully interfere with such right of disposal should answer in damages as in the judgment of the jury may be reasonable under all the circumstances. If, in the opinion of the jury, putting the paper on record hindered or prevented the plaintiff in selling or otherwise disposing of his land, the act itself was unlawful, and the jury could return damages as to them seemed just. So understood, the case seems something like that in which a defendant failed to pay an incumbrance as he had agreed to do, (*Loosemore v. Radford*, 9 Mees. & W. 657;) or to satisfy a judgment as was his duty, (*Allen v. Conrad*, 51 Pa. St. 487;) or, being a banker, to pay a check with funds in hand, (*Rolin v. Steward*, 14 C. B. 595,)—in all which substantial damages were allowed without proof of special damage. It is not claimed that these cases are exactly in point, or that others may not be found which appear to be in conflict with them. But the principal on which they rest may be extended to the case at bar, and sound reason seems to require it.

Certainly one who wantonly puts on record such a paper; apparently with the intent to compel the owner of the property to come to terms with him, ought not to have refuge in the technicalities or the weakness of the law. The injury to plaintiff was real, however difficult the proof of it may be. He was compelled to bring suit to remove the cloud from his title, and, for the time, his property was useless to him. It would be a reproach to the law to give only nominal damages in such a case, and, if anything substantial is to be allowed, it cannot be claimed that the verdict is excessive. The motion for new trial will be overruled.

BREWER, J. I did not sit in the trial of this case, but I heard with my brother, HALLETT, the argument on the motion for a new trial. And while the question is a doubtful one, yet I think substantial justice has been done, and the verdict ought to stand.

BROWN v. FINN.

*(Circuit Court, D. Colorado. March 6, 1888.)***BANKS AND BANKING—STOCKHOLDERS—TRANSFER OF STOCK TO DIRECTOR WITHOUT HIS KNOWLEDGE—FAILURE TO REPUDIATE.**

Where a man, elected a director and vice-president, and assuming the active management of a bank, being bound by a statute to own a certain number of shares, and presumed to know the condition of the books of the bank, not only as to whether the required number of shares are held by him, but whether there are the required number of stockholders, and who they are, does not return a dividend paid him by the bank at a time when it was insolvent, upon stock transferred to him without his knowledge prior to his election as director and vice-president, and does not repudiate the transfer, except by a return of the dividend to the supposed owner of the shares, he must be held the owner of the stock thus transferred to him on the books.

At Law. On motion for new trial.

Wolcott & Vaih, for plaintiff.

Parsons & Lyles and Patterson & Thomas, for defendant.

HALLETT, J. Sam Brown against Nicholas Finn is an action upon a statute of the United States, to recover a sum due from defendant as stockholder in the First National Bank of Leadville, and the question which arose upon the trial and upon the motion for a new trial was whether Finn was in fact a stockholder in that bank at the time of its failure. Upon the facts as disclosed in evidence, the jury found a verdict, by direction of the court. It appeared in evidence that Mr. De Walt, as president of the bank, had, at some time in the fall of 1883, transferred a number of shares to Mr. Finn, and thereupon he became vice-president of the bank, and entered into the active management of its affairs. At or about that time, Mr. Sauer, who had been cashier of the bank, resigned from that position, and Mr. Finn became acting cashier, although not chosen to that position. I believe he became a director at the same time, as was perhaps necessary to qualify him as vice-president of the institution. Some time later,—a month or two perhaps,—he purchased certain shares, 20, I think, of Mr. Sauer. His position is, and he offered evidence to show that at that time and afterwards until January, 1884, he knew nothing of the matter of the transfer of shares to him by De Walt previous to his election as a director and vice-president of the bank. In January, 1884, about the first of that month, he became aware of the transfer of these shares by the circumstance that there was declared by the board of directors a dividend of 25 per cent. upon all of the shares, as well those which were transferred to him by Mr. De Walt as the shares which he had purchased from Sauer, and this dividend was put to his account. In that way he became apprised of it. He sought immediately—within a few days—to repudiate the transfer of these shares, not by having the transfer enrolled upon the books, but by informing Mr. De Walt that he did not assent to that transaction, and paying to him the amount of the dividend which was attributable to those

shares. Upon these circumstances he insists that he is not to be charged in respect of the shares which came from De Walt. Admitting his liability as to the others which he obtained from Sauer, he paid to the receiver the amount coming against him under the statute upon those shares, but declined to pay the amounts which would arise, being the par value upon the shares transferred by De Walt to him; and this suit is for the amount upon those shares, and also for the dividend which was paid him on the 20 shares.

Upon these facts the question obviously turns upon whether Mr. Finn, acting as vice-president and as cashier of the bank, and active in its affairs during the time when these shares transferred to him by De Walt stood in his name upon the book, is to be charged; and if not so, whether, when he ascertained that the shares were in his name, in the early part of January, 1884, he was bound to do more than he did towards repudiating the transfer to him.

Now, upon the first proposition that he is chargeable with notice of the transfer of these shares to him, although he knew not of it, I think the principle is clear enough; and there are several authorities which sustain that view,—two in particular I have brought here.

The first is *Ex parte Brown*, 19 Beav. 97. Dr. Brown was a director of an insurance company called the "Newcastle-upon-Tyne." He had owned some shares in this company, and, as in the case of the Leadville bank, a man named William Henry Brockett had assumed chief control over the affairs of the company. In the language of counsel in discussing the case before the court, he had become the company. He was managing its concerns, and no one else who had been interested in it was giving much attention to its affairs. Dr. Brown sold his shares to Brockett, and gave him directions in respect to the transfer of them; but these directions were not carried out; and certain rules of the company—certain provisions incorporated in the certificate of incorporation—were not followed in respect to the transfer of the shares. In July, 1848, Brockett offered to buy Brown's shares at £1 each. Brown accepted the offer, and on the 9th of the same month gave notice, according to the usual practice, that he had sold his shares to Brockett, to whom he requested them to be transferred. On the first of August he received £75 from Brockett, and handed him his certificate, and afterwards had nothing to do with the company. Brown, in his affidavit, stated that during all the time he was director he never recollected any certificate being produced at the meeting of directors for the purpose of being canceled, and so far as he knew he had complied with all the formalities. There was, however, no entry in the register book, the old certificates had not been canceled, new ones had not been issued, there was no approval of the transfer, and, in short, none of the requisite formalities had been complied with. A clerk, in his affidavit, stated that before 1843 the mode of procedure as to transfers was to give notice to the board of the proposed transfer, and of the name of the purchaser, and, on the purchaser being approved, his name was entered in the register book, the old certificates were canceled, and new ones issued; but after 1843 the proper

number of directors never attended, and the approval was by less number; and in and after 1843 Brockett was himself the entire board.

It is contended in this case that De Walt was the entire board, and he made the dividend, and did all things that were done there without authority from any one.

At the time of Brown's transfer, Brockett, it was alleged, had 100, or at least such a number of shares as, together with Brown's, to exceed the prescribed limit of 100 shares. The significance of that is, by the charter, or some regulation of the company, no one of the members could hold more than 100 shares. And that is the matter of which the master of the rolls talks first in his opinion. Afterwards he says:

"But the circumstance which has materially influenced my judgment, and to which I principally refer in this case, is this: Mr. Brown was one of the directors of the company; he therefore knew that by the eighth clause of the company's deed no business could be properly transacted unless five directors were present, and consequently that it was not in the power of the managing director alone to transact any business of this description for the company. In a former case (and there are other authorities establishing the same principle) I held that a shareholder of the company is not bound to have knowledge of what is contained in the books of the company; that he is not bound by any acquiescence in entries in books, which are merely produced at public meetings, and which he might, if he pleased, then look at; but as regards the directors of a company, the case stands on a totally different footing. A person when he becomes a director accepts a trust which he undertakes to perform for the benefit of the company. If, in the due performance of that trust, he must necessarily have acquired certain knowledge, it appears to me to be but fit that he should be charged with the knowledge of those facts which it was his duty to have become acquainted with. It is merely saying that a person shall be held to know that which it was his bounden duty to know. It appears to me that Mr. Brown was bound to know what took place at the meetings of the board of directors, of which he was a member, and that when he agreed to sell Mr. Brockett seventy-five shares he knew that Mr. Brockett could only hold 100 shares in the company, and that any entry of more was irregular and improper; that it was his duty to know, and that he had the means and opportunity of ascertaining, how many shares Brockett then held; and that he was not entitled to hold seventy-five additional shares. I must hold Mr. Brown to have had knowledge of that which he ought to have known, and whether he had actual knowledge of it or not, is, in my opinion, immaterial for the present purpose."

The other case is from the supreme court of Nebraska.¹ This was an action by the Merchants' Bank against Rudolf and others; and Rudolf, one of the defendants, was a director of the bank. Lewis & Marsh, who were concerned in the transactions out of which the liability of the defendants arose, also had one member of their firm in the bank. Rudolf & Co. pleaded, among other things, that these defendants were sureties, as plaintiff (that is, the bank) well knew; that, after maturity of the note, Lewis & Marsh requested these defendants to become surety on other paper, which they refused to do unless this note had been paid; and, for the purpose of ascertaining this fact in that regard, went to plaintiff's bank, and the cashier there in charge, (stating the purpose of

¹ Merchants' Bank v. Rudolf, 5 Neb. 537.

the inquiry,) and inquired in reference to the payment of the note in suit, and were by the cashier informed that the note was all paid except a small balance, against which the bank held ample security; and that Eaton, the cashier, at a number of other times when engaged in the negotiation of business of the bank, to induce these defendants to become surety for Lewis & Marsh on other paper, the proceeds of which went to the bank on account of Lewis & Marsh, said this note had been paid; and that these defendants, in faith of these representations, went upon the paper of Lewis & Marsh in the sum of more than \$7,692, on which they have since been required to pay, and have paid, sums amounting to \$7,692; that these defendants at the time these representations were made, and for long after, were indebted to Lewis & Marsh in the sum of \$6,223, from which indebtedness, but for the faith and credit given to such statements, these defendants could and would have saved themselves harmless, and have paid this note; that this indebtedness these defendants paid to Lewis & Marsh long before any notice that this note was yet unpaid, and Lewis & Marsh, before said notice had become utterly insolvent; and these defendants are remediless, that Lewis & Marsh, after maturity of the note, made large deposits of money and collections with the plaintiff, and that the plaintiff took and held ample collateral security from Lewis & Marsh for the payment of the note, which might have been by the plaintiff realized and retained; and particularly that, just before the note in suit was due, Lewis & Marsh deposited with the plaintiff certificates of deposit of the Washington Bank of Iowa, in the sum of \$4,347.35, directed to be collected and credited on the note; that plaintiff knew the defendants to be sureties only, and that plaintiff allowed Lewis & Marsh to check out their monies, and also applied the proceeds of the Washington Bank certificates to payment of other indebtedness of Lewis & Marsh, without consent or knowledge of defendants, and to their prejudice as sureties, depriving them of their right of subrogation; that Lewis & Marsh are insolvent, and defendants remediless." Now, this defense on the part of strangers to the bank obviously would be perfectly good, and so the court holds; but the defendants were not strangers to the bank, on account of one member of the firm being of the board of directors; and as to their standing in that respect, how this circumstance affected them, the court says:

"But while this is conceded to be the general rule, it is urged on the part of the plaintiff that these defendants are not in a situation to claim its protection, in consequence of the relation which Rudolf bore to the bank, and also to his co-defendant, Deck. It is insisted that, being the last president, and one of the directors of the bank, he was in a situation which required him to know the condition of its business, and must be conclusively presumed to have known whether said note had been paid or not. No case directly in point has been cited, but we apprehend that the rule contended for is the correct one. In *Morse on Banks and Banking*, it is said that 'the general control and government of all the affairs and transactions of the bank rests with the board of directors. For such purposes the board constitutes the corporation, and uniform usage imposes upon them the general superintendency and active management of the corporate concerns. They are bound to know what is done beyond the merest matter of daily routine, and they are bound to know

the system and rules arranged for its doing. Whatever knowledge a director has or ought to have officially, he has or will be conclusively presumed at law to have, as a private individual. In any transactions with the bank, either on his own separate account or where others are so jointly interested with him that his knowledge is their knowledge, he and his joint contractors will be affected by this knowledge which he has or which he ought, if he had duly performed his official duties, to have acquired.' "

Now, it must be assumed that Mr. Finn, when he became a director of this bank, and its vice-president, and assumed the duty of active management, was advised of the statute which required him to be a stockholder to a certain extent; that is, as to a certain number of shares. It must also be assumed that he had knowledge, or immediately became acquainted with the condition of the books; not only as to whether any shares were held by himself, but who were the stockholders in the bank, —whether there was the requisite number of stockholders, and who they were. Any investigation upon that subject would have led to the discovery that he was a stockholder to the extent of these shares (50.) And therefore, upon the authority of these cases, it must be assumed that he had the knowledge that the shares were standing in his name; and that is a presumption, whether it stands upon estoppel or otherwise, which rests in the general policy in relation to these concerns, —the general policy of the law, which must hold those who are active in setting up and maintaining a corporation to some knowledge of the condition of its affairs. So, also, as to his duty when he became apprised of the condition of things early in January. In the condition of the bank, with a flagrant and most outrageous act of swindling in declaring a dividend of 25 per cent. in an insolvent concern, upon the record of which it must be presumed he had knowledge, it was his duty to repudiate the transfer of these shares at once; he could not allow it to remain for a day. But he allowed his name to stand there, and all he did was to return the money to Mr. De Walt, who he supposed was the owner of these shares; he did not return the money to the bank from whence it came. I do not think the case touches upon the question whether a party shall be charged as a stockholder in a bank or other corporation without his consent. It is conceded that as a stockholder only one cannot be so charged. The authorities are numerous, and stand upon the soundest reason, that if one be put upon the books as a stockholder, without his consent, he shall not be held in respect to such stock; but when he concerns himself in the management of the corporation he vouches for its integrity, stands before the world as indorsing and maintaining it, and he must be liable for whatever the books show in respect to its condition.

The motion for a new trial will be overruled, and judgment entered on the verdict.

UNITED STATES v. MASON.

(Circuit Court, N. D. California. March 5, 1888.)

1. SEAMEN—DESERTION—SHIPPING COMMISSIONERS' ACT, § 51, 17 St. 262.

The provision of section 51 of the act of June 7, 1872, carried into section 4596, Rev. St., relating to shipping commissioners, making desertion an offense, since the passage of the act of June 9, 1874, (18 St. 64,) has no application to coasting vessels navigating the Pacific ocean between the ports of San Francisco and San Diego, in the state of California.

2. SAME—STATUTES—REPEAL BY REVISED STATUTES.

The Revised Statutes, though adopted after the passage of the said act of June 9, 1874, do not repeal the provisions of the latter act.

(Syllabus by the Court.)

Information for Desertion against a seaman.

Geo. W. Towle, for plaintiff.

H. W. Hutton, for defendant.

SAWYER, J. This is an information for desertion, against a party who shipped as a seaman on the steam-ship *Queen of the Pacific*, for a voyage from San Francisco to San Diego, in the state of California, and return. It is framed under section 51 of the shipping commissioners' act of June 7, 1872, (17 St. 262), carried into the Revised Statutes in section 4596. No other provision of the statute has been called to my attention, and I am not aware of any, making the acts charged an offense. The act of June 9, 1874, provides that "none of the provisions of an act entitled 'An act to authorize the appointment of shipping commissioners by the several courts of the United States to superintend the shipping and discharge of seamen engaged in the merchant ships belonging to the United States, and for the further protection of seamen,' shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade, touching at foreign ports, or otherwise, or in the trade between the United States and British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise or voyage." 18 St. 64. This vessel, going on a voyage from San Francisco to San Diego, in the state of California, is not one of the vessels excepted. The language of non-application is the broadest possible. It is "none of the provisions" of the shipping commissioners' act shall apply to this vessel or voyage, and the provision under which the offense is charged is one of the provisions of that act, and beyond all question within the provision of the last act quoted. It in effect clearly repeals the prior act with reference to the ship and voyage in question.

The only other possible question is, whether the adoption of the Revised Statutes, with the provisions of the shipping commissioners' act incorporated in them, on June 22d, a few days after the passage of the

said act of June 9, 1874, repealed the latter; and the Revised Statutes expressly answer this question in the negative. Section 5601, Rev. St., is in the following language:

"The enactment of the said revision is not to affect or repeal any act of congress passed since the 1st day of December, one thousand eight hundred and eighty-three, and all acts passed since that date are to have full effect as if passed after the enactment of this revision; and so far as such acts vary in form or conflict with any provision contained in said revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith."

There can be but one possible construction put upon this provision, and that is, that whatever there is in the revision taken from the shipping commissioners' act, that is in conflict with the said act of June 9, 1874, is repealed. The Revised Statutes are made to take effect from December 31, 1883, and as if passed on that day, "and all other acts passed after that date, although in fact passed before the Revised Statutes, are to be treated and enforced as subsequent statutes, repealing the Revised Statutes, so far as they are inconsistent therewith." *In re Publishing Co.*, 3 Sawy. 616, 617. I so held, immediately after the passage of the act of June 9, 1874, in the case of a seaman who was convicted for a most atrocious and brutal assault and battery upon the master of a coasting vessel, under the sixth clause of section 4596, Rev. St. After conviction, and before sentence, the statute of June 9, 1874, came to hand, and I was obliged to arrest judgment on the ground that the provision had ceased to be applicable to that class of coasting vessels before the commission of the offense. Other courts, so far as I am aware, have uniformly taken the same view of the statute. *U. S. v. Bain*, 5 Fed. Rep. 192; *U. S. v. King*, 23 Fed. Rep. 141; *Burdett v. Williams*, 27 Fed. Rep. 117; *U. S. v. Buckley*, 31 Fed. Rep. 805; *U. S. v. The Grace Lothrop*, 95 U. S. 532.

For the reasons given, the act charged does not constitute an offense under the statutes of the United States, and the information must be quashed, and it is so ordered.

MANN'S BOUDOIR CAR CO. v. MONARCH PARLOR SLEEPING CAR CO.

(Circuit Court, S. D. New York. March 7, 1888.)

1. PATENTS FOR INVENTIONS—NOVELTY—SLEEPING CARS—SIGNAL APPARATUS.

The seventh claim of letters patent No. 122,622, issued January 9, 1872, to William D. Mann, for an improvement in compartment railway cars, describing an arrangement of wire signal bells or apparatus to extend from each compartment to the porter's room, in view of the fact that such signals were in common use in hotels, on steam-boats, and elsewhere prior to the grant of the letters patent, is void for want of novelty, as the mere change of location is not patentable.

2. SAME—INFRINGEMENT—SLEEPING CARS—VENTILATING APPARATUS—DUST-ARRESTERS.

Patent No. 827,289, granted September 29, 1885, to William D. Mann, for an improved system and apparatus for ventilating railway cars, providing the car

with an even supply and exhaust of fresh warm air, from which all dust and impurities have been removed, without danger of draft to passengers, the seventh claim of which describes a combination of a fresh-air conduit, a dust-arrester, a closet, and a flue running from the closet through the car, the dust-arrester consisting of a water-tank, which catches the large cinders and particles of dust, lined with excelsior, which completes the filtering process, is valid, and infringed by a combination which differs only in using a dust-arrester consisting of a box of wire netting filled with wet sponges.

In Equity. On bill for injunction.

Bill for injunction by Mann's Boudoir Car Company to restrain the Monarch Parlor Sleeping Car Company from infringement of letters patent granted William D. Mann for an improvement in compartment cars for railways, and an improved system and apparatus for ventilating railway cars.

Louis W. Frost and Charles G. Coe, for complainant.

John L. S. Roberts, for defendant.

COXE, J. The bill alleges the infringement of three letters patent granted to William D. Mann, and now owned by the complainant. The first of these patents, No. 122,622, dated January 9, 1872, is for an improvement in compartment cars for railways. The drawings and specification describe a car constructed on the European model, with isolated compartments, side doors, and a running board for attendants extending entirely around the car. At the end of the car is the porter's room, which is connected with each compartment by speaking-tubes and wire signal-bells. A passenger desiring to communicate with the porter pulls the bell lever in his compartment and jingles a bell in the porter's compartment. The seventh claim, which alone is involved, is in these words:

"(7) The arrangement of the bells or signal apparatus, to extend from each of the compartments to the porter's room, substantially as shown and described."

The defenses are non-infringement and lack of patentable novelty.

The defendant's cars are known as parlor sleeping cars and are built upon the American plan, substantially like the well-known Pullman cars. An electric push button is placed near each seat, so that the passengers can summon the porter by means of a bell and indicator located at the end of the car. The complainant admits that, prior to the alleged invention, lever pull-bells, like those shown in the drawings and specification, had been used in private houses and in hotels. They had also been used in steam-boats, not only to enable the helmsman to communicate with the engineer, but also to enable the passengers to summon the vessel's attendants, a bell-pull being placed in each state-room for that purpose. The record further shows that the idea of an electrical apparatus, by means of which the passengers in a railway car could signal the trainman, was also old, for in the patent granted to Prud'homme in March, 1871, the inventor says:

"A button or knob may be put, if desired, in passengers' compartment, in order to allow in certain cases the latter to call. * * * A knob or com-

municator, placed within a passenger's carriage, and put in communication with both wires passing underneath, would also cause a ringing at both ends of a train, and thus put the passengers of a compartment in communication with the attendants of said train."

The patentee appears to have been the first to employ a wire signal-bell to summon a servant in a railway car; but can it be that it required an exercise of the inventive faculties to do this, in view of the fact that the identical apparatus had previously been used for the identical purpose in dwelling-houses, hotels, and steam-boats? The additional fact should also be remembered that similar signaling appliances had been used in horse cars and in railway cars. The only novel feature that can by the most liberal construction be discovered, is the location of the apparatus in railway cars. The operation is the same; the result is the same. If it be invention to place a jingle bell in a passenger car, then each successive applicant who finds a new situation for such a bell is entitled to the rewards of an inventor. If this claim is held to be valid, with what consistency could a patent be refused to a person who, for the first time, should connect in a similar manner a row of bath-houses at the sea-side, or the boxes in a theatre, or the tables in a restaurant? To remove a bell from the state-room of a passenger steamer, and place it in the state-room of a passenger car, requires no more of the inventive faculty than to take a steam-whistle from a tug-boat and place it on a woolen mill,—no more than to place a doctor's speaking-tube at the front door of a lawyer. The supreme court has over and over again decided that it was not invention to find a new place for an old device without change in the result, or in the manner of operation. See cases cited in *Electric Co. v. Alarm Co.*, 33 Fed. Rep. 254. But even if the foregoing views are incorrect, it is quite clear, in view of the state of the art and the minute description of the specification, that the claim must be confined, to some extent at least, to the mechanism and arrangement disclosed. It would be a most unwarranted expansion of the claim to give it the broad construction contended for by the complainant, which would bring within its scope every mechanical contrivance by which the porter in a railway car is summoned by the passengers.

The questions arising under letters patent No. 188,991, granted to William D. Mann, January 8, 1878, were, practically, disposed of on the argument. The defendant discontinued the use of the reversible flap, covered by the claim in question, before the two cars, which had the infringing couches, were placed at the disposal of the public. The only serious objection urged by the defendant's counsel against a decree for an injunction being given to the complainant upon the third claim, was that it might affect the question of costs. The disposition which is made of the other patents will remove this objection.

The third patent in suit, No. 327,289, was granted to William D. Mann September 29, 1885, for an improved system and apparatus for ventilating railway cars. The object sought to be accomplished by the inventor, so far as this controversy is concerned, was to provide the car with an even supply and exhaust of fresh warm air, from which all dust

and impurities have been removed, without danger of draft to the passengers. The combination which is described as producing this result consists of a fresh-air conduit, a dust-arrester, a closet which receives the air, a delivery flue running from the closet through the car, a heater within the air-closet, and heater pipes extending through the delivery flue to warm the air. The seventh is the only claim alleged to be infringed. It is as follows:

"(7) In a railway-car, a fresh-air conduit, a dust-arrester, a closet, and a flue running from the closet through the car, and provided with registers, as described, in combination with a heater located within said closet, and heating-pipes located within said flue, all constructed and arranged as and for the purposes set forth."

The defenses are, as before, lack of invention and non-infringement. None of the prior patents show the combination of this claim. The separate elements were old, but no one, before Col. Mann, had assembled them as in the patent; no one had accomplished a result so satisfactory. Every doubt should be resolved in favor of the patent, especially when it is remembered that the patentee has introduced a valuable and practical improvement in car ventilation, as fully demonstrated by the experiments made in June last in the presence of the board of railroad commissioners of this state.

Does the defendant infringe? That the combination used by the defendant has all the elements of the claim, or equivalents therefor, and that they perform substantially the same functions, is sufficiently clear. There are differences of construction between this and the complainant's apparatus, but they are matters of detail which do not change the essential features of the patented combination. For instance, the dust-arrester shown in the drawings and specification consists of a water-tank which catches the larger cinders and particles of dust, and a body of wet "excelsior," or similar material, through which the air is forced to complete the filtering process. In the defendant's car the air is forced through a box of wire netting filled with moistened sponges. This is the most important variation, and though at first sight it may seem substantial, it is thought there is great force in the suggestion that the inventor did not intend to limit himself, in this claim, to the precise form of dust-arrester shown, for the reason that he employs the indefinite article in the expression "a dust-arrester," and also for the reason that he is careful to specifically cover the "dust-arresting tank" in other claims. The claim in controversy is for a combination. The defendant has appropriated the combination, except that one element thereof, the dust-arrester, is not made precisely after the pattern of the dust-arrester of the patent. But it performs the same functions and, in all essential particulars, it is the same. The differences in the construction of the closet and heater are not material. The question of infringement is a perplexing one, and the conclusion that the defendant infringes has been reached with considerable hesitation. The rule which sustains the complainant's position is clearly stated in *Machine Co. v. Murphy*, 97 U. S. 120, 125, as follows:

"Except where form is of the essence of the invention, it has but little weight in the decision of such an issue, the correct rule being that, in determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it; and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way, to obtain the same result, always bearing in mind that devices in a patented machine are different, in the sense of the patent law, when they perform different functions or in a different way, or produce a substantially different result."

See, also, *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. Rep. 970; *Loom Co. v. Higgins*, 105 U. S. 580, 598; *Winans v. Denmead*, 15 How. 340; *Sargent v. Larned*, 2 Curt. 340.

The complainant is entitled to a decree for an injunction upon the third claim of letters patent No. 188,991, and for an injunction and an accounting on the seventh claim of letters patent No. 327,289; but, as the defendant has been successful upon letters patent No. 122,622, the decree must be without costs. *Trap Co. v. Felthousen*, 22 Blatchf. 169, 20 Fed. Rep. 633.

ENTERPRISE MANUF'G CO. v. SARGENT *et al.*

(Circuit Court, D. Connecticut. March 1, 1888.)

1. PATENTS FOR INVENTIONS—ANTICIPATION BY PRIOR PATENTS—MACHINES FOR MINCING MEAT.

Letters patent No. 271,898, issued January 30, 1883, to John G. Baker, for a machine for mincing meat, which combines a casing corrugated by longitudinal grooves with retaining shoulders, a perforated plate, a knife, operating against the inner face of the plate, and a forcing screw, the thread of which extends to and rotates with the knife, the cutting action being produced by the operation of the knife on the perforated plate, are not anticipated by the Miles patents of 1861 and 1864, which combine a case having spiral grooves near the hopper end, then longitudinal grooves, a rotating shaft with spiral blades, and a perforated plate against which the ends of the spirals revolve, in which the principal part of the cutting is done by the revolving spiral blades in the body of the machine.

2. SAME—BY ENGLISH PATENT.

Letters patent No. 271,898, for a machine for mincing meat, describing a combination consisting of a casing corrugated by longitudinal grooves with retaining shoulders, a perforated plate, a knife, operating against the inner face of the plate, and a forcing screw, the thread of which extends to and rotates with the knife, the cutting action being produced by the operation of the knife on the perforated plate, is not anticipated by the Dollman English patent which combines a case with a series of horizontal knives at the hopper end, with a series of screw-like blades on a hollow shaft passing through them, the other end of the shaft carrying an Archimedean screw, the case terminating with a perforated plate through which a solid shaft passes and carries on the outside radial cutting blades working on the perforated plate, the meat being cut into small pieces by being carried by the screw-like blades against the horizontal knives and thence carried by the screw to the end of the case, where it is forced through the perforated plate.

3. SAME—INFRINGEMENT.

The first, second, and sixth claim of letters patent No. 271,898, issued to John G. Baker January 30, 1883, for a machine for mincing meat, which com-

bine a casing corrugated by longitudinal grooves with retaining shoulders, a perforated plate, a knife, operating against the inner face of the plate, and a forcing screw, the thread of which extends to and rotates with the knife, the cutting action being produced by the operation of the knife on the perforated plate, is infringed by a machine manufactured under the Shaw patent, dated March 9, 1886, reissue No. 10,717, dated April 27, 1886, which is substantially a copy of the Baker machine, except that the internal grooves, though longitudinal, describe a long spiral in a direction contrary to that of the feed-screw, but there is no cutting action until the meat reaches the knife.

4. SAME—EXTENT OF CLAIM.

The tenth claim of letters patent, No. 271,398, for a machine for mincing meat, describing the combination of the casing and a perforated plate, adjustable therein, with a feed-screw, and with a knife constructed to turn with the screw, but otherwise free thereon to accommodate itself to the face of the perforated plate, is limited to the combination therein described, and is not infringed by the claim of the Shaw patent for a stationary plate and an adjustable knife.

5. SAME—PATENTABILITY—INVENTION.

The thirteenth claim of letters patent No. 271,398, issued to John G. Baker, for a machine for mincing meat, describing a knife constructed to turn with the feed-screw, but removable therefrom for the purposes of repair, is void, there being nothing new in invention about it.

In Equity. On bill for injunction and accounting.

Charles Howson and Chas. E. Mitchell, for plaintiff.

John K. Beach and Benj. F. Thurston, for defendants.

SHIPMAN, J. This is a bill in equity to restrain the defendants from the alleged infringement of the first, second, sixth, tenth, and thirteenth claims of letters patent No. 271, 398, dated January 30, 1883, to John G. Baker, for improvements in mechanism for cutting up plastic or yielding substances. Upon a motion for a preliminary injunction in this case, the first and second claims of the patent, the history of the art, so far as then disclosed, and the patentability of the invention were examined. *Manufacturing Co. v. Sargent*, 28 Fed. Rep. 185. It is not necessary to repeat the facts or the conclusions which were stated in the opinion upon that motion. The case has now been prepared with great care and has been argued with equal ability. The only important prior patent which was not used upon the motion, and which is now in the case, is the Miles patent of 1861. In the fact that the principal reliance for the cutting of the meat is upon the stationary and moving cutters in the body of the machine, before the meat is delivered to the perforated plate, the device does not differ from the Miles patent of 1864. The manner in which the cutting is performed in the earlier machine differs from the operation of the cutting knives of the later patent. The case is smaller at the delivery end than at the hopper end, and has inside of it, at the hopper end, spiral grooves which occupy about half the length of the case, the other half towards the delivery end having longitudinal grooves. The rotating shaft has spiral blades, the edges of which and the edges of the longitudinal ribs slide past each other, like the edges of a pair of shears, and the two edges constantly cut or shear the meat as it passes from one rib to the next. At the extreme end of the machine is a perforated plate against which the ends of the spirals move, the openings in the plate being

sharpened on one side, and some cutting is accomplished by the blade ends of the spirals against these sharpened edges, but the principal part is done, as in the Miles patent of 1864, by the revolving blades or knives in the body of the machine. There is no difference in the principle upon which the two Miles machines operate,—that of a cutting action upon the meat before it reaches the perforated plate. As will be more fully stated hereafter; the Baker machine abandoned cutting action by the aid of cutters around the shaft, and relied upon a rotating knife on the inside of the perforated plate; and, while it is true that the blunt ends of the Miles spirals of the patent of 1861 moving against the sharpened edges of its perforated plate accomplished some cutting, there is no analogy between that sort of cutting action and that produced by a revolving knife blade passing over the edges of a perforated plate. The Baker machine is not so palpable an improvement over the Miles patent of 1861 as it is over the Miles patent of 1864, but it is an improvement of the same kind, which introduced a new operating principle into the machine, and evinced invention.

As much more time was spent, upon this hearing, in the discussion of the Dollman English patent than was given to it upon the hearing of the motion, the device of that patent requires especial mention. The case has a smooth interior, and a series of horizontal knives at the hopper end, which extend about half the length of the case. At the hopper end of the hollow shaft, within the case, is a series of oblique or screw-like blades, which, on the rotation of the shaft, pass between the fixed knives. The other part of the shaft carries an Archimedean screw, having nearly the same diameter as the interior of the cylinder. "That end of the case in which the Archimedean screw is situated is closed by a plate of hardened and tempered steel, having in it a series of either circular or oblong holes, the sides of which are inclined to either; the smaller diameter of the holes being on the external side of the plate. The end of the solid internal axis (within the hollow shaft) projects through the center of this plate, and carries one, two, or more radial, or nearly radial, cutting blades, working closely upon the perforated steel plate closing the case." The meat is carried by the rotating blades against the fixed knives, and is cut into small pieces, which are carried by the screw to the end of the case. The intent of the inventor was that these pieces should be forced through the holes in the plate, and that, as they were forced through, the rotating blades passing rapidly over the plate should form cutters with the sharp edges of the holes and mince the material. The patent also says: "The perforated plate, and cutters working against it, may be used alone for effecting the mincing, instead of in combination with the rotating blades and fixed horizontal knives, as described." The patentee mounts his rotary knife, which is outside the perforated plate, upon a shaft, independent of the feeding screw, in order that the knife may be enabled, by suitable gearing, to rotate at a higher rate of speed than that at which the feed-screw operates. This characteristic is not deviated from in the different forms of machine which he suggests. The defendant seeks to maintain that if, discarding the independent gearing, the ma-

chine is constructed in accordance with the alternative method which is suggested in the patent, viz., by the use of the perforated plate and cutters alone, it will, although the cutter is on the outside of the plate, be such an approximation to the Baker device that the latter possesses no patentable novelty. If, having discarded the independent gearing and the cutting mechanism inside the casing, the machine is constructed in other respects in accordance with the specification, it is admitted that it would be a failure. It requires the presence of ribs upon the inside of the case, and of a screw which is adapted to co-act with the case, and is therefore a forcing screw, to enable the Dollman machine to operate with alleged success. Upon its success, as thus modified, there is a clear divergence of opinion, but I leave that question undecided, for I have no doubt that the gap between Dollman's patent and success was so great that it could not be bridged except by the aid of invention. The patent contains another alternative suggestion, as follows: "A plate with a series of radial slits may be substituted for the perforated plate, represented in the drawings, and, in place of the rotating knife or knives, a perforated rotating disk may be used." The defendants construe this suggestion to mean that a sharp stationary four-bladed knife may be substituted in the place of the perforated plate, and that a revolving perforated plate takes the place of the rotating knife so that the meat is cut by the knife against the inner face of a perforated plate, and one of the defects in Dollman's first alternative suggestion, that of forcing meat which is uncut through a series of small holes, is thus avoided. The suggestion which the patentee makes is not clearly enough given to enable any body to determine with accuracy how he meant that the cutting should be effected, and one can only admire the ingenuity which evolved the cutter of the exhibit out of "the series of radial slits" of the patent. To make this modification work successfully, it is also necessary to use a screw which shall co-operate with the case and force the meat along in its path. From this more careful examination of the Dollman patent I do not perceive any reason to change my former opinion that it neither anticipated the Baker patent, nor deprived the Baker device of its right to be styled an invention.

The sixth claim of the Baker patent which, with the first and second claims, describes the device as a whole, is as follows:

"(6) The combination of a casing, E, having internal longitudinal grooves, each of which is inclined on one side, and presents an abrupt retaining shoulder on the other, with a perforated plate, knife, and feeding screw, as set forth."

The main object of the patentee was to construct a machine which should get rid of the supposed necessity of preliminary cutting or chopping knives, and rely for its cutting character entirely upon the plate and knife at the end of the casing. Thus the patentee said in his specification:

"A perforated plate and a knife have been used in a cutting machine, but in combination with preliminary cutting or chopping knives, moving and stationary, acting independently of the plate, for mincing meat before it

reaches the said plate in a minced condition, the plate and knife being in this case for the purpose of preventing the escape of large lumps which may have escaped the action of the preliminary chopping knives. In my invention, reliance for cutting up the substance is placed entirely on the plate and knife and a device for imparting direct pressure to a crude uncut substance against the plate without any action on the substance during its passage to the plate, excepting that for effecting the desired pressure, the aim being to cut up the substance to uniform or nearly uniform sizes, a result which cannot be attained when there are intervening choppers to cut the substance up to different sizes, large and small."

But it does not follow that the patentee meant, or that his patent is to be fairly construed as meaning, that the meat was to come to the plate in a condition in which no rubbing or no abrasion or no disintegration had taken place. He simply meant that, in contrast with the Miles machine, there was no cutting action in his device; that no reliance was placed, for cutting up the meat, upon anything else than the plate and the knife; and that the mass was forced to the plate without any other disturbance of its integrity than was incident to the forcing process. The screw must co-act with the case, in order to force the meat along, and therefore there is necessarily a rubbing, an abrasion, and a consequent disintegration of the meat. As was said in the former decision, "The language of the patentee was used with reference to the cutting qualities of the Miles knives, as compared with the non-cutting qualities of the screw," and there was no intention either to provide against, or to inform the public that he had provided against, abrasion of the meat. The preliminary non-cutting characteristic of the invention is specifically mentioned in the first claim, and is to be recognized as existing in the construction of the second and sixth claims. The first claim includes a non-cutting, forcing device; whether piston or screw, is immaterial. The second claim confines the non-cutting, forcing device to a forcing screw, irrespective of the particular shape of the ribs or of the device which enables the screw to co-operate with the case. The sixth claim compels the casing to have the described internal longitudinal grooves. The question, and the important one in the case, in regard to infringement of the first, second, and sixth claims remains to be considered. The defendants' machine is made in accordance with reissued letters patent No. 10,717, dated April 27, 1886; the original having been dated March 9, 1886, to John H. Shaw, assignor to the defendant corporation. The patented portion of the machine was its adjustment of the cutters with relation to the perforated plate. With reference to the first, second, and sixth claims, it is substantially a copy of the Baker cutter, except that while the internal grooves of the Baker casing are straight, the internal grooves or ribs of the defendants' device, though longitudinal, describe a long spiral in a direction contrary to that of the feed-screw. Upon the hearing of the motion, the defendants claimed that their machine was adapted to cut, and did cut, the meat, before it reached the perforated plate, in consequence of the action upon it of the spiral ribs in conjunction with the blades of the screw, and, without committing myself definitely to a conclusion, it seemed to me that there was a shearing

action upon the meat, between the edges of the spiral ribs and the revolving screw-blades, like that of a powerful, dull pair of shears. Considerable oral testimony has been taken upon this question. The silent evidence which the Shaw patent furnishes against its owners in this contention, is noticeable. The invention was made as an improvement upon the Baker cutter. The patentee substantially so said in his specification, and he says also therein that the principal object of the invention was to make a ready and easy adjustment of the cutter, with relation to the perforated plate. Although he describes the construction of the spiral ribs, and says that they run towards the perforated plate, the inclination of thread being by preference about 45 degrees, or considerably greater than the inclination of the spiral rib of the screw, he says nothing in the description, or in the claims, about the cutting action of the ribs, but leaves it to be inferred that the cutting is done entirely by the cutters at the plate. The patent was drawn by one of the most accomplished patent solicitors in the country, and it is impossible that he should have received any instructions from the patentee in regard to the cutting feature of the spiral ribs and screw. It is almost impossible that the inventor should have supposed that his device possessed this important difference from the Baker device, and not have communicated his opinion to his solicitor. The Shaw patent signifies that, if the device has an intermediate cutting action, such action was discovered by the inventor after the date of the application for the patent. Contrary to my former leaning, I now think that the shearing action does not exist in the defendants' machine; certainly not, when it is treated in the usual and natural way. There is a shearing action in the Miles machine of 1861, which has longitudinal ribs upon the case, and rotating blades of very long spiral, and in which the edge of one blade passes the edge of the other, the two blades forming an acute angle with each other. In the defendants and in the Blake machines, the longitudinal ribs are about at a right angle to the circumferential spirals of the screw, and when the screw turns, the meat is wiped around across the shoulders of the grooves, the faces of the blades of the screw sliding upon the faces of the ribs, and the object of the shoulders not being to cut, but to prevent, the meat from merely turning around in the screw, and to assist it in its forward movement. There is the same kind of grinding or disintegrating action in the two machines when the plastic meat is rubbed against the shoulders of the corrugations, but there is no shearing or cutting action as the meat pursues its path to the cutter.

The 10th and 13th claims are as follows:

"(10) The combination of the casing and a perforated plate, adjustable therein, with a feed-screw, and with a knife constructed to turn with the screw, but otherwise free thereon to accommodate itself to the face of the perforated plate, substantially as set forth."

"(13) the combination of the casing, E, closed at one end, and having a detachable perforated plate at the opposite end, with a feed-screw, and a knife constructed to turn with the said screw, but removable therefrom after detaching the plate, as set forth."

These are a portion of the claims of small value, which seem to have been inserted for the purpose of covering every possible patentable feature of the invention. The tenth claim is for the purpose of covering the rocking motion of the screw against the perforated plate, by which it adapts itself to the face of the plate. In the defendants' machine, this rocking motion exists, but their plate is not adjustable; their knife is adjustable, and the plate is stationary. I think that this claim, which is merely for the purpose of protecting one of the minor details of the Baker machine, is to be strictly construed; and, as it requires that the plate should be adjustable, and as the defendants' machine has no adjustable plate, the claim is not infringed. I cannot conceive any patentable invention in the thirteenth claim. It is said by the plaintiff to relate to the mounting of the knife upon the end of the screw in such a manner as to be readily removable and detachable for the purposes of repair upon the removal of the perforated plate. I suppose that the plaintiffs' theory of the nature of the claim is a correct one, but I can see nothing which is akin to invention in the manner in which the knife is mounted upon the screw.

Let there be a decree for an accounting and an injunction against the infringement of the first, second, and sixth claims.

THE LEO.

THE ELEANOR.

THE LEO *v.* THE ELEANOR.

THE ELEANOR *v.* THE LEO.

(*District Court, D. South Carolina. February 6, 1888.*)

COLLISION—BETWEEN SCHOONER, WHILE WAITING FOR PILOT, AND PILOT-BOAT.

After a pilot-boat has put off a pilot in a skiff for a schooner, it is the duty of the schooner to wait for the skiff, and it is the duty of the pilot-boat to keep out of the way of the schooner. So, where a collision occurs between the pilot-boat and the schooner while so waiting, the pilot-boat is in fault, and responsible for the damages which may ensue.

In Admiralty. Libel and cross-libel for damages.

McCrady, Sons & Bacot, for the Leo.

I. N. Nathans, for the Eleanor.

SIMONTON, J. These are a libel and cross-libel for a collision occurring off the bar of Port Royal.

On the morning of 1st December last, the three-mast schooner Eleanor, bound for Port Royal, was spoken by the pilot-boat Leo. It being at that time of the morning—6:30 A. M.—quite dark, the pilot instructed

the schooner to lay to until daylight, when he would put a pilot on board of her. After speaking the Eleanor the Leo tacked out to sea in order to turn and get up to her. On coming back to the place where the Eleanor had been, she found that the schooner had gone on, and had crossed and was just within the north breaker, still, however, on the bar. The master of the Eleanor says that he attempted to lie to; but the sea was very high, the wind was blowing a gale from N. N. E., and this, with the heavy flood-tide sweeping westward, caused his vessel to drift so much that he feared that he would get to leeward of the bar. For this reason, after waiting some 20 minutes, he went in. The pilot pursued the schooner, and overtook her within the north breaker. Coming in around her stern the Leo lay nearly abreast of the Eleanor, under her lee, quite close, and again hailed her, offering a pilot. The offer was accepted. A skiff was put out from the Leo with a pilot, who reached the side of the Eleanor. The sea was very high. Before the pilot could get aboard the collision occurred.

In their effort to explain how it did occur, the crews of the Leo and of the Eleanor give accounts of the occurrence which cannot be reconciled. The crew of the Eleanor say that when the pilot put off in the skiff to come to her, she was on the starboard tack, forging ahead. That the skiff, finding it difficult to catch up with her, her sails were hauled, and she was brought nearer to the wind, so as to lessen her speed. That the Leo then went out on her starboard tack, then tacked again and came on her port tack, steering as if to pass across the bow of the schooner. Fearing a collision if this should be attempted, the master of the Eleanor drew her sails a little more, and brought her nearer to the wind, so as to give a chance to the Leo to pass. The Leo came down on the Eleanor, and, despite of the effort of the master of the Leo to avert a collision by lowering his mainsail, the latter struck the former at about a right angle at the mizzen rigging. All the crew of the schooner and her master swear that, from the time of the approach of the Leo up to and including the moment of collision, the schooner was on her starboard tack, moving slowly ahead. On the other hand, all the crew and the pilots of the Leo swear that, after the skiff had left the Leo, and she had gone off on the starboard tack, she came upon the port tack. As she did so they saw the schooner also on the port tack. That the Leo at once followed her for the purpose of picking up the skiff, and was astern of her, a little to leeward, about 300 yards. When the Leo got about 50 yards from the schooner she found the latter coming rapidly astern down on her, and before she could get out of the way, and in despite of every effort to do so, the schooner came crashing on her. They also all say that the schooner had sternway on her when the skiff reached her, and did not go ahead at all. They explain this by the facts that the wheel of the schooner had been becketed, and had been left alone, and by the further fact that the master of the Eleanor had managed his sails unskillfully.

It is not necessary to attempt to explain this contradiction, nor to decide between them which story is most credible. According to the

statement of the crew and pilots of the *Leo*, the schooner was lying to, waiting for a pilot to board her, as she was bound to do. The *Leo*, having sent the pilot, could go where she pleased. She determined to go back to the schooner to pick up her skiff. For this purpose she put herself on a course following the *Eleanor*, immediately astern of her. She was bound to keep out of the way of the *Eleanor*. The *Eleanor* was as close to the wind as she could get, waiting, and being bound to wait, in response to a lawful summons. The pilot-boat was free. The rule of navigation is imperative. Applying rules 17 and 22 (Rev. St. 823) it was the duty of the *Leo* to keep out of the way. As the *Leo* failed to observe these rules, she was in fault, and by her own admission.

It is ordered that the libel of the *Leo* be dismissed, with costs. Let it be referred to the clerk of this court, as special master, to inquire and report the items of damage sustained by the schooner *Eleanor*.

THE MARCELIA ANN.

BLADES v. THE MARCELIA ANN.

(*Circuit Court, D. Maryland.* November 22, 1887.)

MARITIME LIENS—UNDER STATE STATUTES—PRIORITIES—WORK AND LABOR—SEPARATE CONTRACT.

Under Code Md. art. 67, giving (section 44) a lien upon certain vessels for materials furnished and work done upon such vessels, but providing (section 48) that the lien "shall not entitle the claimant to preference over creditors or claimants secured by mortgage or bill of sale properly executed and recorded before the claim to be secured by such lien shall have accrued," where there is no entire contract for the repairing of a vessel, but the repairs are done from day to day upon the orders of the owner, only such repairs will have preference over a mortgage duly executed and recorded as were done prior to the date of the recording of such mortgage.

In Admiralty. On appeal from district court.

Thomas S. Baer and *William P. Lyons*, for appellant mortgagee.

Thomas S. Hodson, for appellee lienor.

BOND, J. The facts in this case are that on the 6th of October, 1886, the schooner *Marcelia Ann* was libeled in the district court for wages. By order of the court under that libel she was sold, and after the payment of the seamen's wages found to be due, the remainder of the proceeds of sale were paid into the registry of the court for distribution to proper claimants. The schooner was the property of George S. Holland. The remaining proceeds are now claimed by Sumner W. Dana, by virtue of a lien under a Maryland statute relating to liens for work and labor, and by George S. McCready, under a mortgage from George S. Holland, properly executed and recorded on the 17th of June, 1884. The first item in the account for which a lien is claimed is of June 5, 1884, and the last is dated Oct. 17, 1884.

The statute under which the lien for repairs is claimed is found in Rev. Code, art. 67, §§ 44-48, which, after providing for a lien upon vessels for materials furnished and work done upon vessels navigating the Chesapeake bay and its tributaries, provides that such lien shall not entitle the claimant to preference over creditors secured by mortgage properly executed and recorded before the lien claim shall have accrued. Section 48, art. 67. Section 44 gives to parties furnishing materials or labor a lien on the vessel for all debts *due*. In this case there was no entire contract for the repair of the vessel. From all that can be gathered from the record the claimant was to do such repairs upon the vessel as from day to day were discovered to be necessary, and which he was directed by the owner to make. At the end of the day the cost of what was done in the way of furnishing material or labor was due and payable. The claimant could have stopped work at the end of a day or week without any breach of contract, and the owner could have directed him to cease, without liability for a breach, at any time. There appears to have been nothing in the contract to make it necessary for the claimant to go to the expense of providing before hand material for repairs. The labor and materials were furnished *die in diem* and on the 17th of June, when the mortgage was recorded, all that was *due* or had "accrued" was what had been furnished or wrought up to that time. Certainly no action could then have been maintained, for anything that appears in this record, by the claimant against either the ship, or the owner of it, for material or labor furnished after that date. This is not a maritime lien. If it were, it might be argued that the repairs done after the mortgage were done for the mortgagee's benefit, or that, as he knew of them, and the mortgage gave him title, he could be held as owner. But this lien is a statutory remedy, and gives to the claimant no priority beyond that which its plain language implies; and as it expressly provides (section 48) that the lien shall be for such claim only as had accrued at the time of the recording of the mortgage, courts are not at liberty to extend its operation further.

Our attention has been called to the fact that the construction given to the mechanics' lien law relating to buildings is that it gives a lien for all debts contracted for work done, notwithstanding an intermediate mortgage after the commencement of the building. But this is by statute. Section 15, art. 67, so provides, and the legislature having seen fit to make this difference between liens upon buildings and those upon vessels, we have no alternative but to carry out its intentions.

It is therefore determined that the fund in court is liable for all material and labor furnished up to and including the 17th of June, as appears by the account filed, and the remainder, after payment of costs, belongs to the mortgagee. And a decree will be passed accordingly.

THE MALTA.¹

THE MALTA v. SEVEN HUNDRED TONS OF CHALK.

(*District Court, E. D. Pennsylvania. January 31, 1888.*)

SHIPPING—DEMURRAGE—ATTACHMENTS.

A claim against the cargo for demurrage will be allowed for delay caused by the issuing of attachments under conflicting claims to it.

In Admiralty.

Charles Gibbons, Jr., for libellant.

Adams & Edmunds, for respondent.

BUTLER, J. There is no dispute about the freight claimed. The libellant is clearly entitled to demurrage. She is not in any way responsible for the delay. She had a lien for the freight and demurrage on the cargo, and was not interested in the dispute over it. She had a right to hold it until paid. The parties claiming the cargo having chosen to dispute about it, and thus create delay, they must bear the consequence. To cast the loss on the libellant would be grossly unjust. She was not blamable for refusing to discharge on a filthy wharf at the marshal's request. Had she so discharged she would have incurred risk of liability for damage, as well as risk of losing her proper charges, by injuring the merchandise to which she must look for payment. The sum claimed for delay, however, is too great. How much should be allowed per day, the evidence does not render certain. The number of days properly chargeable I find to be 16. Starting with October 11th, seven days are allowed for unloading the chalk. As the vessel was not docked until after 9 o'clock in the morning, a full day's work could not be done on that day. The intervening Sunday must be thrown out, and one day allowed for unloading the cement. This leaves 16 days for which the respondent is liable—the unloading of the entire cargo having been completed by the fourth of November, inclusive. What rate of compensation per day should be allowed must be referred to a commissioner, unless the parties can agree respecting it.

¹ Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

STEIN v. BIENVILLE WATER-SUPPLY CO.

(Circuit Court, S. D. Alabama. March 7, 1888.)

1. CONSTITUTIONAL LAW—MONOPOLIES AND PRIVILEGES—WATER COMPANIES.

The city of Mobile, having acquired by purchase or forfeiture the franchises and plants of two water companies chartered, respectively, in 1820 and 1837, entered into a contract in 1840 with one S., whereby, in consideration of certain covenants contained in the agreement, he was granted "the sole privilege of supplying the city of Mobile with water from the Three-Mile creek for twenty years" from the date of the contract. He was also invested with whatever rights and privileges the city had derived from the defunct companies. The creek referred to was the most accessible source for the city's water supply, and the city had, when the contract was made, certain water-works at that point, which it had acquired from one of the old corporations. The company of 1820 was chartered for 40 years, and for the purpose, clearly expressed in the act, of conducting water "from Three-Mile creek" for use in Mobile. The company of 1837 was incorporated upon the repeal of the charter of 1820, and was invested for about 20 years with the exclusive franchises conferred by that charter. The city then bought out the corporation of 1837, and made the contract with S., which the legislature confirmed in 1841, vesting in S. the privileges under the acts of 1820 and 1837, so far as consistent with the contract of 1840. *Held*, that the exclusive privilege of supplying the city with water was confined to water taken from the Three-Mile creek, and that the grant in 1838 to another corporation of the exclusive right of conducting and bringing water into the city from any point other than Three-Mile creek did not legally "impair" the obligation of the contract of 1840.¹

2. SAME—POLICE POWERS.

In granting an exclusive franchise to supply water to one of its cities and its inhabitants, the legislature of the state does not part with the police power and duty of protecting the public health.¹

3. WATER COMPANIES—CHARTERS AND FRANCHISES—CONSTRUCTION.

The preamble of a statute incorporating a water company, recited, among other things, "that certain individuals have agreed to associate themselves together for the purpose of conducting a supply of water from a creek called 'Three-Mile Creek,' for the use of * * * the city of Mobile." It then provided that the said corporation "shall have and enjoy the exclusive right and privilege of conducting and bringing water for the supply of said city for the space of 40 years," provided the water was brought from said creek within three years from the date of the act, and in the manner therein prescribed. *Held*, that the exclusive privilege of supplying water to the city was confined to water drawn from the Three-Mile creek.

4. SAME—CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACT.

Where the exclusive right of supplying a city with water is confined to water drawn from a certain source, the right of using the streets free of charge for the purpose of laying pipes, etc., for the conveyance of such water, granted in the enabling statute, is not impaired by a subsequent grant of eminent domain to another company drawing its supply from a different source.

5. SAME—DURATION OF FRANCHISE.

A contract between the city of Mobile and one S. provided that S., his executors or assigns, should have the exclusive right for 20 years of supplying the city with water drawn from a certain source, and, until the city should redeem the plant, S. should have quiet possession of it, without let or hindrance from the city or from any one claiming under it. *Held*, that the franchise did not expire with the 20 years, but that it remained a monopoly in the hands of S.'s executor, (S. having died,) until the city redeemed the plant as provided in the contract.

¹See note at end of case.

In Equity. On demurrer to bill.

This bill was filed April 25, 1887, seeking to establish a monopoly in the supplying of water to the city of Mobile, under a contract of December 26, 1840, between the city and complainant's testator, confirmed by act of the Alabama legislature of January 7, 1841; and, as a part of the relief, the bill prayed an injunction upon the defendant from constructing its new, improved, and much larger water-works. An application was made for an injunction *pendente lite*, which was refused by PARDEE, J., June 6, 1887, leave being granted, however, to make application anew therefor to HARLAN, J. The application to HARLAN, J., was likewise refused December 2, 1887, as heretofore reported in 32 Fed. Rep. 876, where additional facts bearing on the case are stated. Demurrers 6, 7, and 8 referred to in the opinion relate to a grant of monopoly affecting the public health, and demurrers 9 and 10 assert that the remedy at law is adequate.

L. H. Faith, for complainant.

P. & T. A. Hamilton, and Overall & Bestor, for defendant.

TOULMIN, J., (after stating the facts as above.) This bill of complaint is brought by the executor of Albert Stein, deceased, as the proprietor of what is known as the "Stein Water-Works," in Mobile, to enjoin the Bienville Water-Supply Company from laying its pipes in or through the streets of the city of Mobile for the purpose of furnishing water through the same to the inhabitants of said city, and from conducting water into said city for the supply of its inhabitants for domestic and municipal purposes, on the claim of an exclusive right in the complainant to furnish that supply. The defendant is a corporation of the state of Alabama, under an act of incorporation approved February 19, 1883, and amended February 4, 1885. By its act of incorporation the defendant is charged with the duty of introducing into the city of Mobile such supply of pure water as the domestic, sanitary, and municipal wants thereof may require. For this purpose power is given to it to acquire lands, and use the public roads and streets of the said city wherein to lay its pipes. It is also authorized to make and maintain proper canals, ditches, pipes, and aqueducts from any point in the county of Mobile, within 20 miles of the city of Mobile, and there is given to it the exclusive right of conducting and bringing water into said city from any point other than Three-Mile creek in said county, for the period of 20 years from the time when water so brought by it is ready for distribution within the limits of said city. The duty is imposed on the corporation of beginning the construction of its works, and of having them ready for distribution of water to the citizens of said city within a time limited by the act of incorporation. The claim of complainant is that he has the exclusive right to supply the city of Mobile with water from all sources, and that any attempt by the defendant to introduce water into said city from any source whatever is an infringement of his rights, which should be enjoined. He asserts that his rights are interfered with by the defendant in laying down pipes and mains for the purpose of

conducting water into said city. But it is not averred that the defendant proposes to conduct and bring water from the Three-Mile creek. To entitle the complainant to the relief prayed for in the bill he must show in himself a clear and indisputable right for the exclusive supply of water by him to the city of Mobile and its inhabitants from any and all sources. His right rests on a contract made by his testator, Albert Stein, with the city of Mobile on December 26, 1840, as confirmed by the act of the general assembly of Alabama approved January 7, 1841.

It seems from the legislation on the subject that before that time sundry attempts had been made to bring water into the city from the Three-Mile creek, by means of corporations chartered for that purpose, but it does not appear that at the time of the agreement with Stein any of said corporations were in existence, or had been organized. By act of the general assembly of December 24, 1824, the charter of the first "aqueduct company," which had been authorized by act of December 20, 1820, was declared to be null and void by reason of the corporation not having complied with the conditions of its charter, and whatever privileges it had were declared to be vested in the city corporation. The period of its privileges was to be for 40 years, provided that before the expiration of three years from the date of its charter it had caused to be conducted the water from the said Three-Mile creek to the city of Mobile, in the manner prescribed in the act of incorporation. The act further provided that after the expiration of the said term of 40 years the water-works of the said "aqueduct company" should become the property of the said city for the use of the inhabitants thereof. These 40 years of privilege expired in December, 1860. It appears that in December, 1836, the city of Mobile, having become the owner of the property connected with the water system, contracted with one Hitchcock to lease the same to him for a term of 20 years, and he was thereafter to supply water to the city. By act of December 25, 1837, the contract between Hitchcock and the city was confirmed, and another aqueduct company was authorized to be organized, and the Hitchcock interest merged in it. This corporation was to take Hitchcock's place. It was to have the rights and privileges of the former aqueduct company, and to continue a corporation after its organization with these rights until the 1st of December, 1856, and until they shall have been purchased out by the city of Mobile, in conformity to the contract with said Hitchcock of December 1, 1836. Whether this company ever organized or not does not appear, but it does appear that the city of Mobile had become the owner of the water-works before the contract was made with Stein in 1840. So it seems that at the time the contract with Stein was made this aqueduct company of 1837 had in some manner been purchased out by the city; the charter of the aqueduct company under the act of 1820 had been vacated and annulled; that of the original term of privileges or monopoly, (which was 40 years,) only 20 years still remained; that the privileges of the charter of 1820 were revived to the aqueduct company by the act of 1837 for the term of 20 years, and until they shall have been purchased out by the city; that when the contract with Stein was

made, the property of the aqueduct company had all been acquired by the city, and that all the privileges of that company had at that time ceased. The city, then, was in a position to contract with Stein for the supply of its inhabitants with water. It had, however, no power to contract with him for the exclusive right of supplying the city with water without the sovereign authority of the state. *Railway Co. v. Railway Co.*, 79 Ala. 465, and numerous authorities cited therein; *Gas-Light Co. v. City of Saginaw*, 28 Fed. Rep. 534. It does not appear that it had such authority. But in December, 1840, the agreement with Stein was made, by which was granted to him, "the sole privilege of supplying the city of Mobile with water from the Three-Mile creek, for twenty years from the date of the agreement," and this agreement was fully confirmed by act of the general assembly of January 7, 1841.

The claim asserted by complainant, as before said, is that he has the exclusive right to supply the city of Mobile and its inhabitants with water from any and all sources, and he bases this claim on the agreement of December 26, 1840, and the act confirmatory thereof of January 7, 1841. "The principle is that no franchise which is granted by the state is ever construed to be exclusive, whether it be in the nature of a contract or not, unless it be so declared in clear terms, or be necessarily implied," or "unless the terms of the grant render such construction imperative," as some writers express it. *Railway Co. v. Railway Co.*, 79 Ala. 472; 1 High, Inj. § 902; Cooley, Const. Lim. 489, marg. p. 395. "No rule is better settled than that charters of incorporation are to be construed strictly against the corporators. The just presumption in every such case is that the state has granted in express terms all that it designed to grant at all. In the construction of a charter, to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation." *Railroad Co. v. Commissioners*, 21 Pa. St. 22; *Bridge Co. v. Bridge Co.*, 3 Wall. 51; *Mills v. St. Clair Co.*, 8 How. 569. And this rule is not confined to the grant of a corporate franchise, but it extends to all grants of franchises or privileges by the state to individuals, in the benefits of which the people at large cannot participate. Cooley, Const. Lim. 490, marg. p. 396. The grant, then, of the Stein Water-Works is not only to be construed strictly against the grantee, but it will not be held to exclude the grant of a similar and competing privilege to the Bienville Water-Supply Company, unless the terms of the grant to Stein render such construction imperative.

Let us now apply these rules of construction to the agreement and confirmatory act under which Stein's claim is asserted. The agreement is declared to witness that the mayor, etc., (the corporate name of the city,) in consideration of the covenants and agreements therein contained, etc., have granted, and by these presents do grant, unto Albert Stein, his heirs, executors, etc., the privilege of supplying the city of Mobile with water from the Three-Mile creek for 20 years from the date of the agreement, as well as all the advantages and benefits which accrue to the said mayor, etc., from, by, and under "An act to incorporate an aqueduct company in the city of Mobile," passed December 20, 1820, * * * as well as

all the benefits and advantages which accrue to the said mayor, etc., by or under an act, etc., entitled 'An act to incorporate the Mobile Aqueduct Company,' passed December 25, 1837, * * * during and until the full end and term of twenty years next ensuing." Then comes the covenant on the part of the city that at the expiration of said term of 20 years it would pay to said Stein, etc., the actual value of his water-works, to be ascertained in a manner pointed out in the agreement. It is contended by complainant that the contract should be construed to accomplish the intention of the parties, and to ascertain that intention regard must be had to the nature of the instrument itself, and the object which they had in view; and if, by a fair construction given to the words used, either singly or in connection with the subject-matter, that intention can be clearly ascertained, effect should be given to it. And the contention is that the subject-matter and object of the contract was the supplying the city of Mobile with pure, wholesome water, and that the intention of the parties to the contract was to grant to Stein the "exclusive privilege and right" to conduct and bring water to the city of Mobile for the supplying of the inhabitants thereof, without restriction as to source. In the construction of contracts the cardinal rule, as has been stated, is to effectuate, if possible, the intention of the parties. The different clauses of a written contract should be construed together, and the intention gathered from the whole instrument, unless it is obvious that the parties intended otherwise. "Courts construing contracts look to the language, the subject-matter, and the circumstances, and avail themselves of the light the parties had when the contract was made, in order that they may view the circumstances as the parties viewed them, and so judge of the meaning of words, and their application to things described." 1 Kinney, (U. S.) Dig. p. 466, § 1, and authorities cited. The subject-matter of the agreement was the supplying of water to the city of Mobile, and while it is clear the primary object in view was to secure an adequate supply of pure, wholesome water, it seems to me equally clear from the language used in the contract, in view of the circumstances under which it was made, that the intention was to grant to Stein the sole privilege of supplying the city with water from the Three-Mile creek, and from no other source. Throughout the whole agreement the exclusive right granted Stein is thus described: "The sole privilege of supplying the city of Mobile with water from the Three-Mile creek." No other source seems to have been thought of. Certain it is no other stream or creek or source of supply is mentioned in the agreement, except that of the "Mobile City Water-Works," which it appears embraced ground at Spring Hill, near the Three-Mile creek, where the fountain was situated.

Another clause in the agreement is that Stein shall have power and authority to conduct the water from any part of the Three-Mile creek. This creek, as the source of supply, was distinctly agreed on, and specifically named. If the intention was to grant the sole privilege of supplying water from any and all sources, why use the qualifying words "from the Three-Mile creek?" There were several considerations which might have influenced the parties in restricting the grant to the sole privilege of bring-

ing the water from the Three-Mile creek, such as the location and accessibility of that stream; the quantity and quality of the water afforded by it; and the fact that the city was the owner of the "City Water-Works," embracing ground at Spring Hill, where the fountain was situated, and whence the city had been endeavoring for years to get its supply of water. Owing to the superior advantages of the Three-Mile creek as a source of water supply for the city of Mobile, the parties might reasonably have supposed that no attempt would be made to bring water from any other creek or stream to supply said city, at least for a period of 20 years. However this may be, by the plain language used in the contract it seems to me its meaning is free from ambiguity or doubt. My opinion, therefore, is that Stein's grant under the agreement of December 26, 1840, is of the sole privilege of supplying the city with water from the Three-Mile creek, and from no other source.

But it is contended by the complainant that the act of January 7, 1841, does not simply confirm the before-mentioned agreement, but that it grants and vests in Stein all the rights, powers, privileges, and immunities which were granted to the Mobile Aqueduct Company under the acts of the general assembly of the state of Alabama, passed December 20, 1820, and December 25, 1837. And he contends that under these acts Stein had the exclusive right and privilege of conducting and bringing water for the supply of said city, without restriction as to source. And it is claimed that if the intention was to restrict the franchise granted Stein to the use of water from the Three-Mile creek merely, there was no necessity to vest in him the rights, privileges, and immunities granted under the acts of 1820 and 1837. The act of 1841 vested in Stein such right, powers, privilege, and immunities as were granted by the acts of 1820 and 1837, so far as they were not inconsistent with the terms of the agreement of 1840; so far as they were inconsistent therewith he took nothing under them. If the acts of 1820 and 1837 granted the exclusive right and privilege of conducting and bringing water for the supply of said city from any and all sources for 40 years, as is contended by complainant, then the rights and privileges granted by said acts were inconsistent with the terms of the agreement, and were not, therefore, granted and vested in Stein by the act of 1841. As is said by one of the learned counsel in this case in an able brief submitted by him:

"Whatever rights are taken under the acts of 1820 and 1837 must be consistent with the grant under the agreement of 1840. If they are inconsistent, they cannot stand together. A sole privilege for forty years, from all sources, is a different thing from a sole privilege for twenty years from a definitely expressed source of supply."

And we have seen that Stein under the agreement had the exclusive or sole privilege to supply water from the Three-Mile creek, only, for a period of 20 years. It may be said that the necessity for vesting in Stein the rights, privileges, and immunities granted under the acts of 1820 and 1837 was to protect the property invested in the water-works under the provisions and penalties created under these acts, and the right to lay its pipes, and keep them in repair, in or under the public roads of

the county and streets of the city of Mobile, and to provide protection against injury and damage to the property, the rights, privileges, and immunities, as provided for by the acts of 1820 and 1837, were very necessary for the proper enjoyment of the privileges granted to Stein under the contract.

But do the acts of 1820 and 1837 grant an exclusive right to supply the city of Mobile with water from any and all sources? The act of 1837 authorized the formation of a corporation, and clothed it with the privileges conferred by the act of 1820 until the 1st day of December, 1856, and until they shall have been purchased out by the city of Mobile. It appears to have been purchased out in some manner prior to December, 1840, and it does not appear that the corporation ever did exercise the rights and privileges conferred on it. The act of 1820, in its preamble, recites, among other things, "that certain individuals have agreed to associate themselves together for the purpose of conducting a supply of water from a creek called 'Three-Mile Creek,' for the use of the citizens and other persons residing in the city of Mobile." The first section of the act authorizes the formation of a corporation; the second section, the digging of canals, ditches, etc., and the third section provides that said corporation "shall have and enjoy the exclusive right and privilege of conducting and bringing water for the supply of said city for the space of forty years: provided, the said corporation shall, before the expiration of three years from the passage of the act, cause to be conducted the water from the said creek to the said city of Mobile in the manner hereinbefore proposed." The preamble of a statute is a key to it to open the minds of the makers as to the objects which are to be accomplished by the provisions of the statute. It is an explanation of what is to follow. Hence we construe the act in connection with the preamble, and, doing so, I can reach no other conclusion than that the intention of the legislature was to restrict the exclusive privilege of supplying the water to the Three-Mile creek. The condition or proviso in the third section clearly applies to the manner and time in which the water from the said creek should be conducted to the city. The state, in effect, says in the act:

"Whereas certain persons have agreed to associate themselves together for the purpose of conducting a supply of water from the Three-Mile creek, for the use of the citizens of Mobile, therefore they are authorized to form a corporation for that purpose, and they shall have the exclusive right to conduct and bring water for the supply of said citizens for the space of forty years: provided, they bring the water from the said creek within three years from the date of the act, and in the manner therein proposed."

"Nothing is better settled than that statutes creating monopolies, granting franchises and charters of incorporation, must be construed liberally in favor of the public and strictly against the grantee. Monopolies are justly regarded as encroachments upon the natural rights of the people, and are viewed with jealousy by courts." Sedg. Stat. Law, 389; *Gas-Light Co. v. City of Saginaw*, 28 Fed. Rep. 539. And the principle is, "that all rights which are asserted against the state must be clearly de-

fined. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and when it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state." *Bridge Co. v. Bridge Co.*, 3 Wall. 51.

It is further contended by complainant that there was granted by the state to Stein the "exclusive privilege" to use the streets of Mobile for the purpose of laying pipes or conduits through which to bring water for the supply of the city, and that the privilege granted by the state to the defendant to lay pipes in the streets for the purpose of conveying water to said city is plainly in derogation of the state's grant to Stein; and the case of *Water-Works Co. v. Rivers*, 115 U. S. 682, 6 Sup. Ct. Rep. 273, is cited as one very much like this case; and the court is asked to compare the charter of that company with the acts granting Stein's franchise. On such comparison, and on an examination of that case, I find a wide distinction between it and this case. The language of the New Orleans Water-Works' charter is: "The exclusive privilege of supplying the city and inhabitants of New Orleans with water from the Mississippi river, or any other stream or river, by means of pipes and conduits on or over any of the lands or streets of New Orleans." Subsequently, under a legislative grant, Rivers proceeded to supply his premises (the St. Charles Hotel) with water from the Mississippi river, by means of pipes and conduits laid through the public streets of New Orleans, and the court held, in the case cited, that the grant to Rivers was plainly in derogation of the grant to the New Orleans Water-Works Company. There Rivers was proposing to bring the water from the Mississippi river, and by means of pipes on or through the streets of New Orleans, when the New Orleans Water-Works Company had the exclusive privilege to bring water from the same source, and by the same means. Here there is no complaint that defendant proposes to bring water from the Three-Mile creek, and here Stein has no exclusive privilege granted him to use the streets for his pipes. He had the exclusive right to bring water from the Three-Mile creek, and had the privilege granted him of using the streets free of charge for the purpose of laying down pipes for the conveyance of water. The language is:

"* * * Shall be permitted the use of the streets in the city of Mobile, free of charge, for the purpose of laying pipes for the conveyance of water, * * * and that the canal or ditch shall be conducted along any of the streets thereof."

And it is further claimed that if Stein's privilege only extends to supplying the city with water from the Three-Mile creek, and only through the works erected by him, still the right and privilege was secured to him without "let, molestation, or hinderance," and that the grant to the defendant is a molestation or hinderance to him in the full enjoyment of the privileges secured by his contract. The city contracted with Stein that he and his executors and assigns should have and retain quiet possession of the water-works for the term of 20 years, without let, molesta-

tion, or hinderance of the city or its successors, or any person or persons claiming by or under them, and should have quiet possession of the same until the city or its successors shall redeem the said works. It does not appear from the record that the state, or the city of Mobile or its successors, or any person claiming under them, are now interfering with or propose to molest or hinder the complainant in the quiet possession of the said water-works. He still has the right to retain such possession, and to supply water from said works, to the citizens of Mobile, and this right will continue until the city of Mobile or its successors shall redeem the said works.

I am of opinion that Stein's exclusive right to supply the city of Mobile with water from the Three-Mile creek has long since expired, (expiring in December, 1860;) but the exclusive use of his water-works, and the exclusive right to supply water therefrom to the citizens of Mobile, remains to him.

If I am correct in the conclusions already reached in this case and herein announced, the point raised by the counsel for defendant, that the contracts under consideration are those in which the public health is involved, and may be modified or abrogated at the will of the legislature, is of no consequence, and need not now be decided. I will say, however, that I am now of the opinion that no question as to the exercise of the police power of the state arises in this controversy. The grant of the charter to the Bienville Water-Supply Company is not, as I view it, in any sense an exercise of the police power of the state. See *Gas-Light Co. v. Manufacturing Co.*, 115 U. S. R. 650, 6 Sup. Ct. Rep. 252, and authorities there cited.

My conclusion is that there is no equity in complainant's bill of complaint, and that all the demurrers thereto should be sustained except the sixth, seventh, eighth, ninth, and tenth, which are overruled.

NOTE.

MONOPOLIES. A municipal corporation has no authority to create a monopoly unless expressly empowered by the legislature, *Meadville Fuel Gas Co.'s Appeal*, (Pa.) 4 Atl. Rep. 733; *Saginaw G. L. Co. v. City of Saginaw*, 28 Fed. Rep. 529; *Jackson Co. H. R. Co. v. Interstate R. T. R. Co.*, 24 Fed. Rep. 306; *New Orleans C. R. Co. v. Crescent City R. Co.*, 12 Fed. Rep. 308, and 5 Fed. Rep. 160; *Davenport v. Kleinschmidt*, (Mont.) 18 Pac. Rep. 249; *Montjoy v. Pillow*, (Miss.) 2 South. Rep. 108; *City of Brenham v. Brenham Water Co.*, (Tex.) 4 S. W. Rep. 143; but it has been held that a municipality may delegate its police powers to persons and corporations, *City of Louisville v. Weible*, (Ky.) 1 S. W. Rep. 605.

Franchises relating to matters of which the public may assume control may be granted by the legislature, as a means of accomplishing public objects, to whomsoever and on what terms it pleases. So held as to the manufacture and distribution of gas, *New Orleans Gas-Light Co. v. Louisiana Light, etc., Co.*, 6 Sup. Ct. Rep. 252; of the privilege of supplying a city with water, *New Orleans Water-Works Co. v. Rivers*, 6 Sup. Ct. Rep. 273. The grant of such exclusive privileges is a contract, the obligation of which cannot be impaired by subsequent legislation, except in so far as the protection of the public health, morals, or safety may be involved, *New Orleans Water-Works Co. v. Rivers*, *supra*; *St. Tammany Water-Works Co. v. New Orleans Water-Works Co.*, 7 Sup. Ct. Rep. 405; *Citizens' Water Co. of Bridgeport v. Bridgeport Hydraulic Co.*, (Conn.) 10 Atl. Rep. 170; *People v. Squire*, (N. Y.) 14 N. E. Rep. 820; *New Orleans G. L. Co. v. Louisiana Light, etc., Co.*, *supra*; *Saginaw G. L. Co. v. City of Saginaw*, *supra*; *City of Louisville v. Weible*, (Ky.) 1 S. W. Rep. 605; as every charter granted is such a contract, *State v. Morris & E. R. Co.*, (N. J.) 7 Atl. Rep. 826; *Pennsylvania R. Co. v. Duncan*, (Pa.) 5 Atl. Rep. 742, and note; *Coast Line R. Co. v. City of Savannah*, 80 Fed. Rep. 646; *Tripp v. Pontiac & L. P. R. Co.*, (Mich.) 82 N. W. Rep. 907.

UNITED STATES *v.* WENZ *et al.*

(Circuit Court, D. Colorado. March 6, 1888.)

PUBLIC LANDS—PATENTS—ACTIONS TO SET ASIDE—LAPSE OF TIME—INNOCENT PURCHASERS.

Patents to lands, after a lapse of 17 years, will not be set aside at the instance of the government, on the ground of fraud in entering the lands and procuring them, in the absence of any proof of a conspiracy, and where it is not shown that subsequent purchasers of the lands had knowledge of such fraud.

In Equity. Bill to cancel patents to land.

H. W. Hobson, for complainant.

Platt Rogers, *W. F. Stone*, and *Geo. Rogers*, for defendants.

BREWER, J. This is a bill filed by the government to set aside the patents to certain tracts in Boulder county, Colorado. I have read the entire testimony, and need only say that recent rulings of the supreme court leave no room for question, and settle this case adversely to the government. There is no evidence of any conspiracy. The land officers are not witnesses. As to whether the land was agricultural or mineral, and as to whether the proper improvements and residence were made and had, the testimony is not clear and satisfactory. The entries were made in 1871, nearly 17 years ago; and, even if wrong were shown on the part of the one entering the land and receiving the patent, there is nothing to show knowledge thereof on the part of the purchasers and present owners. Let decree go for defendants, dismissing the bill. Similar decree may be entered in the other and like cases submitted with this.

WHEELER *v.* SEXTON.

(Circuit Court, D. Nebraska. March 8, 1888.)

MORTGAGES—POWER OF SALE—VALIDITY OF SALE UNDER POWER.

Upon the authority of the Nebraska supreme court decisions, a sale of land situated in Nebraska, under a power of sale in a mortgage, is invalid, the mortgagee being confined to an action for the sale of the premises, or to an ordinary suit at law to recover the debt itself.

In Equity. Action in ejectment by John G. Wheeler against Thomas Sexton.

Montgomery & Jeffrey, for plaintiff.

W. H. Munger, for defendant.

BREWER, J. This is an action in ejectment. The facts are these: In 1874 Haron Wheeler was the owner of the land. He resided in Moline, Ill., and, besides the tract in controversy, owned several other pieces

of property in Illinois and Missouri. Certain parties indorsed a note for him, and to secure them he executed a mortgage on these several tracts. The mortgage contained a power of sale, authorizing the mortgagees, on default in payment of the note, to advertise and sell in the city of Rock Island, Ill. He did default, and the mortgagees advertised and sold. The single question is as to the validity of that sale. As the land is situated in this state, it is a question of local law, and in it this court must be guided by the decisions of the supreme court of this state. *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. Rep. 10; *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. Rep. 263; *Samuel v. Holladay*, 1 Woolw. 406. The validity of such a power, and of the sale made under it, at common law may be conceded; and it is also true that in the Nebraska statutes can be found no express prohibition upon such a power; yet it seems to me that the supreme court of Nebraska, by two or three decisions at an interval of many years, has ruled against the validity of a sale made under such a power, and limited the mortgagees' remedies to proceedings in court. The first case referred to is that of *Kyger v. Ryley*, 2 Neb. 22, (decided some time prior to 1873.) It is true, in that case the precise question was whether, when a note was barred, the mortgage securing it was also barred; but the opinion discusses at some length the different *status* of a mortgage at common law, and that under the statute, and in the course of the opinion this declaration is found: "The remedy of the mortgagee is confined to an action for the sale of the pledged or mortgaged premises to pay the debt secured by the mortgage, or to an ordinary suit at law to recover the debt itself." Again, in the cases of *Webb v. Hoselton*, 4 Neb. 308, and *Hurley v. Estes*, 6 Neb. 386, (decided in 1876 and 1877,) the court ruled that a deed of trust to a third person, as trustee for the creditor, is no more than a mortgage, and subject to the same rules as to its nature and the method of foreclosure. And finally, in the case of *Comstock v. Michael*, 17 Neb. 298, 22 N. W. Rep. 549, (decided in 1885,) these facts were presented: A deed of trust had been executed containing a power of sale similar to the one at bar. Under that power the trustees sold and conveyed. The proceedings were regular. The purchaser, who was the original creditor, brought this suit, and in it set forth the original trust deed, the proceedings under the sale, and prayed a decree quieting the title. He also set forth the debt which was secured by the trust deed, and prayed in the alternative that, if the proceedings under the sale were not valid, he might have a decree of foreclosure. The trial court, holding the proceedings invalid, found the amount due on the debt, and decreed foreclosure. The debtor took the case to the supreme court, and that court held that a foreclosure was proper, but reversed the judgment on the ground that the debt had been fixed at too large an amount. After holding that a bill stating facts and praying relief in the alternative was good under equity practice, it adds these words:

"There can be no doubt but that a deed of trust can be foreclosed the same as an ordinary mortgage, and although the plaintiff had at one time adopted and sought to pursue an unwarranted and inadmissible remedy, yet it cannot be said that he thereby forfeited his right, while yet *in loco penitentiae*, to

turn back and enter upon the true course. And as to the effect of whatever he did while in pursuit of the false method, while we must hold that he gained nothing by such proceedings, we must admit that he lost nothing beyond his time, labor, and expenses."

Counsel for defendant insists that this expression of opinion is mere *dictum*, and that therefore the question is still open for consideration by this court; but I cannot so regard it, even if this case stood by itself. Certainly, when taken in connection with the earlier cases, it would seem as though the supreme court had decided the question, so far as this state is concerned; for if the proceedings under the power were valid, the plaintiff had a good title, and should have had a decree quieting it. He should not have been put to the delay and expense of a foreclosure sale, with the possibility of finally losing the land. If his title were good, the amount of the original debt was immaterial. That his bill and prayer were good for a decree quieting the title was conceded, and the only question was whether there was enough in it to sustain a foreclosure; and yet upon such a state of facts the supreme court says that he took nothing by his proceedings under the power, and reduced the amount of debt as found by the trial court. So, whatever might be my views upon this question as an independent proposition, I think the supreme court of the state has decided it, and I must follow that decision.

Judgment will be entered for the plaintiff.

BISCHOFFSHEIM v. BROWN *et al.*

(Circuit Court, S. D. New York. March 19, 1883.)

RAILROAD COMPANIES—BONDS AND MORTGAGES—TRUSTEES.

The complainant's firm were agents for a railway company to negotiate certain mortgage bonds, and account for the proceeds to trustees. They negotiated the bonds, and became accountable for the price, but subsequently bought them back in their own interest, and led the company to suppose that they had never been negotiated. Subsequently they made a loan to the company upon a pledge of the bonds as collateral security, and by the terms of the agreement of loan the trustees of the company (who had the equitable title to the proceeds of all the bonds pledged) agreed to treat the loan as a trust fund, and disburse it for certain specified objects. In a suit brought by the complainant, as survivor of the firm, to enforce the agreement, alleging that the trustees had appropriated the money to foreign objects, and seeking to compel them to account, it appeared that the loan was made in entire ignorance of the fact that the bonds had been negotiated, and that the trustees were entitled to a larger sum than in the hands of the complainant's firm than the sum loaned. *Held*, (1) that a court of equity would not, upon such a state of facts, assist the complainant, because he did not come into court with clean hands; (2) that the trustees could invoke the principle of equitable set-off to defeat the action.

Bill in Equity.

Bischoffsheim, survivor of the firm of Bischoffsheim & Goldschmidt, complainant, filed a bill against J. C. Brown and Jesse Seligman, to re-

cover certain moneys alleged to have been paid to them as trustees for complainant's firm, and applied by them contrary to the terms of the trust, in the matter of the loan made by them to the New York, Boston & Montreal Railway Company.

Evarts, Southmayd & Choate and B. H. Bristow, for complainant.

Bangs, Stetson, Tracy & MacVeagh, for J. C. Brown and Jesse Seligman.

C. W. Bangs, for J. & W. Seligman & Co.

Cary & Whitridge, for Brown Bros. & Co.

Porter, Lowrey, Soren & Stone, for the New York, Boston & Montreal Railway Company.

WALLACE, J. The complainant is the survivor of the former firm of Bischoffsheim & Goldschmidt, of London, and has filed this bill to recover the sum of \$917,182, advanced by that firm to the New York, Boston & Montreal Railway Company, of which sum \$294,444 was advanced September 1, 1873; \$269,937 was advanced September 15, 1873; and the balance was advanced on or about October 3, 1873. The averments of the bill are that these moneys were received at these dates by the defendants, John Crosby Brown and Jesse Seligman, as trustees for Bischoffsheim & Goldschmidt, to apply the same towards the construction and equipment of the unfinished railway of the company; that they applied the fund in great part to foreign purposes; and that before the suit was brought the railway enterprise became abortive, and it was impossible to carry out the purposes of the trust. It is further averred by the bill that the banking firm of Brown Bros. & Co. and J. W. Seligman & Co., the members of which are named as defendants, received portions of the fund from the trustees, with notice of the trust and of the misapplication of the fund. The bill prays for an accounting, and for other relief.

In the view of the case which has been reached, the material facts may be briefly stated. On the 14th day of March, 1873, Bischoffsheim & Goldschmidt entered into an agreement with the railway company by which they undertook to market in London \$6,250,000 of an issue of \$12,250,000 of the first mortgage bonds of the company. The defendants, John Crosby Brown and Jesse Seligman, were trustees under the instrument known as the "Disbursement Trust Agreement," by which the proceeds of the whole issue of mortgage bonds were to come to their hands for the purpose of being appropriated and distributed to various beneficiaries and objects, in part for the payment of designated creditors and in part for the construction of railway for the company, in the manner particularly specified by that instrument. By the contract made between Bischoffsheim & Goldschmidt and the railway company for marketing the bonds in London, the former were to negotiate them to the public at prices which would produce the company 90 per cent. in currency, (except as to \$839,000 of the bonds,) less specified commissions and charges; the proceeds were to be at the disposal of the company in monthly installments, as payable by the terms of the subscription for

the bonds, and subject to the order of the company, or the order of the disbursement trustees, on the 6th day of each month; and Bischoffsheim & Goldschmidt were to account to the company for the proceeds of all the bonds subscribed for by the public, and allotted by them, less the commissions, etc., which they were authorized to retain. The contract also provided that Bischoffsheim & Goldschmidt should have a call or option to purchase the bonds at 80 per cent. for \$839,000, and 90 per cent. for the residue, until July 31st next ensuing; should in no event be bound to account for any amount beyond that price; and should have the right to buy and sell and deal in the bonds for their own account and benefit, as though they were not the agents of the company to negotiate the same. Immediately after the making of this contract, Bischoffsheim & Goldschmidt issued a prospectus, offering the bonds to the public for subscription at £180 for each \$1,000 bond, payable £10 on application, £20 on allotment, £40 May 2d, £40 June 3d, £40 July 1st, and £30 August 1st. Applications were received by Bischoffsheim & Goldschmidt largely in excess of the bonds offered, and within a few days the entire \$6,250,000 were subscribed for and allotted unconditionally, and the £30 per bond payable on allotment duly paid by subscribers. The bonds were in very great demand; but only a small part of them, certainly not more than about \$2,000,000, were allotted to the general public, although about \$10,000,000 were applied for by the public. The greater part, viz., \$4,166,000 were allotted to a syndicate, known as the "Paris Syndicate," friends of Bischoffsheim & Goldschmidt, who were interested with Bischoffsheim & Goldschmidt in manipulating the market so as to advance the price. March 27th, Bischoffsheim & Goldschmidt notified the company of their desire to exercise their option of purchase, and called for the delivery of the \$839,000 of bonds which they had a right to purchase at 80 per cent., and \$4,166,000 which they had the right to purchase at 90 per cent., being \$5,000,000 in all. From that time thenceforth Bischoffsheim & Goldschmidt led the company to believe that this was the whole amount of bonds actually negotiated by them. They never distinctly asserted that no more had been negotiated, but insisted that they were accountable for \$5,000,000 only, and beyond that statement maintained a reserve which was effectual to lead the officers of the company to suppose that no more had been negotiated. The latter were also led to that belief by the statement of one McHenry, who had been an agent of the company, and was at the time supposed to be acting in its interest, but who was in fact in the interest of Bischoffsheim & Goldschmidt. This statement was contained in a letter from McHenry to the company of the date of March 27, 1873, in which he wrote that for some reason a revulsion of feeling had set in against the bonds, "arising, perhaps, from so many being disappointed in not receiving allotments," consequently the whole capital had been on the market, and Bischoffsheim, for the safety of the loan, had been compelled to purchase it. Although the statements in this letter were false,—because over \$4,000,000 of the bonds had been permanently placed with the Paris syndicate,—the officers of the company were not aware of it. Shortly

after the call of Bischoffsheim & Goldschmidt, the company delivered to them the remaining 1,250 bonds. Bischoffsheim & Goldschmidt never rendered any account of the disposition of these bonds. In September, 1873, the company, being in urgent need of money, sent its agents to induce Bischoffsheim & Goldschmidt to advance what was needed. Bischoffsheim & Goldschmidt finally consented to advance the sum which this suit is brought to recover, and a contract was entered into by which the company pledged 1,250 of the bonds then in the possession of Bischoffsheim & Goldschmidt as collateral for the loan. That agreement, among other things, recited that the money advanced by Bischoffsheim & Goldschmidt was to be paid to John Crosby Brown and Jesse Seligman for the disbursement thereof in completing the railway "under a trust for that purpose already in existence." The agreement was formally reduced to writing about two weeks after the time when its terms had really been arranged, and after the sum of \$294,444, and the further sum of \$269,937, had actually been advanced by Bischoffsheim & Goldschmidt. In the mean time Bischoffsheim & Goldschmidt had sent an agent—one Cassel—to New York, and the formal agreement was executed there, September 29th, and delivered to him there by the officers of the railroad company. Simultaneously with the delivery of this agreement, a letter was delivered to Cassel, signed by Brown and Seligman, which contains the alleged trust sought by the bill to be enforced. The latter was addressed to Bischoffsheim & Goldschmidt, bore date September 30, 1873, and after acknowledging the receipt through cable transfers of the two advances already made, read as follows:

"We understand that these sums, with such further sum as you may place in our hands on or about October 1st proximo, is so placed as a special fund to be disbursed by us for account of the completion of the construction of the New York & Boston Railroad, and the purchase of rolling stock of the New York, Boston & Montreal Railway Company, not exceeding the limit of the allotments made in the disbursement trust to these two accounts, and not as part of the proceeds of the first mortgage bonds coming into our hands under the consolidation and disbursement trust agreement; and, so far as we have any control over the matter, we assent to the arrangement made by your firm and the New York, Boston & Montreal Railway Company, by contract dated September 29, 1873."

The questions mainly litigated in the case, and to which the evidence is largely addressed, are as to the meaning and effect of the promise contained in this letter, and whether moneys advanced were disbursed conformably with its terms by the trustees. Although the bill of complaint was filed in 1877, the testimony of the complainant was not taken until the summer of 1881, and he then testified that his firm never collected or received any money as proceeds of the bonds pledged; and it was not until the spring of 1887, upon the examination of certain witnesses in London, that the fact was elicited that March 26, 1873, Bischoffsheim & Goldschmidt had formally notified the Stock Exchange of London that the whole \$6,250,000 bonds which they had undertaken to negotiate had been unconditionally allotted to the public, and the sums due upon allotment had been paid thereon. Further investigations were instituted by

the defendants after learning this fact, and they discovered and proved that Bischoffsheim & Goldschmidt opened an account with the Imperial Bank, Limited, of London, in the name of the railway company, and that in this account credit items were entered for the various installments payable upon a subscription aggregating the subscription price for the whole of \$6,250,000 of bonds. Thereupon the defendants gave notice that they should apply for leave to amend their answers, so as to allege that when the moneys in suit were loaned, Bischoffsheim & Goldschmidt had in their hands more than the amount loaned, as the proceeds of the negotiation of the bonds, and belonging to the company. This notice was given before the complainant's evidence was closed, and when there was ample opportunity to meet the new issue. The complainant has attempted to meet it; but the only evidence he has produced is his own testimony, which is, in substance, that he bought back the bonds, or rather the scrip certificates which were in circulation prior to the definitive delivery of the bonds, in order to sustain the market, and kept up payments in the account with the bank so that the transaction should appear regular, and in order to keep the scrip alive. No attempt was made to fortify this testimony by the production of his own books, or by any corroborative evidence. It is in conflict with the testimony given by him in 1881. Bischoffsheim & Goldschmidt never informed the company that such transactions had taken place. Their silence is significant, and especially so in view of their enigmatical answer to inquiries by the company at the time, which naturally called for an explanation. After receiving their letter of March 27th containing the call for \$5,000,000 of the bonds, on April 10, 1873, the president of the company wrote them calling attention to the fact that he was advised by cable of the allotment of the whole \$6,250,000, and stating that he should forward that amount in place of the \$5,000,000 called for. April 24, 1873, Bischoffsheim & Goldschmidt answered that letter as follows: "We beg to state that, as stated in our respects of March 27th, only \$5,000,000 of your company's first mortgage bonds have been purchased by us." The company knew that Bischoffsheim & Goldschmidt had exercised their right to purchase that amount of bonds. No information on that point was necessary. It is entirely obvious that this curt communication was meant to silence further inquiries. The contract between Bischoffsheim & Goldschmidt and the company gave Bischoffsheim & Goldschmidt no authority to buy back bonds for the company which had been actually negotiated, although it did allow them to do so on their own account, and for their own benefit; and it is therefore altogether unlikely that they would have assumed to buy back for the company, in order to sustain the market, without communicating with the company, and informing its officers of the necessity for doing so. Certainly, good faith, and the duty of full information by an agent to his principal, required them to inform the company whether they were buying them back at the company's risk or for their own account. It is incredible, in view of the great demand for the bonds at the subscription price, that Bischoffsheim & Goldschmidt were unable ultimately to place a single bond, ex-

cept those which they purchased of the company themselves. Under all the circumstances, it seems reasonable to conclude that after the whole amount had been allotted, and when the public appetite was fierce and unappeased, Bischoffsheim & Goldschmidt commenced to buy the scrip on their own account, and for their own benefit, and continued to speculate in it until definitive bonds were deliverable, and thus had the \$1,250,000 of bonds on hand at the time of making the loan to the company. Upon this state of facts the case is so clear that it can hardly be expected that any time will be spent in examining the record in order to find out whether the moneys loaned by Bischoffsheim & Goldschmidt were disbursed by John Crosby Brown and Jesse Seligman according to the alleged trust evidenced by the letter of September 30, 1873. It is enough to defeat the complainant that he does not come into court with clean hands. At the time the loan was made, the lenders had in their hands more than the amount loaned, as the proceeds of bonds which they had negotiated, which they were bound to account for to the company, and pay over to John Crosby Brown and Jesse Seligman as the trustees of the disbursement trust agreement. The equitable title to this money was in John Crosby Brown and Jesse Seligman, as trustees under that instrument, and they not only had the right to receive it from Bischoffsheim & Goldschmidt unconditionally, but it was their duty to disburse it, when received, conformably with the trusts of that instrument. If they have received it, although they have received it in the form of a loan from Bischoffsheim & Goldschmidt, and have not disbursed it as they were required to, the beneficiaries in the disbursement trust agreement can question their acts, and call them to an account; but no one else can do so. On the other hand, if the money received by them from Bischoffsheim & Goldschmidt was other money, and not the identical money that Bischoffsheim & Goldschmidt should have paid over to them, Bischoffsheim & Goldschmidt, or the complainant as survivor of that firm, cannot be permitted to assert an equitable title to it, so as to follow it into the hands of the trustees, and compel them to refund it, without doing equity, and placing the trustees in possession of what belonged to them. It would seem also that, if the trustees have an equitable title to a larger sum of money in the hands of the complainant, they can invoke the doctrine of equitable set-off to shield themselves against a recovery of the money to which the complainant claims an equitable title; and the other defendants are not liable unless the trustees are liable, because they succeeded to the rights of the trustees when they received any part of the money in controversy. Inasmuch as the defendants John Crosby Brown and Jesse Seligman have not filed a cross-bill, they cannot have any affirmative relief by way of an accounting for the money in the hands of Bischoffsheim & Goldschmidt beyond the amount received.

The decree ordered is therefore a dismissal of the bill.

v.34r.no.3—11

BANQUE FRANCO-EGYPTIENNE *et al.* v. BROWN *et al.*

(Circuit Court, S. D. New York. March 19, 1888.)

1. RAILROAD COMPANIES—BONDS AND MORTGAGES—FRAUDULENT PROSPECTUS—RIGHTS OF BONDHOLDERS.

The complainants, acting as a syndicate, purchased part of an issue of railway mortgage bonds offered for sale to the public by a prospectus issued by the agents of the railway company. Trustees had been appointed by an agreement between the several constituent companies composing the railway company to receive and disburse the proceeds of the bonds for certain specified objects, among them the payment of the debts of the constituent companies. In a suit brought by complainants against the railway company, the trustees, and various defendants to whom the trustees had paid part of the proceeds of the bonds, the bill alleged that the prospectus contained various untrue and fraudulent representations; that the complainants relying thereon had been induced to purchase the bonds by fraud; that the trustees and the other defendants who had received part of the proceeds were aware when they received the money of the false and fraudulent character of the prospectus; and that the prospectus also contained a promise that the proceeds of the bonds should be used to complete the construction of the railway, and not for the extinction of liabilities of the constituent companies; but the proceeds were applied in part by the trustees, and were received by the other defendants in payment of such liabilities, with knowledge of this promise. The object of the suit was (1) to rescind the purchase for fraud, and charge the trustees and the recipients of the moneys from them as trustees *ex maleficio*; and (2) to enforce the promise of the prospectus as a promise to the purchasers of bonds in the nature of a trust, and compel the trustees and the recipients from them to account for the part appropriated contrary to the promise. *Held*, that complainants were merely creditors of the company, and as such, even were the issue presented by the bill, could not assail the validity of the agreement appointing the trustees, nor question the doings of the trustees as such.

2. SAME—PLEADING—MULTIFARIOUSNESS.

If the bill presented a case seeking relief because of the invalidity of the trust agreement, or the violation of the provisions of that agreement by the trustees, the conjunction of such a cause of action with the causes of action arising upon the prospectus would render the bill multifarious; and the joinder of causes of action so wholly disconnected would render the bill so obnoxious that the court *sua sponte* would refuse to tolerate it.

3. EQUITY—JURISDICTION—RESCISSION OF CONTRACTS—FRAUD.

Equity will not refuse jurisdiction of a suit to recover moneys obtained by fraud when the money in part has passed into the hands of several third parties with knowledge of the fraud, and the object of the suit is to reach what remains in the hands of the original wrong-doers, and follow the rest and reach it in the hands of the other defendants. In such a case the remedy is more adequate and complete in equity than at law.

4. SAME—MISREPRESENTATION IN PROSPECTUS.

Misrepresentation by prospectus, except as between promoters and shareholders, is to be tried by the ordinary criterion of misrepresentation. But a reasonable construction of the language of a prospectus may require that a future tense should be given to words in the past or present tense.

5. SAME.

A right of rescission because of misrepresentations in a prospectus must rest upon misrepresentations concerning material facts, and not of mere matters of opinion, and must relate to existing facts, and not to matters of future conduct or expectation. It cannot be founded upon the breach of pure promissory statements.

6. SAME.

Unless promissory statements are such as imply that a certain condition of things, or state of facts, exists at the time to form the basis of the promised

future state of things, they do not give birth to a right of rescission. Fraud cannot be predicated of promises not performed for the purpose of avoiding a contract.

7. **SAME.**

If a prospectus contains material false representations, those who authorize it to be issued cannot repudiate them as made without their authority, while retaining the fruits of the prospectus.

8. **SAME.**

A statement in a prospectus respecting the uses to which the moneys to be derived from the sale of bonds are to applied is to be construed as a representation of intention, or the expression of the expectation and purpose of the promoters, if the language falls short of a distinct and unequivocal promise.

9. **SAME—FOLLOWING MONEYS INTO HANDS OF THIRD PERSONS.**

When a prospectus contains a statement which may be construed as a promise by the promoters to the purchasers of bonds that the moneys derived from the sale of the bonds will be used for certain specified objects, and not otherwise, and the promoters upon receiving the moneys pay them out to creditors of the company, disregarding the promise in the prospectus, the bondholders, although they relied upon the promise in parting with their money, cannot reclaim it upon the theory of a trust, and follow it into the hands of those who received it lawfully from the promoters, although with notice of the promise. It is only when money is held in a fiduciary character, so that the equitable title is in the beneficial owner, that the latter can follow it into the hands of a third person.

Bill in Equity. The Banque Franco-Egyptienne *et al.*, complainants, filed a bill against John Crosby Brown, Jesse Seligman, W. W. Sherman, W. B. Duncan, and the executors of James Brown, deceased, and of Treanor W. Park, deceased.

Evarts, Southmayd & Choate, for complainants.

Bangs, Stetson, Tracy & MacVeagh, for John Crosby Brown and Jesse Seligman, defendants.

Jennings & Russell, for McCullough, administrator, etc.

Lord, Day & Lord, for executors of James Brown, deceased

WALLACE, J. Although the pleadings and proofs in this case present a formidable record, the real controversy is a comparatively narrow one when limited, as it must be upon the bill of complaint and by the controlling facts, to its real proportions. The complainants sue on behalf of themselves and of all other persons similarly situated. They are the members of several banking firms, aliens and citizens of France, who, together with other persons not named in the bill, were acting in concert in March, 1873, as a syndicate to market \$6,250,000 bonds of the New York, Boston & Montreal Railway Company, then offered to the public for subscription in London, and who became purchasers by subscription of two-thirds of the bonds. The bonds were part of an issue of \$12,250,000 first mortgage bonds created by the railway company pursuant to a consolidation agreement by which several constituent companies were united and merged together as a new corporation under the laws of the state of New York. That agreement, among other things, provided for the creation by the new company of first and second mortgage bonds,

to be used proportionately and upon trusts enumerated, in part for railway construction and equipment and in part to extinguish existing obligations of the constituent companies, which bonds were to be delivered to and negotiated by "disbursement trustees" to be thereafter nominated by the new corporation, and were to constitute a fund in their hands to be distributed and applied pursuant to the specified trusts. Before the disbursement trustees accepted the trusts, the provisions of the consolidation agreement were modified by the concurrence of the immediate parties to it, and a "disbursement trust agreement" was executed, by the terms of which the disbursement trustees were relieved of the duty of negotiating the bonds, the persons who were to act as such trustees were named, and the fund to arise from the negotiation of the bonds was to be appropriated and applied upon somewhat different trusts from those originally enumerated. The persons named in this agreement as disbursement trustees formally accepted the trusts created by it. Shortly afterwards the bonds purchased by the complainants were offered to the public in London by Messrs. Bischoffsheim & Goldschmidt, who had undertaken with the consolidated company to market the bonds. The principal defendants in the suit are the trustees named in the disbursement trust agreement, to-wit., John Crosby Brown, Jesse Seligman, William Watts Sherman, to whose hands came the greater part of the proceeds of the bonds, together with William B. Duncan and the executors of James Brown, deceased, and of Treanor W. Park, deceased. The trustees assumed to distribute the proceeds of the bonds according to the terms of the disbursement trust agreement, and Duncan, Brown, and Park were beneficiaries under the terms of that agreement, and respectively received part of the proceeds.

The argument has taken a wide range, and it has been contended for the complainants—(1) That the trustees and the other original defendants were parties to a scheme of deceit and fraud by which unprofitable railroad properties were to be merged together and mortgaged, the mortgage securities marketed, and the proceeds captured by the promoters; that the complainants were induced by deceit and fraud to purchase the bonds, and thus to supply the proceeds which were to be appropriated, and were kept, as plunder by the promoters; and that they are entitled to resort to a court of equity, charge the defendants as trustees *ex maleficio*, and follow the proceeds. (2) That the complainants were induced to purchase the bonds, relying upon the truth of certain false and fraudulent representations contained in the prospectus issued in behalf of the consolidated corporation when the bonds were offered for sale upon the London market; that the defendants knew this when the proceeds came to their hands respectively; and, that, having received the proceeds under such circumstances, the defendants are trustees *ex maleficio* even though they were innocent and honest otherwise in their participation in the transactions complained of. And (8) that the proceeds of the bonds were a trust fund in the hands of the trustees, impressed, both by express contract and constructively, with the equitable rights of the complainants to have them applied for specified purposes; that the trustees have disre-

garded and subverted these equities by applying the proceeds to foreign objects; and consequently that they and the recipients from them with notice must account.

The theory of a contract trust rests on the propositions—(1) That the complainants were entitled to avail themselves of the trusts created by the consolidation agreement; that this agreement was the charter of the company, and could not be materially changed without legislative sanction; that the trustees and the recipients of the fund arising from the proceeds of the bonds were bound to know that any disposition of the fund contrary to the provisions of that agreement was unauthorized; that the disbursement trust agreement, so far as it permitted a different disposition, was consequently invalid; and that it was the duty of the trustees to return the proceeds to the complainants unless they were willing and able to conform to the directions of the consolidated agreement. (2) That the prospectus, upon the faith of which the complainants bought the bonds, contained an express promise that the proceeds should be applied by the trustees in a specified manner, to-wit, should be held and applied by them for completing the construction of railroad property, while the remaining first and second mortgage bonds should not in the mean time be offered for sale, but should be held by them for the extinction of all outstanding bonds and stock of the constituent companies; and that, if the trustees were not parties to this promise, so that it is not to be treated as a promise by them, nevertheless they knew of it when they received the proceeds,—knew that the railroad company had pledged itself accordingly, and were bound either to repudiate it and return the moneys or apply them conformably to the promise.

It will be found that if the bill of complaint asserts more than two distinct causes of action or grounds of recovery against the defendants, there are but two which the evidence justifies in any view that can reasonably be taken of it. The complainants allege in substance in their bill that they loaned to the railway company the amount of money advanced upon their subscription for the company's bonds; that they subscribed for the bonds upon the faith of a prospectus issued to induce the subscription; that the prospectus contained various representations concerning the character and value of the mortgaged property, and the condition and circumstances of the enterprise in which their money was to be used; that they knew nothing in respect to these matters but what they learned from the prospectus, except that various of the persons who were named in it as connected with the enterprise were regarded as men of wealth and high standing; that many of the material representations contained in the prospectus were false and fraudulent, put forth to stimulate a subscription on the part of persons like the complainants, ignorant of the natural features and surroundings of the said railway enterprise; that in consequence they were deluded and beguiled into subscribing for the bonds, and the disposal of the bonds to them under the circumstances involved a gross fraud and imposition upon them on the part of the railway company, its officers and agents, and on the part of the said trustees; and that the complainants and other takers of the bonds similarly situ-

ated are entitled to reclaim the amount which they paid for the same, with interest. The bill also sets forth facts constituting another cause of action, which in substance is that the moneys of the complainants, received by the trustees on account of the bonds, were received by them to be disbursed according to the terms of a promise in the nature of a trust contained in the prospectus; that this promise was to the effect that \$6,000,000 of the first mortgage bonds not then offered for subscription would be reserved by the trustees for the extinction of the liabilities of the constituent companies forming the consolidated company, and the proceeds of the \$6,250,000 then offered would be used and applied by the trustees solely for completing the construction and equipping the railways of the company; that the moneys were used and applied by the trustees in violation of this promise; that the trustees attempt to excuse themselves for such misuse and misapplication by a claim that they acted under the provisions of an instrument called the "disbursement trust agreement;" that the complainants did not know anything of that agreement, or of any of the documents relating to the organization or condition of the railway company, when they subscribed for the bonds, but relied solely upon the prospectus and the representations and assurances therein contained; that the issuing of the prospectus was in law the act of the trustees, and when they received the complainants' money the trustees knew its terms and conditions; that the pretended excuse of the trustees is untenable, because, if the said disbursement trust agreement contained provisions inconsistent with the terms of the prospectus, it was alterable, and was altered by the prospectus, and moreover did not conform to the consolidation agreement under which the railway company was formed; that however much the terms of the prospectus may have differed from those of the consolidation agreement or the disbursement trust agreement, yet the trustees had no right to apply the complainants' moneys otherwise than conformably to the promise of the prospectus. In order to charge the defendants other than the trustees, the bill avers that the trustees disposed of part of the complainants' moneys to Duncan, Park, and Brown; that these persons, together with the firm of Seligman & Co., were among the promoters of the scheme for organizing the consolidated company, and mortgaging its property; and selected the trustees in their interest; that they received the moneys pursuant to their original plan of getting rid of their worthless interests in the pre-existing railway companies, and with full knowledge of all the facts and circumstances connected with the negotiation of the bonds. The prayer for relief (after an offer in the prayer by the complainants to surrender the bonds held by them) is that it may be adjudged that the disposal of the bonds to the complainants was fraudulent on the part of the company, its officers and agents, and of the trustees; that the complainants be repaid the money paid for the bonds, with interest, less interest received upon the bonds; that the trustees account and pay the same to the complainants, less such sums as may be refunded by the other defendants; and that the other defendants, who have received portions of the proceeds of the bonds from the trustees, account and repay the same to the complainants. The bill

prays for discovery, and for other relief to which special reference is unnecessary.

Plainly, the averments of the bill present two principal grounds of complaint against the defendants as the basis of the relief sought: *First*, that the money of the complainants was obtained by deceit, of which the prospectus was the vehicle, whereby complainants are entitled to rescind their subscriptions and reclaim the money of the defendants who received it and participated in the deceit, or were cognizant of the deceit when the money came to their hands; *second*, that the prospectus contained a promise, in the nature of a trust to the effect stated, whereby the complainants are entitled to reclaim their money of the trustees who received it and applied it, disregarding the promise, and of the other defendants who received it with knowledge of the facts. There are allegations in the bill which may have been designed to charge that the trustees, as well as Duncan, Park, and Brown, were parties to a scheme of deceit and fraud, by which unprofitable railroad properties were to be merged together and mortgaged, the mortgage bonds marketed, and the proceeds captured by the promoters; and that the complainants were drawn into this scheme and induced to purchase the bonds, and thus supply the plunder which was to be and was appropriated by the promoters. Certainly, a considerable part of the argument for the complainants at the bar has proceeded upon the theory of such a cause of action, and that the complainants are entitled upon that theory to reclaim their money in a court of equity. But if any such charge was originally contemplated by the bill, the evidence to support it is not found in the record. Nothing in this controversy is better established by the proofs than that all the defendants, who were among the promoters of the consolidation scheme, were convinced that their enterprise offered excellent prospects of success as a practical and legitimate undertaking, and believed when the mortgage was created that the bonds subsequently bought by the complainants were a good speculative investment, and would ultimately prove a safe and profitable one for the purchasers.

A narrative of the transactions preceding the issuing of the prospectus and the sale of the bonds is necessary.

The consolidation scheme originated in 1871; and negotiations ensued in which Messrs. Park, Duncan, and others, represented the Harlem Extension Railroad Company, Gen. Schultz (as agent for James Brown) and George H. Brown represented the Dutchess & Columbia Railroad Company, and Messrs. McKinney and Hoyt represented the New York & Boston Railroad Company; and a provisional agreement for a consolidation was reached in the spring of 1872. The scheme contemplated the merger of these three railway companies with two other railway companies, viz., the Putnam & Dutchess Railroad Company and the Pine Plains & Albany Railroad Company, which latter companies were to be organized to construct and bring into the proposed consolidated line intervening lines of railway. The Harlem Extension Railroad Company had been created in 1870 by the consolidation of the Bennington & Rutland Railroad Company with the Lebanon Springs Railroad Company, and upon

the merger of those two companies assumed a mortgage debt of the constituent companies of \$2,500,000. In April, 1870, the Harlem Extension Railroad Company had created a mortgage to secure its bonds to the amount of \$4,000,000, \$2,500,000 of which were set apart to retire by exchange the mortgage bonds of the two constituent companies. The defendants Park and Duncan were large creditors of this company. According to the answers of these defendants, Park was a holder of \$900,000 of the bonds of the Harlem Extension Railroad Company, and \$300,000 of the bonds of the Lebanon Springs Railroad Company, and Duncan held \$75,000 of the bonds of the Harlem Extension Railroad Company, and \$24,000 of the bonds of the Lebanon Springs Railroad Company; and they were the owners of certain rolling stock in use by this company. The railway property of the Harlem Extension Railroad Company had cost about \$4,000,000. Its railroad was about 117 miles in length, and was in operation from Rutland, Vt., to Chatham Four Corners, and it was the lessee in perpetuity of the Bennington & Glastonberry Railway. Prior to the merger, as is alleged by the answers, the two constituent companies had regularly met their obligations, but after the merger the Harlem Extension Railroad Company lost business connections theretofore existing, and had not earned operating expenses during the year 1871.

The Dutchess & Columbia Railroad Company was organized in 1866, and at the time of the negotiations had cost, with its equipments, about \$2,600,000. Its road extended from Fishkill Landing, on the Hudson river, to Millerton Station, on the Harlem Railway, near the Connecticut line, a distance of about 59 miles. Nearly \$1,500,000 had been paid in on its capital stock. Its first mortgage bonds (\$1,500,000) had been sold at from 80 to 85 per cent. of par. It had a second mortgage for \$600,000, a third for \$125,000, and a fourth for \$275,000. At one time it had been leased by the Boston, Hartford & Erie Railroad Company for an annual rental of \$200,000, but this company had defaulted in payment of rent, and, upon the termination of the lease, in March, 1870, the railroad was without equipment, and without means. James Brown was a large stockholder and creditor of this company, his interest approximating the sum of \$1,000,000. The president of this company was his son, the defendant George H. Brown, and the defendant John Crosby Brown was the trustee of the several issues of mortgage bonds. George H. Brown held \$52,000 of its stock, and \$6,000 of its first mortgage bonds, and John Crosby Brown held \$5,000 of the stock and \$74,000 of its first mortgage bonds. After the termination of the lease to the Boston, Hartford & Erie Railroad Company, the railroad was without equipment, and without means to meet the interest on its mortgage debt; and thereupon James Brown purchased rolling stock and leased it to the company, and made advances to assist the company in carrying on its operations. At the time of the negotiation it was not earning operating expenses.

The New York & Boston Railroad Company was organized in 1869 to build a line of railroad from the Harlem river, near New York city, to

Brewsters, in the county of Putnam, a distance of about 58 miles, and was in progress of construction at the time of the negotiations. Messrs. Hoyt & McKinney had been the principal promoters of this company. About \$2,000,000 had been expended in construction. It had created first mortgage bonds for \$2,000,000. Among those who had assisted the enterprise financially were the banking firm of Seligman & Co., of which the defendant Jesse Seligman was a member. Prior to 1871 this firm had advanced the company over \$160,000, and they had continued to make advances subsequently. While the consolidation scheme was pending they advanced \$200,000 on \$400,000 of its mortgage bonds, and \$100,000 on \$150,000 of the bonds.

The two completed railways had experienced the usual vicissitudes of young enterprises, and at the time were unprofitable, but there is no reason to suppose that their owners regarded them as likely to be permanently so; the uncompleted one, the New York & Boston Railway, had been projected by intelligent and enterprising men, who believed in its ability to maintain itself when completed. It occurred to those interested in the three disconnected railways that by building the necessary link lines to unite them together, and merging all under one management, the three concerns could be utilized as members of an extensive system, and a trunk railway line be formed extending from Rutland, in the state of Vermont, to New York city, having connections at the *termini* and at intervening points upon the line with other railroads, then built and in operation, or projected; and that the new company would be able to command a much larger traffic locally than had inured to the disconnected roads, a traffic that would develop and increase with the increase of facilities and the growth of the communities along the route, and would also command a valuable independent traffic from its connections with other railroads. This was certainly not an unreasonable expectation in view of the results of many previous instances of railway consolidations, and in view of the physical and geographical conditions of the particular enterprise. They proposed to construct a railway which should be not only a north and south line, terminating at Rutland in the north, and on tide water at the Harlem river near New York city on the south, and be an avenue of traffic reaching into Northern Vermont and Lower Canada, but one which by its connections with railways running east and west would derive a considerable business from the commerce between the eastern and western states. As the scheme took life and form it grew in dimensions, and the horizon of the promoters became enlarged, so as to include alliances and combinations with other important railway corporations to strengthen and fructify the new railway. Negotiations were commenced with the Erie Railway Company and with the Central Vermont Railway Company looking to such an alliance. A charter for an underground railway company in New York city was secured; and the construction of various branch roads to serve as tributaries to the main line was included in the program of the projectors. During the latter part of 1871 and the early part of 1872 the scheme gradually assumed a practical and defined form, and a basis

of consolidation was reached satisfactory to the parties having a controlling interest in the three principal railway companies. In the spring of 1872 the preliminary steps for carrying out the scheme of consolidation were so far matured that the two corporations for building the link lines were organized, and the provisional agreement of consolidation referred to was formally prepared and approved by the board of directors, respectively, of the five constituent companies which were to consolidate, viz., the New York & Boston Railroad Company, the Putnam & Dutchess Railroad Company, the Dutchess & Columbia Railroad Company, the Pine Plains & Albany Railroad Company, and the Harlem Extension Railroad Company. This agreement provided for the exchange of the capital stock of the constituent companies for the capital stock of the new company, the payment of the mortgage indebtedness of the constituent companies by the exchange or proceeds of mortgage bonds to be created by the new company; the payment and discharge by the constituent companies of all their outstanding liabilities; and the delivery of their respective railways to the new company,—those of the Harlem Extension Company and the Dutchess & Columbia Company to be delivered in complete condition and good order, and those of the Pine Plains & Albany Company, the Putnam & Dutchess Company, and the New York & Boston Company to be delivered with their tracks fully laid, graded, and bridged, and fenced according to law. The agreement further provided for the erection by the new company of first mortgage bonds to the amount of \$15,750,000, and second mortgage bonds to the amount of \$5,000,000, which were to be appropriated to retire by purchase or exchange the bonded indebtedness of the divisional companies, and pay for the rolling stock and equipment of the new company, and for the application of the capital stock not exchanged, and of mortgage bonds not thus appropriated to the general uses of the company. The proofs do not show satisfactorily what was the basis of adjustment between the several constituent interests, but the provisional agreement provided that the mortgage trustees should set apart \$4,000,000 first mortgage bonds and \$1,000,000 second mortgage bonds to be used for the exchange or purchase of the bonded and other indebtedness of the Harlem Extension Railroad Company and its constituent companies, the Lebanon Springs Railroad Company and the Bennington & Rutland Railroad Company; \$1,030,000 first mortgage bonds for the purchase or exchange of the bonded indebtedness of the Pine Plains & Albany Railroad Company; \$2,500,000 first mortgage bonds for the exchange or purchase of the bonded indebtedness of the Dutchess & Columbia Railroad Company; \$1,720,000 first mortgage bonds for the exchange or purchase of the Putnam & Dutchess Railroad Company; and \$3,000,000 first mortgage bonds for the exchange or purchase of the bonded indebtedness of the New York & Boston Railroad Company. It would seem from the evidence that the understanding between the promoters and the holders of the underlying indebtedness of the constituent companies was that the latter were to be paid 55 cents in cash and 45 cents in the stock of the new company per dollar for their securities, and it was doubtless

expected by the projectors that a sufficient surplus arising from the sale of the first and second mortgage bonds would remain to construct the several branch roads which were intended to be built. Shortly after the provisional agreement was thus approved, Messrs. Lowrey and George H. Brown were sent abroad as the agents of the several companies, to enlist financial assistance for the enterprise. At that time James McHenry, of London, was potent in the affairs of the Erie Railway Company, and Messrs. Bischoffsheim & Goldschmidt, of London, were its recognized financiers; and overtures had been made by the promoters to McHenry, who was then in this country, to assist them to obtain a loan. When Messrs. Lowrey and Brown arrived in London, Bischoffsheim & Goldschmidt had already been advised of their mission by McHenry. While there, Messrs. Lowrey and Brown prepared a printed report, which exhibited in detail all the physical features and conditions of the proposed railway, and statistics and estimates of the expected sources of revenue. They circulated this report extensively among leading bankers and capitalists. They took this report, together with all the documents necessary to show the previous and present *status* of the constituent companies, and the provisions of the scheme of consolidation, to and left them with Mr. Sharp, the solicitor of Bischoffsheim & Goldschmidt, to whom they had been referred by Bischoffsheim & Goldschmidt. Before they fulfilled their errand, McHenry came to London and took part in placing the enterprise before Messrs. Bischoffsheim & Goldschmidt. It commended itself to the favor of both McHenry and Bischoffsheim & Goldschmidt as one likely to be advantageous to the Erie Railway Company. As a result of the negotiations thus instituted, a tentative arrangement was made between the promoters and Bischoffsheim & Goldschmidt to the effect that, after the latter should bring out a new loan for the Erie Railway Company, which they were then about to offer, they would undertake the financing of the new company; but that the consolidation scheme, which, as then devised, contemplated a mortgage of about \$45,000 per mile of railway, should be so modified that the first mortgage should represent \$35,000 per mile, and also that a definite arrangement should be made between the promoters and the Erie Railway Company for an alliance of interests. All the documents, statistical and legal, bearing upon the character and merit of the enterprise, were left by the agents of the constituent companies in the custody of Bischoffsheim & Goldschmidt, or their solicitor, Mr. Sharp, during the pendency of the negotiations, and remained there until the present controversy first arose.

The reduction of the amount per mile of the proposed first mortgage necessitated a readjustment between the promoters of the basis upon which the constituent properties should be provided for, the indebtedness of the company be satisfied, and the proposed enterprise be carried through. While negotiations to this end were going on between the promoters and the various parties in interest, negotiations were also commenced with the officers of the Erie Railway Company touching an alliance and the co-operation of that company in obtaining the necessary fi-

nances for the scheme. About the 1st of September, 1872, a contract was executed between the Erie Railroad Company and the five constituent companies, which, after reciting the proposed consolidation, a connection contemplated between the consolidated road and the Erie Railway by an underground railway to be built in the city of New York, and the ability of the Erie company, "through its friends and agents, and through the money and influence of those interested in its securities," to assist in the negotiation of the first mortgage bonds proposed to be made by the consolidated corporation, contained the following covenant:

"That the said party of the first part [the Erie Company] agrees that it will aid and assist the said parties of the second part [the five companies] to negotiate the said first mortgage bonds to be issued by such proposed consolidated company to the extent above recited, upon condition that the proceeds of such bonds shall in the first place be used only for the purpose of completing said main line from High Bridge to Rutland, and to put the said line in complete working order, and for paying such claims as may now exist, and which it is necessary should be paid, in accordance with the terms of such proposed consolidation, as the same are expressed in the agreement already made relating thereto; and said parties of the second part agree that all proceeds of such consolidated bonds, when the same are realized, shall be so used and disposed of to the extent aforesaid."

The contract then defined the terms of the traffic arrangements which were thereafter to exist between the Erie Railway Company and the consolidated company, and closed with a covenant by the parties of the second part that the contract should be fully confirmed and duly executed by the consolidated company as soon as organized, and a covenant by both parties that the duration of the contract should be for the term of 50 years.

About this time it became necessary for the promoters to assist the New York & Boston Railroad Company to raise money so that it might consummate on its part the proposed scheme of consolidation. Application was made to Bischoffsheim & Goldschmidt in this behalf, and they consented to advance about \$400,000 for that purpose. As a condition of that advance an agreement was entered into between the five constituent companies and Bischoffsheim & Goldschmidt, bearing date October 31, 1872, reciting the proposed consolidation of the five constituent companies, and their purpose to create and issue mortgage bonds at the rate of \$35,000 per mile upon the consolidated main line, to be negotiated by Bischoffsheim & Goldschmidt, and providing that the companies should proceed without delay to complete the proposed consolidation, and create and issue the proposed bonds, and place the same in the hands of Bischoffsheim & Goldschmidt for sale upon commission, and that Bischoffsheim & Goldschmidt should bring out, introduce, and undertake the sale of the consolidated bonds, on terms therein specified as to commission and brokerage, and should have an option to purchase the bonds at 90 per cent., less commission and brokerage. Concurrently with the execution of this contract, a written agreement in the form of a letter to Bischoffsheim & Goldschmidt was signed by five of the promoters personally, which, among other things, contained a promise that

the proposed first mortgage should be at the rate of \$35,000 per mile, instead of \$45,000, as originally contemplated.

The promoters being now ready to proceed in perfecting the modified scheme of consolidation, such proceedings were taken that the Dutchess & Columbia Railroad Company, the Putnam & Dutchess Railroad Company, and the New York & Boston Railroad Company consolidated together by the name of the New York Boston & Northern Railroad Company; and the Harlem Extension Railroad Company and the Pine Plains & Albany Railroad Company consolidated together under the name of the Harlem Extension Railroad Company; and shortly afterwards, and on or about December 19, 1872, the two companies consolidated as the New York, Boston & Montreal Railway Company. The agreements for consolidation were ratified by the stockholders of the several constituent companies, as required by law. The consolidation agreement which thus created the new corporation was executed under authority derived from chapter 917 of the laws of New York of 1869. This statute allows directors of companies proposing to consolidate to enter into a joint agreement under the corporate seal of each company, prescribing the terms and conditions of the consolidation and the mode of carrying the same into effect; and requires the agreement, after the same is ratified by the stockholders of the respective companies, to be filed in the office of the secretary of state. The statute does not impose any restriction upon the contracting corporations in respect to the terms of the agreement to consolidate, except that the capital stock shall not exceed the sum of the capital stock of the constituent companies, and that no bonds or other evidences of debt shall be issued as a consideration for consolidation. The statute also preserves unimpaired the rights and means of all creditors of the constituent corporations, and provides that all the debts and liabilities of those corporations, except mortgages, shall attach to the new corporation, and be enforced against it. The consolidation agreement provided, among other things, that the railway company should execute and deliver to Jesse Seligman, William Watts Sherman, and John Crosby Brown, as trustees, a mortgage of all its property then existing or thereafter to be acquired (except certain equipments) to secure its bonds to the amount of \$12,250,000, to be known as its consolidated first mortgage, and a second mortgage to the trustees to secure additional bonds to the amount of \$12,750,000, to be known as its consolidated second mortgage; and that the said first and second mortgage bonds, when issued, should be delivered to three persons as "disbursement trustees" to be nominated and chosen by the railway company upon specified trusts. These trusts were contained in the seventh article of the agreement, and were (1) to arrange for the sale of the first mortgage bonds when issued, by negotiating in advance of the issue, and publishing a prospectus in respect to the proposed issue conformably to the rules of any stock exchange, and to sign the same for the company; (2) to receive payments on account of the purchase money of the first mortgage bonds; (3) to invest the proceeds upon interest during such times as they should not be required for the purposes of the trust, and apply the interest to the gen-

eral objects of the trust; (4) "to set apart the amounts of first and second mortgage bonds mentioned in the next three sections of the article for the purposes, and dispose of the same in the manner, thereafter specifically directed;" and (5) to sell and dispose of designated amounts of first mortgage bonds, and apply the proceeds respectively to specified purposes.

The provisions of the fourth and fifth trust are more fully set forth as follows: The fourth trust provides for the extinction of the debts of the several companies forming directly or indirectly the consolidated company, and to that end declares that the disbursement trustees shall set apart, hold, and dispose of specified amounts of first and second mortgage bonds, and apply the proceeds to purchase the following debts of the original companies at not exceeding 45 per cent. in cash, and the balance of 55 per cent. in second mortgage bonds: (1) \$1,729,000 first mortgage bonds and \$1,838,000 second mortgage bonds to the payment or discharge of the Dutchess & Columbia mortgage debt, and the Dutchess & Columbia unsecured debt, and any surplus to the mortgage trustees; (2) \$1,552,000 first mortgage bonds and \$1,650,000 of second mortgage bonds to the payment or discharge of the New York & Boston mortgage debt, and any surplus to the treasurer of the consolidated company; (3) \$2,903,000 of first mortgage bonds and \$3,087,000 of second mortgage bonds to the payment and discharge of the Harlem Extension mortgage debt, and the Harlem Extension unsecured debt, and the balance to the vendors of the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company. The fifth trust declares that the trustees shall sell and dispose of specified amounts of first mortgage bonds, and apply the proceeds as follows, viz.: (1) \$1,500,000 to the purchase of rolling stock and equipment; (2) \$230,000 for a payment due under the Bennington & Glastonberry Railroad Company lease; (3) \$172,000 for a payment due under the Clove Branch Railroad Company lease; (4) \$897,000 to complete the Putnam & Dutchess Railroad; (5) \$1,287,000 to complete the Pine Plains & Albany Railroad; (6) \$805,000 to complete the New York & Boston Railroad; (7) \$1,000,000 to the payment of interest on the consolidated first mortgage bond; and (8) the balance to the treasurer of the consolidated Railway Company. George H. Brown was selected as president of the company, and Park and Duncan were selected as two of its directors. John Crosby Brown, Jesse Seligman, and W. Watts Sherman were selected as trustees under the mortgage. Other directors were chosen who represented the several constituent interests. It is to be noticed that by the agreement of consolidation disbursement trustees were to be selected by the consolidated company, and at some time previous to the issuing of its mortgage bonds were to negotiate and issue the bonds, and that in order that the bonds should be applied to the payment of the outstanding indebtedness of the constituent companies, as well as to construction and equipment, the entire issue was to be divided into specific amounts applicable to the several objects. Shortly after this agreement was executed, the new company found itself in need of funds, and applied through its president to

Bischoffsheim & Goldschmidt for a loan. February 6, 1873, Bischoffsheim & Goldschmidt made an advance to the new company of \$270,687 upon its note with collateral, and the president of the company made an agreement with Bischoffsheim & Goldschmidt in the form of a letter authorizing them in substance to exchange the collaterals for the first mortgage bonds of the consolidated company when placed in their hands for sale. Before the bonds were issued, and before the disbursement trustees nominated by the company agreed to serve as such, the instrument known as the "disbursement trust agreement," bearing date February 11, 1873, was executed. The contracting parties to that agreement were the new corporation as party of the first part, and Seligman, Sherman, and John Crosby Brown, parties of the second part. The latter, who were the mortgage trustees, had likewise in the mean time been nominated as the disbursement trustees by the railway company. The instrument, after reciting the consolidation of the several railroad companies constituting the new corporation, the existence of certain specified indebtedness of the several companies, the execution by the consolidated company of its first and second mortgage bonds, the purpose of that company to have the proceeds and avails of these bonds applied to the extinguishment of the indebtedness of the several constituent companies, and the construction, completion, and equipment of the lines of railway of the consolidated company, then recites that, since the agreement of consolidation was made, negotiations for the sale of the first mortgage bonds "have resulted in an arrangement by which the same are to be sold, issued, and disposed of in accordance with the terms and conditions of a plan or prospectus for the sale thereof that has been or shall be put forth in the name of the said company at London, or as the same may be modified or altered," and that the avails are to be placed in the hands of the disbursement trustees, to be by them appropriated and applied solely for the purposes and uses thereafter particularly designated. The agreement then provides that the company shall place in the hands of the disbursement trustees the proceeds of the entire issue of its first mortgage bonds, and \$6,575,000 of its second mortgage bonds; directs the trustees to use the same in amounts and upon trusts specifically enumerated, and requires the application of the proceeds to be made *pro rata* upon the different trusts as avails of the bonds come to their hands. The agreement contained this clause: "Whatever proceeds and avails of said first mortgage bonds shall be received by the said trustees, they shall appropriate, distribute, and divide to and among the several applications to be made thereof, as hereinbefore provided, in the proportion that the bonds allotted thereto bear to the whole issue of such bonds."

The use directed constitutes the trusts of the agreement. The applications directed were as follows: (1) \$1,729,000 first mortgage bonds and \$1,838,000 second mortgage bonds to the payment of the mortgage and unsecured debt of the Dutchess & Columbia Railroad Company, at rates not exceeding 45 per cent. of the amount in cash, and the balance in second mortgage bonds at par; (2) \$1,552,000 first mortgage bonds and \$1,650,000 second mortgage bonds to the payment of the New York

& Boston Railroad Company mortgage debt, at not exceeding 45 per cent. of the amount in cash, and the balance in second mortgage bonds; (3) \$2,903,000 first mortgage bonds and \$3,000,000 second mortgage bonds to the payment of the Harlem Extension mortgage and unsecured debt, at 45 per cent. of the amount in cash, and the balance in second mortgage bonds; (4) \$1,500,000 first mortgage bonds to the purchase of rolling stock and equipment for the consolidated railway, including the purchase of rolling stock sold to the company by James Brown and William Butler Duncan, \$200,000 to each, respectively; (5) \$230,000 first mortgage bonds for payment due the Bennington & Glastonberry Railroad Company upon a lease; (6) \$172,000 first mortgage bonds for the payment due the Clove Branch Railroad Company upon a lease; (7) \$897,000 to the completion of construction of the Putnam & Dutchess Railroad; (8) \$1,287,000 to the payment for the construction of the New York & Boston Railroad; (9) \$805,000 to complete the New York & Boston Railroad; (10) \$1,000,000 to the payment of interest on the consolidated first mortgage bonds; and (11) the residue of the avails and proceeds of all the bonds to the treasurer of the consolidated company.

It will be seen that the disbursement trust agreement was intended to relieve the disbursement trustees of the duty of issuing and negotiating the sale of the mortgage bonds. The recital that an arrangement for the negotiation of the bonds had been made by the company after the consolidation agreement was executed was inaccurate, because the arrangement referred to was the agreement made between the five constituent companies and Bischoffsheim & Goldschmidt of the date of October 31, 1872, already mentioned. There was no occasion for the provision which had been incorporated in the consolidation agreement imposing this duty upon the disbursement trustees; and doubtless the insertion of a clause to that effect was an oversight, and resulted from copying the language of the provisional consolidation agreement in that respect, which had been prepared in the spring of 1872 for the approval of the constituent companies. The modification of the consolidation agreement introduced by the disbursement trust agreement had been considered and determined upon some little time previous to the execution of the latter instrument. In order to expedite the placing of the first mortgage bonds, the company, before the disbursement trust agreement was executed, and on February 6th, sent Mr. Sherman abroad with a power of attorney authorizing him to dispose of the bonds. This instrument gave him plenary discretion, and authorized him to substitute agents with like powers; but it was undoubtedly intended to permit him to make the formal agreement with Bischoffsheim & Goldschmidt, in the name of the new company, which had in effect been made in its behalf by the five constituent companies in October previously. Mr. Sherman carried with him duly authenticated copies of the agreement of consolidation of the first consolidated mortgage of the disbursement trust agreement then unsigned, and of other documents which it is not necessary to mention. February 12th the solicitors for the consolidated company sent by mail to McHenry in London duplicate copies of the same papers accompanied by the nec-

essary evidence of the execution of the disbursement trust agreement. Shortly after Mr. Sherman's arrival in London, he executed a power of attorney to McHenry, substituting the latter as an agent with full authority to contract for the consolidated company in the negotiation of the bonds. March 14th McHenry executed, on behalf of the company, an agreement with Bischoffsheim & Goldschmidt, by which the latter were empowered to negotiate the whole issue of first mortgage bonds,—\$6,250,000 thereof within 14 days, and the remaining \$6,000,000 "at such times and in such amounts as they should think fit, and whenever the main line of the company's railway from New York city to Rutland should be open to public traffic,"—at a price to produce not less than 90 per cent. of the par value, less commissions and charges. By the contract, the proceeds were to be paid by Bischoffsheim & Goldschmidt to the company by installments as received by them conformably to the terms of the prospectus to be issued. A prospectus announcing that Bischoffsheim & Goldschmidt were authorized to offer the bonds, and specifying the price and terms of payment, had been prepared, mainly by McHenry, in London, and had been circulated by Bischoffsheim & Goldschmidt among some of their friends, before the formal execution of this contract.

The facts thus summarized, with others of secondary importance, not adverted to, in the history of the consolidation scheme to the time the bonds were offered for sale, supply the *data* for inferences which are quite inconsistent with the existence of any such fraudulent conspiracy on the part of the promoters as has been asserted. It appears that by the scheme, as matured, the owners of the Dutchess & Columbia Railroad were to get only about \$865,000 cash for property upon which about \$2,600,000 had been actually expended for construction; the owners of the Harlem Extension Railroad were to get only about \$1,106,000 for property upon which about \$4,000,000 had been actually expended for construction; and the owners of the New York & Boston Railroad were to get only about \$700,000 for property upon which about \$2,000,000 had actually been expended for construction. These cash payments were very considerably less than the then value of the properties. These properties represented a considerable investment beyond the actual cost of construction by those who had contributed the means to the several companies to build and operate their roads. As an equivalent for these properties, and for the moneys invested in them by stockholders, bondholders, and creditors, the parties in interest,—mainly the promoters of the consolidation,—were to have, besides the cash payments mentioned, 55 per cent. of the outlay in second mortgage bonds; to which extent, of course, their reimbursement was contingent upon the ability of the company to provide for the interest and ultimately the principal of the first mortgage bonds. It is also manifest that the enterprise had commended itself to men of experience and prominence in railway undertakings, who were on the spot, and familiar, not only with the general features, but largely with the details of the scheme, and had no interest as promoters, but were consulting their own interests as the owners of adjacent rail-

ways; and these men had pledged themselves to assist in negotiating the first mortgage bonds among their own friends and business coadjutors. It further appears that the promoters had disseminated full information of the nature of their enterprise among leading financiers and capitalists in London early in the summer of 1872, and had endeavored to enlist the co-operation of bankers, who, through their correspondents and branch houses in New York city, had full facilities for discovering a fraudulent exploitation; that the promoters had at that time especially solicited the co-operation of Bischoffsheim & Goldschmidt, whose intimate relations with McHenry and the Erie Railway Company gave them direct sources of authentic and complete information; and that, after doing this, the promoters left their enterprise, the subject of investigation and criticism, to sink or swim upon its merits, until the spring of 1873. It seems utterly improbable that Bischoffsheim & Goldschmidt, after having this long period in which to acquaint themselves, through their counsel and financial agents at New York, and through McHenry and their associates in the Erie Railway Company, with everything that was needed to be known about the merits of the enterprise, would have risked their financial reputation, and committed themselves to the responsibility of marketing the bonds at 90 per cent. of par without resorting to information wholly independent of that communicated by the promoters; and unless they were parties to the alleged conspiracy, it must be inferred that they were convinced, after a sufficient investigation, that the enterprise was an honest one, and one to which they could reputably lend the sanction of their name. It is not claimed that they were parties to the conspiracy, but, on the contrary, this is disclaimed by the counsel for the complainants.

The salient facts and considerations thus referred to are sufficient to refute the charge of such a conspiracy on the part of the defendants. But it is proper to refer to other evidence in their exculpation. The report of Mr. Barnes, an engineer, and an authority of undoubted qualifications, experience, and reputation upon railway projects, made in the spring of 1872, has been produced. This report was not procured to influence the public, but was procured by John Crosby Brown for his own information, and at his own expense, in order to satisfy himself that the enterprise was one with which he could properly connect his name. Mr. Barnes made a careful personal investigation of the existing conditions and the prospective merits of the undertaking. His report embodies in detail a full summary of them; and his opinion was that the enterprise was a judicious one, and that the proposed consolidated railway would be adequate security for a larger mortgage than the first mortgage, which was subsequently created. The complainants have compelled the production by the defendants of the private letters passing between various members of the Brown family, and the private letters passing between the various members of the Seligman family, during the period from the inception of the scheme to the time the bonds were sold in London and subsequently, and put them in evidence, to reveal the secret history of the transactions in suit. These letters demonstrate the confidence of John

Crosby Brown and Jesse Seligman that the first mortgage bonds were a good speculative investment, and that the consolidated property ought to earn more than enough to meet the interest upon them. The letters of George H. Brown indicate his conviction that the earnings of the property, in view of all the combinations made or to be made, would be such as to make the second mortgage bonds as good as the first. The opinion of Mr. Duncan is manifested by his letter to Mr. Bischoffsheim, written when he had no interest to pervert the truth. This frank, unpremeditated, confidential letter speaks trumpet-tongued in vindication of his good faith. No letters indicating the opinion of James Brown or of Mr. Park are in evidence. James Brown was a man of advanced age when the scheme originated, and his interests were represented by Gen. Schultz, who had no personal motive to engage in a fraud. Mr. Park died before his testimony was taken in the cause, and his motives and views can only be conjectured.

It has seemed necessary to consider the charge of conspiracy made against the defendants, irrespective of the question whether the bill of complaint contains any such charge, because thousands of pages of the printed record are occupied by evidence of no pertinency to the controversy, except as bearing upon such a charge. If the charge is unfounded, the defendants are entitled to the benefit of a vindication. The conclusion reached is not only that the charge is unfounded, but also that it is without a shadow of justification. The promoters did not assume to be philanthropists, but they were not tricksters. They were well-known men of business, who concerted the consolidation scheme in order to make money for themselves. They were anxious to convert their investments in railways that were not productive at the time into investments that would be productive in the future; they convinced themselves that their enterprise had the elements of legitimate success; they were willing to stake a very considerable part of their investments upon the chances of its success; they expected to have to treat with men of experience, sagacity, and acuteness when they should apply for the necessary pecuniary means to float their enterprise and put it on its feet; and, finally, they sought for the means required of men who not only had as good an opportunity to judge of the merits as they themselves, but whose judgment was probably better, because more disinterested than their own. It would be strange if among the many actors in promoting the consolidation, some of whom are not defendants in this suit, there were not those who were unscrupulous, and cared little about the outcome so long as it was profitable to themselves. It would be strange if among the concomitants and incidents of such a scheme there were not things done, and other things left undone, which savor of recklessness, and bring reproach upon their authors, and measurably upon all associated with them. These things, however, fall far short of intentional fraud, and are common, if not inevitable, in the history of large projects of a speculative character like this one, in which the diversity of motives and interests is as various as are the temperaments and characters of those who participate.

Before considering the case with respect to the prospectus, and the

rights and liabilities of the parties growing out of the publication of that document, it is desirable to eliminate matters which have been argued at much length at the bar as authorizing a decree for the complainants, but which have no legitimate place in the real controversy between the parties. The substantive averments of the bill, so far as it proceeds upon trust, are, in effect, that the trustees are responsible to the complainants, because they undertook a trust relationship and responsibility to the complainants by the conditions of the prospectus, and cannot justify themselves as against the complainants under any of the documents relating to the organization of the railway company, or under the disbursement trust agreement, because they were required to conform themselves to the trust of the prospectus or return the complainants their money. The bill does not attempt to place the relief sought by the complainants upon their right to enforce the provisions of the consolidation agreement, or to assail the trusts of the disbursement trust agreement as contravening the provisions of the consolidation agreement. If such a case had been presented by the bill in conjunction with the causes of action founded upon the prospectus, the attempt to join a cause of action to enforce an express trust arising upon an instrument executed before the prospectus was published, and wholly inconsistent with the alleged trust contained in the prospectus, would have rendered the bill multifarious; and the joinder of such a controversy with one founded upon a fraud, or a series of frauds, whereby the complainants became entitled to reclaim moneys which they were induced to loan the company, would render the bill so obnoxious to the recognized rules of pleading that a court of equity, *sua sponte*, would refuse to tolerate it. A suit to enforce the provisions of the consolidation agreement upon the theory that trusts were created by that instrument in which the mortgage creditors of the company are beneficiaries would require the presence of all the persons and corporations to whom distribution of the proceeds of the bonds was to be made, and they are not defendants in the present bill; and would require different evidence, and the decree would proceed on widely different principles from one for the recovery of the money of the complainants that came to the hands of the trustees impressed with a different trust, or which they acquired *ex delicto*. In such a suit, the vast mass of evidence which appears in this record, and which was introduced to establish fraud, would have been utterly irrelevant; and the introduction of such an unnecessary and foreign issue into the bill would have been so inconvenient, oppressive, and vexatious as to impede and pervert the orderly administration of justice. Irrespective of any question of pleading, there is nothing in the provisions of the consolidation agreement upon which the complainants can found any right. That instrument did not create any trusts, but was an agreement between the parties who signed it for the future creation of trusts for their own benefit. The trustees never became parties to it, there never was any perfect institution of the trust contemplated by it, and before the trust fund which the parties to it proposed to create and distribute was created the contracting parties abrogated the agreement by substituting a new one. Until the persons se-

lected to carry out the trusts declared in the new agreement became parties to that agreement and accepted the trusts, the trustees had no official existence, and assumed no personal responsibility. The only express trusts which they have ever assumed are those which they accepted when they became parties to the disbursement trust agreement.

It remains to consider the case so far as it proceeds upon the theory that the defendants are responsible for the moneys claimed because they were obtained by the inducement of a prospectus which contained fraudulent misrepresentations of material facts, and also a promise amounting to an equitable obligation to apply the complainant's moneys in a way different from that observed. The officers of the railway company took a very subordinate part in formulating or issuing the prospectus. It was their understanding, and also that of all the promoters, that a prospectus was to be issued and published incident to the sale of the bonds. Such a document was necessary if the bonds were to be listed with the stock exchange. The consolidation agreement contemplated that the trustees would undertake the office of negotiating the bonds and issuing of the prospectus upon which the bonds were to be offered to the public, but before they consented to act as trustees the negotiation of the bonds had been committed to Bischoffsheim & Goldschmidt by those who controlled the affairs of the company; and by the terms of the disbursement trust agreement the trustees were to receive the proceeds for distribution among the objects and to the beneficiaries of the trust, and were relieved of the duty of negotiating the bonds. As has been stated, the agreement between Bischoffsheim & Goldschmidt of October 31, 1872, by which they became contractors for negotiating the bonds of the company, was an agreement between them and the constituent companies afterwards composing the consolidated company; and, by force of the statute authorizing the consolidation, this agreement became obligatory upon the consolidated company as soon as it came into being. This agreement was supplemented by the authority given to Bischoffsheim & Goldschmidt by the consolidated company upon the advance made by them February 6, 1873; and when Sherman went to London with the power of attorney, his mission, so far as it related to the negotiation of the bonds, was merely to conclude formally with Bischoffsheim & Goldschmidt a contract in behalf of the consolidated company embodying the terms of the previous agreement. Mr. McHenry was the mediary selected by the officers of the company to conclude the formal contract with Bischoffsheim & Goldschmidt; and pursuant to the previous understanding between the officers of the company and McHenry, Sherman substituted McHenry as agent for the company, with full powers to contract for the negotiation of the bonds, and thereupon McHenry executed the contract with Bischoffsheim & Goldschmidt of the date of March 14, 1873. Prior to the execution of this contract, McHenry and Bischoffsheim & Goldschmidt had been engaged in the preparation of the prospectus, and Bischoffsheim & Goldschmidt had applied to the complainants inviting them to assist in marketing the bonds. So far as appears, Sherman took no part in any of the acts of the promoters. He

had no interest in the enterprise, and knew nothing about its details. He went abroad upon a pleasure trip, and as soon as he returned home resigned as a trustee. The prospectus was issued and bears date as of the date of the contract.

It was supposed at this time by the officers of the railway company that McHenry had interested himself for the company because of the alliance which existed between it and the Erie Railroad Company, and because the Erie Railroad Company was anxious to promote the new enterprise and bring it to a completion; but in fact McHenry was acting with Bischoffsheim & Goldschmidt, and was a partner with them in the profits which they were to derive by commissions and otherwise by negotiating the bonds. When the agents for the promoters, who visited London in the summer of 1872 to solicit financial assistance, returned to this country, they left with Mr. Sharp, the solicitor of Bischoffsheim & Goldschmidt, who was also the solicitor of the Erie Railway Company in London, the printed report which they had prepared, as well as all the other instruments and papers relating to the several companies and the proposed scheme of the consolidation; and they also left with Bischoffsheim & Goldschmidt a statement embodying all the conditions and details of the enterprise, which statement had been delivered by them to Bischoffsheim & Goldschmidt as the basis for negotiations. McHenry resorted to these materials for the preparation of the prospectus, and on February 1, 1873, had prepared one, a proof copy of which was on that day mailed by him to the president of the consolidated company. This was received by Brown, the president, February 14th. With a view to its preparation, McHenry had cabled Brown, on January 27th, to send a statement of the intended appropriation of the first mortgage bonds "that we may state authoritatively that proceeds of said issue will complete works." Brown cabled him in reply, stating that \$6,000,000 first mortgage bonds and \$6,500,000 second mortgage were to be appropriated to redeem old mortgage indebtedness, \$3,400,000 (first mortgage bonds) to complete new works, \$1,500,000 for equipment, and \$1,000,000 to meet future interest, "all in trust for these specific purposes," and also that with the \$3,000,000 second mortgage bonds and \$3,000,000 of unissued stock the company would have ample means to complete the whole line according to their programme; that 200 miles of lines were then in operation; that 56 more were ready for iron, and would be in operation by June; and that 50 more would be during the year. The proof prospectus forwarded by McHenry to Brown, February 1st, was prepared by McHenry in part from the information derived from this cable. It purported to offer for public subscription "\$4,900,000, part of \$12,250,000 first mortgage bonds." It recited the formation of the railway company by the consolidation of the several constituent companies, and gave the names of the officers, directors, and mortgage trustees. It also contained the following statements:

"By the purchase and consolidation of the several lines mentioned, and by works in progress, these railways will form one main line connecting New York with Boston and Montreal. The entire line, including branches, will

be 350 miles in length, of which 200 miles are now in operation, 50 more will be completed and in working order by June next, and the whole will be completed during the present year. The route extends from the city of New York through the populous and fertile counties of Westchester, Putnam, Dutchess, Columbia, and Rensselaer, in the state of New York, the counties of Rutland, Anderson, Franklin, and Chittenden, in the state of Vermont, and the manufacturing county of Berkshire, in Massachusetts. Throughout the length of the line the local passenger and freight business promises to be very large, while in the vicinity of New York city it will only be limited to the capacity of the railway. The Erie Railway Company, considering that the control of this railway and its connections is of the first importance towards securing a direct entrance into the city of New York, with access to Boston, and the chief manufacturing towns of the New England states and to the British Provinces, have entered into working arrangements with the New York, Boston & Montreal Railway Company for a term of fifty years, and, without any closer connection at present, the lines will practically be worked as one administration. * * * The holders of the first mortgage bonds of the several lines included in the consolidation have agreed to accept 45 per cent. first mortgage bonds of the present issue, and 55 per cent. of the second mortgage bonds. Messrs. Bischoffsheim & Goldschmidt are authorized to offer for public subscription \$4,900,000 of the above bonds of the New York, Boston & Montreal Railway Company to complete the construction and equipment of the railways of the said company, the balance of \$12,250,000 being reserved for the conversion of the divisional mortgage bonds issued by the several companies now constituting the New York, Boston & Montreal Railway."

Upon receiving this copy of the proposed prospectus, the president of the company had a consultation with Mr. Barlow, who was at that time the counsel of the Erie Railway Company and also the counsel at New York of Bischoffsheim & Goldschmidt, and as a result of the conference they both joined in a cable, sent February 14th, to McHenry, directing him to correct the prospectus so as to offer \$6,250,000 for subscription, and also directing him to arrange for the sale of the remaining \$6,000,000. The purpose of this dispatch is shown by a letter written the next day by Brown to McHenry, in which he uses this language:

"There is one point upon which I desire to touch that is very important to us. You do not fairly understand, I think, that we have contracts with the bondholders on the different roads to surrender their bonds and take in exchange, not first mortgage bonds, but 45 cents in cash and 55 per cent. in second mortgage bonds at par. Under the plan of prospectus sent us, if we rightly understand it, you propose to negotiate and sell on the London market only that portion of the bonds that is not to be used for conversion, and, if we judge rightly, leave us to settle with the old mortgage bondholders in first mortgage bonds, which, not being in accordance with our contract with them, would necessitate an advance on our part of the 45 per cent. cash necessary to carry out our agreements with them. This, as you are aware, we are not in position to do, and therefore we have already supposed that we should receive through Messrs. Bischoffsheim & Goldschmidt the proceeds of the whole \$12,250,000; which proceeds, being placed in the hands of the disbursement trustees, would be held by them for the retiring under the contract of the old bonds. It will have a very damaging effect upon our credit here unless this contract, arranged with so much care and placed in the hands of such trustees as William Watts Sherman, John Crosby Brown, and Jesse Seligman, can be carried out by us. We may entirely misunderstand the terms of the prospectus, and by it may be intended that as soon as the \$6,000,000 has been actually con-

verted, or, in other words, as soon as the trustees hold in their hands the old mortgages to cover the \$6,000,000, or any part thereof, that then these bonds become available on the London stock exchange, and can be sold like the first issue through Messrs. Bischoffsheim & Goldschmidt under the contract."

A further explanation is found in a letter of the same date written by Barlow to McHenry as follows:

"The \$6,000,000 (remainder first mortgage bonds) are reserved for exchange under consolidation agreement for existing prior mortgages on the whole line, but I assume that your prospectus is so worded that if the market will take the whole issue these surplus bonds, after cancellation of old bonds, can be sold. This is what the parties desire."

McHenry answered the cable of Brown and Barlow as follows:

"Disposal of your bonds absolutely certain, but I must be allowed to manage in my own time and fashion. Do not make engagements for expenditures until all is ready."

February 13th, McHenry mailed to the president of the company another copy of the proposed prospectus, and this was received by him February 26th. This prospectus purported to offer \$6,250,000, part of \$12,250,000 first mortgage bonds for public subscription, and contained this statement:

"The balance, \$6,000,000, will be used for the extinction by conversion or payment of the divisional first mortgage bonds issued by the several companies now consolidated."

It also contained a statement of the estimated revenue of the railway from various specified sources. Otherwise it was a substantial duplicate of the first proof prospectus. In the mean time McHenry and Bischoffsheim & Goldschmidt were engaged in perfecting plans to bring out the loan. March 10th McHenry telegraphed to President Brown as follows:

"Prospectus will be issued Thursday. I engage the \$6,000,000 firsts will be reserved until line opened in order to secure syndicate guarantee, but when first issue placed advances can be arranged on second half."

Brown immediately cabled to McHenry, (March 10, 1878):

"Must not engage reserve without advances on the \$6,000,000 at 87½ currency net to us. Must have 45 cash on old securities to fulfill engagements and complete road. For this purpose need proceeds of whole issue."

McHenry cabled in reply, (March 11th):

"I have placed \$5,000,000 with syndicate to guarantee success. Can manage only \$6,250,000, and shall manage \$6,000,000 as circumstances permit."

What McHenry meant by this dispatch is more fully explained in his letter of the date of March 14th, to Brown. He said:

"In order to make an absolute success of this first issue and a consequent good market for further issue, I have arranged with the Paris syndicate and given them a large percentage for the guarantee of the subscription. I have arranged with Bischoffsheim & Goldschmidt to place at your disposal \$1,000,000 monthly, say on the 6th of each month, until the loan is exhausted, particulars of which will be settled by cable. In the prospectus you will see that we have been compelled to insert a clause postponing the public subscription of the second issue until the main line is finished to Rutland. If it is neces-

sary for you to have money before the second issue, there is nothing in the prospectus to prevent a private subscription similar to that now practically made for the first issue."

This was the last copy of the proposed prospectus ever seen by any of the officers of the company or any of the defendants until some time after the sale of the bonds by Bischoffsheim & Goldschmidt.

The prospectus which was finally adopted, known as the "final prospectus," was prepared by McHenry shortly before March 14th, was issued on that day by Bischoffsheim & Goldschmidt, and a copy was sent by them to the Banque Franco-Egyptienne which was received by the latter at Paris March 15th. It seems to have been the thirteenth or fourteenth revision of the various prospectuses prepared by McHenry and Bischoffsheim & Goldschmidt between the last of January and March 14th. This document, after giving the names of the officers and directors of the company, offered the bonds for public subscription in the following language:

"Issue of \$6,250,000, part of \$12,250,000, first mortgage bonds (the remaining \$6,000,000 being reserved for extinction of existing mortgages, will not be offered for subscription until the main line from New York city to Rutland is opened for public traffic) of the New York, Boston & Montreal Railway Company."

It contained this further statement:

"The proceeds of the present issue of \$6,250,000 first mortgage bonds will be held by the trustees (Messrs. John Crosby Brown, W. Watts Sherman, and Jesse Seligman) for completing the construction and for the general purposes of the consolidated undertaking." * * * The documents connected with the company may be seen at the office of H. P. Sharp, Esq., 92 Gresham House, Old Broad Street."

It repeated in substance the statements recited in the two proposed prospectuses sent by McHenry to Brown concerning the general nature and conditions of the enterprise, and its relations with the Erie Railway Company; but it amplified in somewhat florid language the paragraphs which depicted the future prospects and plans of the company. It was largely devoted to representations intended to show the advantages which might be expected to inure to the Erie Railway Company by reason of the alliance between that company and the consolidated company, and bears evidence upon its face that those who prepared it and put it in circulation designed to influence the market for Erie securities abroad by advertising these advantages in glowing terms. There was also prepared by McHenry, and put into circulation in some instances by Bischoffsheim & Goldschmidt, a printed statement intended to supplement the advertisement of the enterprise contained in the prospectus. This also was largely devoted to showing the benefits expected to accrue to the Erie Railway Company from its relations with the consolidated railway. Most of the statements in this paper like those in the prospectus are promissory; and the only material ones not found in the prospectus are that "the corporation will own the lines from the Battery in New York to Rutland," and "the promoters propose to complete a first-class line with low grades and easy curves, in order to transport goods at a rate that shall defy competition." Copies of a map which had been prepared by some

of the promoters for exhibition in London in the summer of 1882, showing the route and plan of the proposed railway and its branches and connections, were also circulated with the prospectus by Bischoffsheim & Goldschmidt. As there is no satisfactory evidence that any of the complainants or any of the officers of the railway company or any of the defendants ever saw the printed statement, and as the map is of trivial importance in any aspect of the case, no further reference to either of these papers is necessary.

At this time the complainants had organized themselves as a syndicate under the management of the Banque Franco-Egyptienne which had been formed to deal in loans brought out in London by Bischoffsheim & Goldschmidt for the Erie company and its affiliated concerns. The firm had a house in London and in Paris. Henry L. Bischoffsheim was the manager of the London house, and his father, Louis R. Bischoffsheim, was the head of the Paris house. The firm in each city was composed of the same persons, except that Mr. Tallon, who was a member of the Paris firm, was not a member of the London firm. Louis R. Bischoffsheim was the president of the Banque Franco-Egyptienne, and the Paris firm of Bischoffsheim & Goldschmidt were members of the syndicate. The London firm, as contractors for placing loans brought out by them in London, had been assisted by the Paris firm and the Banque Franco-Egyptienne in floating the loans. In such operations it is customary to create and maintain a market for the securities until they are ultimately absorbed by the public at prices which are sufficiently remunerative to the contractors and their coadjutors. The bank had formed a syndicate consisting of the same members when the London firm had recently marketed large issues of bonds for the Erie Railway Company and the Atlantic & Great Western Railway Company, and the syndicate had assisted in floating these loans, not as partners with the contractors, but as guarantors and subscribers for the loan upon commissions and options. The Paris firm of Bischoffsheim & Goldschmidt and the other members of the syndicate were jointly interested in the profits of these transactions, and in the subsequent dealings of the syndicate in the bonds; and the relations between the syndicate and the London firm were such as to imply a mutual co-operation in manipulating the market for the profit of all concerned until the securities might be finally disposed of to the public. Shortly prior to the making of the contract between the railway company and Bischoffsheim & Goldschmidt of London, by which the latter became contractors for bringing out the loan, Henry L. Bischoffsheim went to Paris to obtain the co-operation of the syndicate. A letter of the date of March 4th, written to him after his return home by Mr. May, manager of the bank, shows the state of the negotiations at that time. It is as follows:

"Our appetite is certainly still in existence, and your proposition is not of the nature to make it disappear, but before giving our decision in the name of the syndicate it is necessary for us to know all the conditions of the business. It is probable that your letter of to-day will give us these details, and we will send you our reply as quickly as possible."

Although a considerable part of the private correspondence passing between some of the members of the syndicate and Bischoffsheim & Goldschmidt had been produced in evidence, the complainants have not produced the letter which was doubtless received by Mr. May or by some other member of the syndicate containing the details which Mr. May required and expected. A paragraph in the same letter illustrates the character of the relations between the syndicate and Bischoffsheim & Goldschmidt, and is as follows:

"The very complete information which you give us on the subject of the New York, West Shore & Chicago Railroad Company is conclusive. It is a matter to be left altogether aside."

In the mean time negotiations were taking place between Louis R. Bischoffsheim, representing the syndicate, and Henry L. Bischoffsheim of London by correspondence which has not been produced. It would seem that by March 9th the information desired of "all the conditions of the business" had been obtained by Mr. May, or by Louis R. Bischoffsheim, and laid before the members of the syndicate. On March 9th Mr. May wrote to Henry L. Bischoffsheim as follows:

"We had a committee meeting this morning to discuss Montreal (New York, Boston & Montreal Railway Company) business, and the following are the propositions which your father made to us: (1) To guaranty the whole issue in consideration of one-half per cent. commission; (2) power for the participants of the syndicate of guaranty personally to subscribe after the close of the subscription and after knowledge of the result, to the whole extent of their share in the syndicate of guaranty, with power for you to reduce their subscription not exceeding one-third; (3) payment by you to the Banque Franco-Egyptienne of a commission of one-fourth per cent. on the subscription by the participants, that is on a minimum of two-thirds of the subscription. This matter is accepted in principle, but as your father will inform you, we should prefer to have three-fourths per cent. for the guaranty of the commission instead of one-half. As soon as you inform your father by telegraph that all the above conditions are accepted, the matter may be considered as settled, and you will please confirm the same to us by letter."

Before this letter was written, a copy of a proposed prospectus, the eighth revision, had been forwarded to the bank by Bischoffsheim & Goldschmidt, and been received. March 10th the negotiations between the syndicate and the London firm were formally concluded on the part of the latter, and a letter embodying the contract was mailed on that day by the latter to the bank. In substance, the arrangement was that the syndicate were to guaranty that the \$6,250,000 bonds about to be offered to the public by Bischoffsheim & Goldschmidt should be "placed," and any amount not placed should be taken by the syndicate; and in consideration thereof the syndicate was to have a commission of one-half per cent. upon the amount, and an option of taking not less than two-thirds of the issue after the result of the public subscription should be known. It was stipulated that Bischoffsheim & Goldschmidt should not change the terms of the prospectus as to the price of the bonds and the dates of payment upon subscriptions, and it was further understood

that the syndicate should be promptly notified of the result of the public subscription.

It appears that the course of business pursued by the contractors in the negotiation of such loans is to notify the public by advertisement, and by the circulation of the prospectus, when subscriptions may be made. These are generally made upon forms of application sent by the contractors, accompanying the prospectus, to bankers. The application list remains open for several days, and then the contractors proceed to make allotments to the applicants. If the applications are in excess of the loan offered, the affair is a success, and the contractors exercise their own pleasure in selecting the applicants and making allotments, or, as was contemplated in the present instance, decline to make allotments to the general public, and allot the loan, more or less of it, to themselves or their friends. The members of the syndicate were not formally notified that they had been included as participants in the guaranty, or in the subscription, until some time after the arrangement had, in the words of Mr. May, been "settled in principle;" indeed, some of them were not informed that anything of the kind was on foot until some days after the subscription had been actually made. The bank, after consulting with some of the members, assumed the responsibility of representing the rest, and on the 11th of March ratified the agreement embodied in the letter of Bischoffsheim & Goldschmidt of March 10th. Thereafter the bank addressed circulars to the members of the syndicate, announcing that they were respectively included as participants, and allotting them respectively specified interests in the commission and the option. The complainants acquired the bonds in suit by becoming participants in this option. The Paris firm of Bischoffsheim & Goldschmidt, as a participant, became a subscriber for nearly \$1,500,000 of the bonds. As the prospectus underwent revision by McHenry and Bischoffsheim and Goldschmidt, copies of the revision were forwarded by them to the bank for inspection. As has been stated, a copy of the final prospectus reached the bank March 15th. March 18th Bischoffsheim & Goldschmidt telegraphed the bank as follows:

"Whole public subscription above \$9,000,000 and below \$10,000,000; telegraph instructions for to-morrow."

It is apparent that before this telegram was sent they had kept the bank advised of the extent of the public demand for the bonds and of the applications received. On the 17th of March they were notified that the syndicate had concluded to exercise its option of subscription; and by a letter of the date of March 17th they notified the bank as follows:

"In accordance with your instructions, we have subscribed on your account \$4,166,000 first mortgage bonds of the New York, Boston & Montreal Railway, and we debit you with \$41,660 in your account."

By the terms of the agreement with the syndicate Bischoffsheim & Goldschmidt were entitled, if the syndicate exercised its option for subscription, to reduce the subscription to one for two-thirds of \$6,250,000. They did so, and allotted only the two-thirds, doubtless in order that the public might have the other third. The syndicate which, as origin-

ally formed, was to continue until August 15, 1873, unless sooner terminated, was dissolved early in April, 1873, and a new one was formed. This appears from notices given by the bank to the participants which are so instructive, as depicting what the syndicate really was and how its operations were managed, that a copy of one of them should be given. The circular notice dated April 14, 1873, is as follows:

"We have the honor to inform you that we have sold to a new syndicate, formed for the purchase of bonds of American railroads, the \$4,166,000 New York, Boston & Montreal first mortgage bonds subscribed by our syndicate at the time of the issue. As the syndicate is by this event dissolved, the participants are released from the payments mentioned in our letter of the 12th of March, 1873, and not yet made. Your interest in the syndicate being £ ———, we place at your disposal at the office of Messrs. Bischoffsheim & Goldschmidt in London £ ———, forming your proportionate part of the sum above mentioned."

On the same day the bank sent a circular letter to the participants as follows:

"We have the honor to confirm to you that you are included for a participation of £ ———, in a syndicate formed with a capital of £3,200,000 to purchase and sell mortgage bonds of railways of the United States of America. This syndicate will exist until the 31st day of December, 1873. The syndicate has already secured the purchase of \$633,000 Atlantic & Great Western first mortgage bonds at 80; \$4,166,000 New York, Boston & Montreal first mortgage bonds at 82; \$4,445,000 Erie Company convertible gold bonds at 82; total £1,702,669. You will therefore kindly pay to the credit of the Banque Franco-Egyptienne, at the office of Messrs. Bischoffsheim & Goldschmidt in London, 10 per cent. on your participation, viz., £ ———, for your proportional part in the call made by the syndicate."

The syndicate did not, however, dissolve December 31st. The following extracts from a circular letter sent by the bank to the participants, of the date of December 31st, explain why the syndicate was not dissolved.

"The duration of the syndicate of which you have vested the management in us being limited to the 31st of this month, we desire to explain to you the course it seems to us desirable to pursue at this moment in our joint interest. The crisis which prevails in America, and which took place so soon after the formation of our syndicate, has led to a certain depreciation in all railroad securities, and has restricted their sales. Although the securities held by the syndicate have been relatively speaking less injured by the crisis, we have not thought of selling them at prices which seemed to us below their real value. So far as concerns the Erie convertible gold bonds, and the small balance of Atlantic & Great Western first mortgage, we think that it is necessary to return to each the portion represented by his participation. The market for these two securities is sufficiently settled and their value is high enough to prevent this division of securities from leading to any inconvenience. So far as concerns the bonds of the New York, Boston & Montreal Railway, we are convinced that it is extremely important to remain united for some time still, as a joint course of action will alone allow us to carry on negotiations to the advantage of the participants. We will therefore send you, as soon as the accounts of the syndicate are settled, your share of Atlantic & Great Western and of Erie bonds as likewise the cash balance which may be due to you. You will thus remain a participant in the syndicate of \$4,166,000 New York, Boston & Montreal bonds."

The relations which existed between the syndicate and Bischoffsheim & Goldschmidt in the transaction of marketing and dealing with the bonds are also characterized by what took place between them in January and February of 1874. In January the railway company was embarrassed, and the coupons for semi-annual interest on the bonds were to mature February 1st. Bischoffsheim & Goldschmidt wrote the bank, January 23d, as follows:

"After consideration, we think that it is against the interest of the syndicate to send *en bloc* to New York so large an amount of coupons * * * to be cashed at the office of the New York, Boston & Montreal Company, * * * thus revealing to that company the small quantity of its bonds *which are in the hands of the public.*"

The syndicate accepted and acted upon the suggestion. About the same time the bank and the syndicate acquired information of certain "special advantages" which the London firm had received in the negotiation of the bonds for the railway company. To quote the testimony of Mr. May, "they acquired this knowledge at the same time that they learned that in the other enterprises as to which they had dealings with this firm it had taken special advantages, concerning which it had not informed them. It was a consequence of these discoveries, that the bank and syndicate, desiring to enforce their claim against the house of Bischoffsheim & Goldschmidt, of London, and the estate of Mr. Louis R. Bischoffsheim, entered into an arrangement in February, 1874, whereby the bank and the syndicate obtained satisfaction of their claims." This arrangement was an agreement, of the date of February 19, 1874; to which all the members of the syndicate were parties upon one side, and Bischoffsheim & Goldschmidt of London, and the heirs of Louis R. Bischoffsheim of Paris, were parties upon the other side. By its terms the syndicate was continued until August 1, 1876, and Bischoffsheim & Goldschmidt agreed to pay the interest upon the bonds at their own risk during the continuance of the syndicate, and also to account to the syndicate for all losses upon the bonds at the selling price of 70 cents on the dollar. They also agreed to bear jointly with the heirs of Louis R. Bischoffsheim one-half of any further loss to the syndicate arising by a fall in the price of the bonds below 70 cents per dollar. Under this arrangement the syndicate has received over \$1,000,000.

So far as the statements of the prospectus require consideration as misrepresentations which were intended to induce persons to buy the bonds, they may be divided into three classes—those relating to existing facts, those which are merely matters of opinion, and those of the character of promissory representations. If the complainants are entitled to resort to a court of equity to obtain a rescission of their purchase of the bonds, and to reclaim the money they were induced to advance, because of misrepresentations in the prospectus, they must rely upon misrepresentations concerning material facts, and not as to mere matters of opinion, and which relate to existing facts, or be predicated of what was untrue at the time, and not of matters of future conduct or expectation. Misrepresentation by prospectus, except as between promoters and share-

holders, is to be tried by the ordinary criterion of misrepresentation. What was said by the lord chancellor, in *Hallows v. Fernie*, 3 Ch. App. 467, of the preliminary character of a prospectus is peculiarly apposite to the document in question:

"Everyone knows that it is intended to usher a company into existence. No one is surprised to find that a future tense must be given to words in the past or present tense. * * * This ought always to be borne in mind when a construction is to be put upon the language of a prospectus."

Almost all the statements in the prospectus, except those concerning the legal organization of the company, the amount of its bonds and stock, and the names of its officers and directors, are expressions of what is proposed to be done, and relate to the future plans of the promoters of the expected results of the enterprise. The only other statements which are not of this character, or are not mere expressions of opinion, are found in the paragraph which states that of the system "200 miles are now in operation, 56 miles more will be in working order by June, and the whole is intended to be completed during the present year," and the paragraph which, after reciting the advantages which the Erie Railroad Company will derive from the enterprise, refers to the "working arrangements" entered into between the two companies for the "term of fifty years." The only statement in these two paragraphs which was untrue was the one in reference to the number of miles of railway then in operation. In fact less than 190 miles were then in operation instead of 200. This misrepresentation doubtless originated in the cable message of Brown to McHenry of January 27th, and being accepted as true by McHenry, was incorporated by him into the prospectus. It was a statement made by Brown upon insufficient and erroneous data, put forth carelessly by the impulsive and over sanguine author without any deliberate purpose to deceive, in the belief that it was substantially true. The description of the proposed railway as one "extending from New York city to Rutland" and as one which would afford the Erie Railway, by junction at Fishkill, "a direct entrance into the city of New York, was likely to convey a wrong conception of the location of the New York terminus of the railway, but was literally correct. The railway, as located at the time, terminated on tide water at the Harlem river, the northerly boundary of New York city, whence practical access to the business portion of the city was only by water communication. This fact had been explicitly pointed out by the promoters to Bischoffsheim & Goldschmidt in the communication addressed to them in the summer of 1872, and in the "report" circulated by the agents in London at that time, and distinctly appears in the mortgage itself. Inasmuch as the plans of the promoters included a connection of the railway with the heart of the city by the underground railway, for which they owned a charter, or by arrangements with some other rapid transit system, and the description is to be interpreted as speaking of the future, the language was not mendacious. The vice of the prospectus is found in the highly colored and exaggerated estimates of the probable sources of revenue of the railway. These were so artfully blended with arguments based upon the revenues

and profits of other railways that the presentation of the prospects of the enterprise was well calculated to delude and deceive the inexperienced or credulous investor. Although no legal responsibility can attach to the publication of these misleading matters of opinion, because no purchaser of bonds had a right to rely upon such opinions as an inducement to his purchase, they deserve severe reprobation, and the authors must be held morally accountable for a production which no honest and intelligent man should have sanctioned. The ardent confidence of promoters in the ultimate verification of their opinions is no excuse for putting forth reckless and fanciful estimates and assertions in such a circular to beguile the unwary. Primarily, the moral responsibility for this prospectus, which was mendacious in spirit if not in intent, rests on McHenry, Bischoffsheim & Goldschmidt, and such officers of the railway company, including George H. Brown, as saw the copies of the proposed prospectus sent to Brown by McHenry. No right of rescission can be founded upon the breach of the promissory statements of the prospectus. Promissory statements may be made in terms which imply that a certain condition of things exist at the time, and form the basis of the promised future state of things. When they are of this description, if they are intentionally false, they are fraudulent, and form the basis of a right of rescission; but otherwise fraud cannot be predicated of promises not performed for the purpose of avoiding a contract. Like untruthful expressions of expectation or opinion, even though when made they are made with intent to deceive, they are not fraudulent in legal definition, because they are not misrepresentations of existing facts. *Sawyer v. Prickett*, 19 Wall. 146; *Fenwick v. Grimes*, 5 Cranch. C. C. 439; *Jorden v. Money*, 5 H. L. Cas. 214; *Fisher v. Common Pleas*, 18 Wend. 608; *Ex parte Burrell*, 1 Ch. Div. 551; *Andrew v. Spurr*, 8 Allen, 412.

The promissory statements of the prospectus, except those which refer to the extent of line expected to be completed in the following June, and the time when the whole line and branches were to be completed, relate wholly to the application to be made of the proceeds of the bonds then offered to the public, and the purpose of the officers of the railway company to apply the bonds not then offered, together with other bonds and capital stock of the company, for the extinction of pre-existing indebtedness. The statements respecting the application of the proceeds of the bonds are to be ascribed in part to the defiant refusal of McHenry and Bischoffsheim & Goldschmidt to accede to the plans and wishes of the officers of the company, and in part to the understanding of the latter that the terms of the prospectus would not be such as to cripple the company in carrying out the engagements contained in the disbursement trust agreement. The officers of the company were so far committed to McHenry and Bischoffsheim & Goldschmidt in the negotiation of the bonds that they could not then recede without such a delay and rehabilitation of their plans for obtaining the necessary finances to carry out the scheme of consolidation as would probably have been fatal to it. McHenry and Bischoffsheim & Goldschmidt understood this perfectly well. They also knew that the company required the proceeds of the whole issue of first

mortgage bonds, or should have understood it, because the disbursement trust agreement had previously been placed in their possession and was then in their possession, or in that of Mr. Sharp, their solicitor. But it suited their purposes to offer only a part of the issue of first mortgage bonds at that time, doubtless because they believed that the bonds would bring a better price than if the whole issue were offered to the public then. With full knowledge of the situation, they insisted upon dictating the conduct of the affairs in a manner to suit themselves. The officers of the railway company did not see the final prospectus until March 27th, and at that time regarded the statement respecting the application of the proceeds of the bonds as of no practical importance in view of the representations of McHenry that there was nothing in the prospectus to prevent a private issue of the remaining \$6,000,000, and that he had arranged with Bischoffsheim & Goldschmidt to advance \$1,000,000 monthly until the loan was exhausted. But it is quite unnecessary at present to consider who was responsible for these statements of the prospectus, because as promissory representations merely they are of no consequence in passing upon this branch of the case. Inasmuch as the railway company received the proceeds of the bonds through subscriptions made by the complainants pursuant to the conditions of the prospectus, it must be regarded as the responsible author of the prospectus, and liable as a principal for the acts of its agents; and Bischoffsheim & Goldschmidt, who issued the prospectus, as well as McHenry, are to be deemed the agents of the company as between it and the public. In this view, if the prospectus contained any actionable false representations, the railway company cannot repudiate them while retaining the money; and even though they were not designedly false, if they were untrue the purchasers of the bonds became entitled to reclaim the moneys if they were induced to purchase in reliance upon such statements. The seller of property must be presumed to know whether the representations which he makes of it are false or true; and it is immaterial to a purchaser, who confides in them, whether the misrepresentations proceeded from fraud or mistake. *Smith v. Richards*, 13 Pet. 26. The misrepresentation of the length of railway lines in actual operation at the time the prospectus was issued might or might not be important and material to the purchasers of the bonds. A difference of a dozen miles more or less could hardly be considered a serious matter to the purchasers, if the traffic of the railway was as valuable and productive without them as with them; or if, as was the case here, the dozen miles and many more were speedily to be included in the security of the mortgage. If the complainants belonged to the class of investors who rely upon the information communicated by advertisements or a prospectus in becoming stockholders or creditors of a new company, the effect of this misrepresentation, and perhaps of other statements in the prospectus, would need to be considered, but it is impossible to believe that they trusted to the prospectus for the information which induced them to purchase the bonds. They were a body of speculators who were accustomed to embark with the bank, and co-operate through that corporation, with Bischoffsheim & Goldschmidt,

in floating the loans and trading in the securities of the Erie Railway Company and its allied concerns, and because the bonds in question were of this class and were brought out under such auspices, the bank assumed the responsibility of including them as members of the syndicate, and committing them, as participants in the present instance; and this was done when it was understood that Bischoffsheim & Goldschmidt were to prepare the prospectus as they pleased except as to the time and terms of the payments to be made. The inducement to the definitive subscription for the bonds was the information from Bischoffsheim & Goldschmidt that the public wanted double the amount offered. It is utterly improbable that men of the astuteness and experience of the complainants were induced to put millions of dollars of money into a speculation by the confidence reposed in the statements of any prospectus. None would have appreciated better than they the unreliability of such statements, or understood better the inaccuracies and exaggerations which generally characterize such advertisements. They were less interested in informing themselves about the real value of the bonds than ordinary investors, because they were not buying for a permanent investment but for a temporary one, and intended to sell them again when they were properly manipulated to advance the price. Buying the bonds for their speculative merits and not for their intrinsic value, the question with complainants was not what the bonds would be ultimately worth, but what they would probably sell for to the public, within a few weeks or months, when their price should be established by the dexterous methods of a combination of skilled operators. They were interested in the contents and form of the prospectus because it was important to them that the bonds be properly launched upon the market, and also because the document was designed in great part to advertise the benefits which would accrue to the Erie Railway Company from the new railway, with the obvious motive of enhancing the price of the securities already held by the syndicate. They doubtless scrutinized it for these reasons as it passed through the several revisions; they doubtless assumed that in a general way it correctly exhibited the enterprise; but that they relied upon it for the information which induced them to buy the bonds is too incredible for belief.

Many of the complainants have testified as witnesses in the cause. They state in substance that they relied upon each and all the representations of the prospectus in making subscription for the bonds. It is common experience, now that parties are competent witnesses, that such testimony is always forthcoming. It is not improbable that some of the witnesses honestly think that they did rely upon these representations, and are convinced that they purchased the bonds confiding in their truth. But each witness states positively that he had no information at the time that there were underlying mortgages on the property of the railway company, and if he had been aware of that fact he would not have become a subscriber. Yet this fact was distinctly stated in the final prospectus, and in the whole series of previous revisions, and appeared conspicuously in two places in the document. It was natural that the complainants

should rely upon the judgment of Bischoffsheim & Goldschmidt as safer than any they could form themselves without an independent investigation too expensive and dilatory to be made for the purposes of a temporary speculation. They appreciated the moral responsibility which is assumed by such a house in offering the loan to their friends and to the public. They had no reason to doubt the good faith of Bischoffsheim & Goldschmidt, because the Paris firm as a member of the syndicate had more than one-third of the whole interest in the venture; and the relations of the syndicate with Bischoffsheim & Goldschmidt, through the Paris firm and through the president of the bank, were so intimate and confidential that any departure from the duty of exercising the utmost good faith would have been rank treachery. No commentary upon the nature of these relations, and the light in which they were regarded at the time by all concerned, is needed in view of the agreement of February 19, 1874, by which they exacted an equivalent for the "special advantages" enjoyed by Bischoffsheim & Goldschmidt, and the latter acknowledged the justice of the claim. So implicit was their confidence in the judgment and good faith of Bischoffsheim & Goldschmidt that they did not care to examine the documents and papers relating to the railway company which they knew were in the hands of Mr. Sharp. It is quite impossible to believe that the syndicate was not put in possession of all the information necessary to induce its members to participate in the subscription, or that "all the conditions of the business" were not given to the syndicate as required by Mr. May. This information may not have been given to all the members; but that it was given to the Paris firm, to the president of the bank, and to the controlling spirits of the syndicate before the subscription was made, can hardly be doubted. It was the reliance upon such information and upon the judgment and good faith of Bischoffsheim & Goldschmidt, and not upon the statements of the prospectus, that led the members of the syndicate to subscribe. The conclusion that the complainants were not induced by the statements of the prospectus to buy the bonds is fatal to their case, so far as it proceeds upon misrepresentation, and dispenses with any investigation of the evidence with a view to ascertain whether the trustees, or the recipients of money from them, believed or had any reason to suppose that the prospectus contained fraudulent representations.

The question remains whether the prospectus contained a promise for a specific application of the proceeds of the bonds offered for sale which impressed an equity upon the proceeds in favor of the complainants, and entitled them upon a misapplication to call the defendants to an account. This question may be disposed of briefly. Those who read the prospectus could fairly gather from its several statements the understanding that the railway company proposed to use the proceeds of the bonds then offered to complete the construction of the railway, and for such other general purposes of the undertaking as might be necessary, but not for the extinction of underlying mortgages. The statements about the reservation of the remaining \$6,000,000 of the issue for the extinction of the outstanding existing mortgages and stock of the constituent compa-

nies are inconsistent with the idea that any part of the proceeds of the other \$6,250,000 were to be used for that purpose. But no theory of trust can be founded upon the effect of these statements. They are the mere representations of intention, the expression of the expectation and purpose of the railway company, which fall short of a promise, and do not partake of the definite and obligatory nature of a contract. Not only is there no distinct promise not to use the proceeds for the general purposes of the undertaking, but the statement is that they will be used for these purposes; and the intention of the company not to use them for one of these purposes, the extinction of the underlying liens, is left to inference only, and is implied from the statement that other bonds will be so used. No purchaser of bonds was justified in assuming that the company intended to tie itself rigidly to conditions which in the exigencies of the enterprise might become injudicious or impracticable, or in attributing such a meaning to the recitals as they would bear if contained in a contract. A prospectus is an introductory proposal for a contract in which the representations may or may not form the basis of the contract actually made. It may contain promises which are to be treated as a sort of floating obligation to take effect when appropriated by the persons to whom they are addressed, and amount to a contract when assented to by any person who invests his money upon the faith of them. But if the statements as to what is proposed to be done in the future are not distinctly promissory, are equivocal, and capable of different meanings, the inference is reasonable that they are not put forward or acted upon as essential stipulations. Whether the statements are to be regarded merely as the expressions of intention, or as a contract with the purchasers of the bonds that the proceeds should be devoted to the exclusive purpose of paying for the construction of uncompleted parts of the railway, the failure to make such an application of them cannot be redressed in the present action. In the view the most favorable for the complainants they loaned their money to the railway company upon the security of the mortgage accompanying the bonds, and upon the faith of a promise by the company to use the money in a particular way for their advantage. By this transaction the railway company and the complainants did not enter into any fiduciary relation, but simply became debtor and creditor. While the promoters of a company occupy a fiduciary relation towards those they induce to become shareholders, and the company itself is a trustee for its stockholders, bondholders stand upon a different footing. They are merely lenders upon security, and as creditors part with their title to the money loaned. *Van Weel v. Winston*, 115 U. S. 228; 6 Sup. Ct. Rep. 22. If a borrower refuses to keep his agreement with the lender to use the money borrowed in a particular way, the lender has his remedy at law for breach of contract, or in an appropriate case may have relief in equity and compel specific performance. But there is no principle of equity which allows him to pursue the money as a trust fund when the borrower has parted with it to another who has obtained title to it as between himself and the borrower. Even where money has been obtained by deceit, so that in judgment of

law the contract of loan is voidable as between the lender and the borrower, it cannot be followed by the lender into the hands of one who has received it innocently and with a right to retain it as against the borrower. The law, from considerations of convenience and public policy, in order to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to all persons who receive it from him innocently upon a valid consideration, whether upon a new consideration or for an existing debt. *Miller v. Race*, 1 Burrows, 452; *Justh v. Bank*, 56 N. Y. 478; *Stephens v. Bourd, etc.*, 79 N. Y. 183. In *Mason v. Waite*, 17 Mass. 560, a carrier to whom a sum of money had been intrusted lost it to the defendant gaming, and the court held it could be recovered by the owner because the defendant received it unlawfully, but declared that had the carrier paid the money to an innocent person to satisfy a debt of his own, "the case might have been different, as it would be mischievous to require persons who receive money in the way of business or in payment of debts to look into the authority of him from whom they receive it." Although that was an action at law, it was one for money had and received, which is of the nature of an equitable action. It is only when money is held in a fiduciary character, so that the equitable title is in the beneficial owner, that the latter can follow it into the hands of a third person. In the present case the moment the bonds were sold the equitable title to the money vested in the trustees by force of the consolidation agreement as modified by the disbursement trust agreement, and as soon as it was received they acquired the legal title and the equitable title vested in the beneficiaries designated by the latter instrument. The trustees were not the borrowers. They were agents for the beneficiaries of the disbursement trust agreement, whose duty it was to see that the proceeds realized from the bonds were devoted to the specific uses of that trust; and they had no other duty or power in the premises. Those who issued the prospectus and negotiated the bonds were not their agents, but were the agents of the railway company, and the trustees could not be responsible officially for their acts. If they had sanctioned the representations of the prospectus, and had accepted the proceeds of the loan upon the express or implied undertaking to appropriate them exclusively to pay for the construction of uncompleted railway, they might have rendered themselves personally accountable to those for whom they undertook to act. They could not have consented to such an appropriation without disloyalty to the trusts of the disbursement trust agreement, and would have been responsible to the beneficiaries under that agreement for any disposition of the money not authorized by the instrument. But if they had accepted the complainant's money upon a foreign trust they could not be heard to deny their own responsibility for refusing to comply with the trust. The case of *Wilson v. Church*, 13 Ch. Div. 1, cited for the complainants, is not inconsistent with these views. In that case money was loaned upon bonds to a company which had issued a prospectus containing a statement that certain persons named would act as trustees for the bondholders and exercise their powers for the protection

of the bondholders, and would retain out of the proceeds of the bonds sufficient to pay for building a railway which was to be built for the company by another company, and apply the proceeds as received to pay for the work done upon the railway. The proceeds were delivered by the company to these persons who accepted them as trustees to make the promised application for the bondholders. The railway was not built, and the enterprise contemplated by the company became impracticable, and thereupon the bondholders brought suit to recover the money in the hands of the trustees. The company made no claim to the money. The case was treated as one where, in the language of BRETT, L. J., "the fund contributed by the bondholders was deposited for the trust under which it was to be handed over from time to time in payment for work done, and otherwise it was not to be handed over." Upon the plainest principles of equity the fund was adjudged to be returned to the bondholders. They had never parted with their equitable title to the moneys which were, by contract, to be held and appropriated for their protection by their own trustees.

Not only was there no fiduciary relation in the present case which authorized the complainants to regard the trustees under the disbursement trust agreement as their trustees, bailees, or agents, but the complainants were not justified in relying upon any promise contained in the prospectus as a contract by the officers of the railway company to appropriate the money in a way not authorized by the disbursement trust agreement. They were bound to take notice of the limitations upon the power of the company to make any disposition of the proceeds of the bonds inconsistent with the provisions of the consolidation agreement which was the charter of the company. Whenever a corporation goes for business it carries its charter, and all persons dealing with it must take notice of the powers and limitations thereby imposed upon its agents. *Railway Co. v. Gebhard*, 109 U. S. 537, 3 Sup. Ct. Rep. 363; *Ernest v. Nicholls*, 6 H. L. Cas. 418. An inspection of that instrument would not have informed them of the existence of the disbursement trust agreement, but it would have informed them that the proceeds of the bonds were required to be appropriated to specific objects, and that this was a fundamental feature of the consolidated scheme. That instrument was sufficient to put them upon inquiry, and knowledge must be imputed to them of all the facts which a sufficient inquiry would have disclosed. The prospectus itself pointed out a proper source of inquiry to all who wished to become acquainted with the documents creating the company and creating the trust which the trustees were to administer, and inquiry at that source would have led them to the disbursement trust agreement, and informed them that the promise of the company, contained in the prospectus, was one which it was beyond the power of the company to make or fulfill. Consequently if the complainants loaned their money to the railway company relying upon that promise, they did so at their own peril. Certainly they cannot follow it into the hands of those who never consented to receive it upon such terms, but received it because they were entitled to it as trustees of a different trust.

There are interesting questions of law in the case which have not been considered. It has been insisted for the defendants that upon any view of the facts which might have been reached the bill ought to be dismissed because the controversy is not one of equitable cognizance, and because the complainants have separate interests and cannot join in the suit. If the suit were brought against those defendants only who were the immediate recipients of the money of the complainants, a court of law would be the appropriate and exclusive forum for the controversy, so far as it proceeds upon the theory of fraud or deceit; because no relief peculiar to a court of equity, such as the cancellation of documents or the award of damages unknown to courts of law, would be essential to the adequate protection of the complainants, and the only decree which would be directed would be one for the recovery of the money with interest. *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. Rep. 249; *Ambler v. Choteau*, 107 U. S. 586, 1 Sup. Ct. Rep. 556. But an action at law would not lie against those defendants and the defendants who it is alleged became subsequent recipients of the money with notice of the fraud. It would seem, therefore, that the complainants have the right to come into a court of equity in order to obtain a rescission of their purchase and a recovery of the proceeds from those who committed the fraud and at the same time from those who have received part of the proceeds under circumstances which render them trustees *ex maleficio*, and thus obtain a remedy more adequate and complete than they could obtain at law. But it is unnecessary to decide this question or the question whether the complainants can sue jointly, or to consider other objections which have been urged against the complainant's case. The parties who have litigated this cause so many years and at such great expense seem fairly entitled to an exposition of the real merits of the controversy as they appear to the court, and the case should not be unnecessarily disposed of upon any technical grounds. The complainants have lost their money by buying the bonds of a company officered and commended to public confidence by many of the best-known capitalists of this country. They undoubtedly supposed when they saw the names of such men connected with the enterprise as promoters or officers of the company that the enterprise had at least a reasonable chance of success; but it collapsed within a few months of the time when it was advertised in such glowing terms. They may not have been aware when they brought this suit, and may not be aware now, that the enterprise never had any chance to live after the refusal of Bischoffsheim & Goldschmidt to advance the money which the promoters supposed they would advance pending the negotiation of the whole issue of first mortgage bonds, and that primarily Bischoffsheim & Goldschmidt should be considered as responsible for its failure. If the officers of the company had received the money which they expected, the uncompleted railways could have been built, and the consolidated railway equipped, opened for traffic, and put upon the basis of a going concern. Whether the expectations of the promoters would have been realized is a matter of conjecture only, but it is not unreason-

able to suppose that the new railway would have gradually gathered strength and eventually obtained a fair traffic and become a paying property. The bill is dismissed.

CAMDEN IRON-WORKS v. FOX.

(Circuit Court, D. New Jersey. December 14, 1887.)

1. CONTRACTS—INTERPRETATION—EVIDENCE—ADMISSIBILITY.

An order, otherwise complete, to a manufacturer of iron pipe for a large quantity of that material, given and accepted August 27, 1884, was in writing, and concluded in these words: "The entire delivery to be completed within _____ weeks from date. We will wire you to-morrow in confirmation of these deliveries." *Held*, in an action by the manufacturer to recover damages for refusal of the buyer to accept the pipe when delivered, that a conversation between the parties had on August 27th prior to the execution of the contract, and subsequent correspondence by mail and telegraph, were admissible to show that the blank was to be left until the buyer, who was under a contract to furnish the pipe with a per diem penalty, had ascertained what his limit was, and that he then was to, and did the next day, wire what was to go in the blank, viz., the word "nine."

2. SAME—PERFORMANCE—TIME OF THE ESSENCE.

One who was under a contract with a per diem penalty to deliver iron pipe to a city, gave a written order to a manufacturer, which was accepted the same day. The time of delivery was left blank, but the understanding of the parties was that the buyer was to telegraph the date the next day, which he did, fixing the delivery "within nine weeks from date." The order was then entered by the manufacturer. The buyer wrote from time to time urging the speedy prosecution of the work, and finally, when the period was more than up, rescinded the order as to all pipe not then delivered. *Held*, in an action by the manufacturer for damages for refusal to accept, that time was of the essence, and that the manufacturer, having entered the order after the blank was filled, was bound thereby, and could not recover.

At Law. Trial by the court without a jury.

S. H. Grey, for plaintiff.

Corlandt Parker and David McClure, for defendant.

WALES, J. The plaintiff brought this action to recover damages from the defendants in consequence of their refusal to accept and pay for a certain number of cast-iron water-pipes which they had ordered to be manufactured and delivered by the plaintiff. The contract between the parties was in writing, and in these words:

"*Camden Iron-Works, Phila.*—GENTLEMEN:

"Please enter order for

800 lengths 12 in. cast-iron water-pipes

300 " 6 " " " " "

—To conform in all respects to the specifications of the D. F. W., city of New York.

"Prices, 6 in., \$32.22; 12 in., \$30.45 per ton of 2,000 lbs., delivered on dock N. Y. city.

"*Delivery.* You to commence making the 6-in. pipe immediately following execution of order now in your books from N. Y. city, and to commence mak-

ing the 12 in. on completion of 12 in. order now in hand from Boston. The entire delivery in New York to be completed within ——— weeks from date. We will wire you to-morrow in confirmation of these deliveries.

"Yrs.,

FOX & DRUMMOND.

"Accepted: WALTER WOOD, Prest. Camden Iron-Works."

This order and acceptance were written in the office of Camden Iron-Works, in Philadelphia, and dated the 27th of August, 1884, and the contract was complete with the exception of filling the blank space next preceding the word "weeks." Parol evidence of the conversation had between Mr. Wood and Mr. Drummond on the 27th of August, and prior to the signing of the paper of that date, was admitted to explain a latent ambiguity, namely, the purpose of the blank space, and the meaning of the words, "We will wire you to-morrow in confirmation of these deliveries." Subsequent correspondence by letter between the parties was also admitted for the same reason. From this evidence it appeared that Mr. Wood and Mr. Drummond, during their interview on the 27th of August, and preceding the signing and acceptance of Fox & Drummond's order, were unable to agree on the time within which the pipes should be delivered in New York, and this was left open until Mr. Drummond could ascertain, on his return to New York, the utmost limit of time that could be allowed. Fox & Drummond were under a contract to furnish water-pipes for the New York department of public works within a specified time, and were liable to a penalty of \$50 for each and every day's delay in the fulfillment of that contract. Having discovered the time when their contract with New York would be up, Fox & Drummond sent to the plaintiff a telegram and a letter, of which the following are copies:

(Telegram.)

"NEW YORK, August 28, 1884.

"R. D. Wood & Co., Phila.: We confirm yesterday's order N. Y. pipe, inserting the word 'nine.'
FOX & DRUMMOND."

(Letter.)

"NEW YORK, August 28, 1884.

"R. D. Wood & Co., Phila.—GENTLEMEN: We wired you confirming order given yesterday for the New York pipe. Please insert the word 'nine' in the blank space before the word 'weeks.' This will make the letter writer gave you complete.
FOX & DRUMMOND."

The defendants again wrote to the plaintiff, under date of September 1, 1884:

"GENTLEMEN: We wrote you on August 28th, confirming our telegram of same date re New York pipe, and presume same duly reached you, and that all is satisfactory.
FOX & DRUMMOND."

The plaintiff replied to this on the next day:

"GENTLEMEN: We have yours of the first instant at hand, and have entered your order for 6 and 12 inch pipe," etc.

As early as September 20th, Fox & Drummond wrote to plaintiff:

"GENTLEMEN: Please advise definitely when you will commence on the N. Y. pipe. We expected you would commence by this time. The delivery must be on time."

To this plaintiff replied, on the 23d:

"We shall turn onto your 12's at Millville on Thursday, September 25th."
—But without making any reference to the time of delivery. The defendants wrote again on the 23d September to plaintiff:

"GENTLEMEN: We are waiting a reply to the letter of September 20th, relative to the N. Y. pipe. You will oblige by wiring us to-morrow on the subject in case you have not already written us. This is important."

October 8th Fox and Drummond wrote to plaintiff:

"If there is going to be any further delay on our order we should know it at once, as a matter of justice to us, and thus have an opportunity of transferring some portion of the order to some foundry that will deliver the pipe at once, and so enable us to carry out our contract with N. Y. city."

October 10th Fox & Drummond informed the plaintiff by letter that there was little time then left in which to complete the order, and that no extension would be granted; and on October 29th they notified the plaintiff that no pipe would be accepted by them after that day, under the contract of August 27th. Only 49 pieces of 12-inch pipe were delivered in New York within the nine weeks, and these were paid for. Acceptance of all sent after that time was refused. The nine weeks ended on the 29th of October. The plaintiff did not enter the order of August 27th until after the receipt of the telegram and letter from the defendants directing the insertion of the word "nine" in the blank space. It was, at that moment, optional with the plaintiff to have accepted or refused the terms of delivery insisted on by the defendants. If the plaintiff did not intend to be held to an expressly limited time for delivery, the defendants should have been frankly and promptly informed of such intention, so that they could have looked elsewhere for the needed pipes. But this was not done, although on September 2d plaintiff wrote to the defendants, "Have entered your order for 6 and 12 inch pipe," and thus led the latter to believe that their instructions had been obeyed, and that the time for delivery stipulated for by them had been made a part of their order.

In view of these facts, the court finds that the order of August 27th was incomplete until the blank space had been filled up according to the meaning of the words, "We will wire you to-morrow in confirmation of these deliveries;" and that the telegram sent to and received by the plaintiff on the following day, directing how the blank should be filled, was made a part of the contract; that the absence of any objection by the plaintiff to the insertion of the word "nine" after the receipt of the telegram and letter of the 28th of August, was evidence of acquiescence in the terms proposed by the defendants; that the plaintiff had no authority to enter the order of August 27th without filling in the blank as directed by the defendants, and was consequently without authority to manufacture the pipe and charge the defendants therefor, unless the terms of delivery, as stipulated for by the defendants, were complied with. No parol evidence can be admitted to vary or explain a written contract, except in case of fraud, mistake, or latent ambiguity. Here there was no fraud or mistake in the inception of this order, but there

was an obscurity about it, as originally written, which required to be removed before the contract between the parties could be rightly interpreted, and for this purpose only was testimony *dehors* the written agreement received. Under the operation of this rule, the larger portion of plaintiff's testimony was excluded.

The plaintiff having failed to deliver the articles contracted for within the time limited for their delivery, there can be no recovery in this action, and judgment must be entered for the defendants for costs.

BARSON v. ROBERTSON, Collector.

(Circuit Court, S. D. New York. January 25, 1888.)

CUSTOMS DUTIES—CHARGES AND COVERINGS—ACT OF MARCH 3, 1883—TIME OF TAKING EFFECT.

Section 7 of the tariff act of March 3, 1883, repealing the statutes which provided for duties on charges and coverings, and prohibiting the assessment of duties on such charges and coverings, did not take effect until July 1, 1883.

(*Syllabus by the Court.*)

At Law. Action to recover back custom duties.

The plaintiff, during the period between March 3 and July 1, 1883, made various importations of Portland cement, from Germany. The goods were invoiced, and entered for consumption as "free on board," and the invoice and entered value included packing and transportation charges. The collector assessed a duty of 20 per cent. upon the entered value, including charges, and refused to receive or consider new consular invoices in which the charges were separately stated. This action was brought to recover the duties assessed upon the charges. At the close of plaintiff's case counsel for defendant moved for the direction of a verdict in favor of the defendant, on the ground that the duties had been properly assessed by the collector, and that, at the time the goods were entered, charges were dutiable by law, inasmuch as section 7 of the tariff act of March 3, 1883, abolishing duties on charges, did not take effect until July 1, 1883.

Hartley & Coleman, for plaintiff.

Stephen A. Walker, U. S. Atty., and *W. Wickham Smith*, Asst. U. S. Atty., for defendant.

LACOMBE, J., (*orally.*) Of course acts take effect from the day of their passage, unless the law-makers express the intention that they shall take effect at some other time. This particular act of 1883 provides particularly, as to different parts, especial dates upon which those parts shall take effect. It is now contended that the use in section 7 of the word "hereafter" is conclusive and controlling of the question, and determines that, as to the provisions embodied in that section, the act was to take

effect March 3, 1883,—the day of its passage. In my opinion no such single word in a statute would be sufficient to determine the question. An examination of the whole act in all its parts should be resorted to before we undertake to say what was the expressed intention of congress as to the date when it should take effect. The earlier sections, from 1 to 5, are mainly concerned with internal revenue matters, and provide for the taking effect of the act on different dates. The provision with regard to duties upon imports will be found in section 6 and those succeeding. Section 6 provides that on and after the first day of July, 1883, "the following sections shall constitute and be substituted for title 33 of the Revised Statutes," and then follows the enumeration of the various dutiable articles, with the rates of duty which they shall respectively pay. Then follows section 7, which is directed to removing the duty upon the packages, sacks, or boxes, or other coverings in which dutiable goods may come. Were there nothing here save section 6 and section 7, while it might seem somewhat remarkable that congress should have fixed upon different dates for the taking effect of these different provisions with regard to imports, there would not be sufficient to show a clear intention on the part of congress that the regulations with regard to coverings should not go into effect until the 1st of July. In my opinion, however, the next section is controlling of the question. Its sole purpose, when it is examined in connection with the section of which it is an amendment, indicates that it was part of the plan or scheme for relieving importers from the obligation of paying duties upon the coverings in which their goods come to this country, and that section expressly provides that the provisions it contains shall go into effect on and after the 1st day of July, 1883.

I am forced, then, to the conclusion that it was the clear intention of congress, and that they have expressed that intention with sufficient clearness to warrant holding, that the provisions in regard to the coverings went into effect on the 1st of July, 1883, and I shall therefore direct a verdict for the defendant, and give the plaintiff an exception.

SMITH *et al.* v. GOOD.

(*Circuit Court, D. Rhode Island. March 8, 1888.*)

CONSTITUTIONAL LAW—AMENDMENT TO STATE CONSTITUTION—RIGHT TO QUESTION IN FEDERAL COURTS.

Act R. I. March 10, 1886, (Pub. Laws, c. 550,) provides that the question of the adoption of article 5 of amendments to the constitution, prohibiting the manufacture and sale of intoxicating liquors to be used as a beverage, shall be submitted to the people, the ballots counted by the governor, secretary of state, and attorney general, and the result authoritatively announced by the governor by proclamation. *Held*, in an action on a promissory note, given for the purchase price of such liquors, by the indorsee, who took it with full knowledge of the consideration, that the circuit court of the United States sitting in Rhode Island had no power to inquire into the question of the legal

adoption of the amendment, the political power of the state having declared that the amendment had been legally adopted, the amendment having been acquiesced in by the people, and it never having been adjudged illegal by the courts of the state, and that judgment should be entered for the maker of the note.

At Law.

Chas. E. Gorman, for plaintiffs.

Wilson & Senekes, for defendant.

COLT, J. This case was heard by the court, jury trial having been waived. It is an action upon a promissory note given for the purchase of intoxicating liquors. It is admitted that the plaintiffs cannot recover if article 5 of amendments to the constitution of Rhode Island, which prohibits the manufacture and sale of intoxicating liquors to be used as a beverage, has been legally adopted.

By the agreed statement of facts it appears that Hanley, Hoyer & Co. were liquor dealers in the city of Providence, on June 12, 1886; that they were duly licensed to sell liquors at wholesale and retail under the law for one year from July 1, 1885, and that they sold to the defendant, at Providence, on June 12, 1886, certain intoxicating liquors to be used as a beverage, for the sum of \$696.50, and in payment thereof took the note declared on in this action. The note was afterwards, for value received, indorsed and delivered to the plaintiffs, with full knowledge and notice that it was given for the purchase of intoxicating liquors to be used as a beverage. It is further admitted that the governor of Rhode Island issued the proclamation of May 14, 1886, declaring article 5 to be a part of the constitution of the state. It is also agreed that there were no town meetings in certain towns in the state on the first Wednesday of April, 1886, and no ward meetings held in the Ninth and Tenth wards of the city of Providence on that date; and that the ballots cast for the amendment in the towns of Lincoln, Cumberland, Warwick, and East Providence, and in the Ninth and Tenth wards of the city of Providence, were given in district meetings, and not in town or ward meetings. The contention of the plaintiffs is that the amendment was not legally adopted because—*First*, under article 13 of the constitution of Rhode Island a ballot on a proposed amendment can only be given in town or ward meetings; *second*, in the several acts creating districts no jurisdiction is conferred upon district meetings to receive ballots upon a constitutional amendment; *third*, the act of submission of March 10, 1886, does not submit the proposition of amendment to be voted upon in district meetings, but to "meetings of electors,"—meaning necessarily those established in the constitution; *fourth*, even if the act can be construed as intending to submit the amendment to district meetings, it was beyond the power of the legislature to submit it to be voted upon at other meetings than those designated in article 13 of the constitution.

The first question which meets us at the beginning of this case is whether the court has any jurisdiction to determine the issue which is here raised. When the political power of a state declares that an amend-

ment to the constitution has been duly adopted, and the amendment is acquiesced in by the people, and has never been adjudged illegal by the state court, the jurisdiction of a federal court to question the validity of such a change in the fundamental law of a state should clearly appear. I am referred to no case in which any federal court has assumed to exercise such a power. There are decisions of state courts where the supreme court of the state has passed upon the regularity of the adoption of amendments to their constitution where the instrument prescribed the mode of amendment. The question is reviewed at great length in the recent case of *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. Rep. 788, 15 N. W. Rep. 609, and the majority of the court there held that a case involving the regularity of the adoption of an amendment to the constitution, not in any manner pertaining to the judicial authority, is subject to the jurisdiction of the state court; but in view of the powerful dissenting opinion of Judge BECK in that case it can hardly be said that such a rule of decision is fully established in the state tribunals. But however this may be, I cannot but consider the position of the federal courts as different. I am not satisfied that any such judicial power is conferred under the federal constitution upon the courts of the United States. It seems to me contrary to the plan of the federal government for its judiciary to thus interfere with what is recognized and accepted as part of the constitution of a state. The very framework of the federal government presupposes that the states are to be the judges of their own laws; and it is not for the federal courts to interpose, unless some provision of the federal constitution has been violated. It is not pretended in this case that any federal question is raised. The federal courts derive their powers from section 2 of article 3 of the constitution of the United States, and I find no such power there enumerated as is here sought to be invoked. The constitution itself provides when the United States may interfere in the government of the states. Section 4 of article 4 declares that the United States shall guaranty to every state in the Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature or of the executive, (when the legislature cannot be convened,) against domestic violence. When the United States will interfere with the government of a state under this provision, rests with congress or the executive rather than with the courts.

The assumption of such a power by the federal courts as is now contended for would lead to much confusion, and place the fundamental laws of the states on very unstable foundations. The adoption of an amendment may turn upon a question of fact as well as law, and, if it be a question of fact, where is the limit or end of the controversy that may be provoked? Suppose one party denies that the requisite number of qualified electors voted for the amendment. Might not the court be forced into the inquiry as a question of fact of the legal qualification of every voter in the state who voted for the amendment? Where the political power of the state has declared that the fundamental law has been changed, and the legislature have passed statutes in obedience

thereto, and the people have accepted such change, it cannot be that the state of Rhode Island must wait until the end of protracted proceedings in a federal court to discover what its fundamental law is, in a case where it is not pretended that any question arising under the federal constitution is involved. Further, questions of fact are tried by jury, and a decision only binds the parties to the case; one jury in one case might decide that the amendment was valid, and another jury in another case, upon a different presentation of the facts, might reach the conclusion that the amendment was invalid. Surely a court should hesitate before assuming a jurisdiction which might lead to such results. And this is another reason why the clearest authority should be shown before a federal court should assume to pass upon, and perhaps declare illegal, the solemn act of a state by which its fundamental law is changed. But the federal courts have refused to interfere in these cases. I know that the plaintiffs rely on the distinction between the adoption of a new constitution and an amendment to an existing constitution. It is admitted that the first act is political in its nature, and therefore outside of the judicial power. But upon reason it is difficult to see any wide distinction between the two. Both are acts of the same sovereign character on the part of the people, and both concern changes in the organic law of the state. The federal courts have never recognized this distinction. Indeed, the reasons which are urged against the power of a state court to adjudicate upon the validity of a new constitution do not apply to the federal courts, and therefore, if a federal court can take jurisdiction in the one case, it may in the other. It is said that a state court is forbidden from entering upon such an inquiry when applied to a new constitution, and not to an amendment, because the judicial power presupposes an established government, and if the authority of that government is annulled and overthrown, the power of its courts is annulled with it; and therefore, if a state court should enter upon such an inquiry, and come to the conclusion that the government under which it acted had been displaced by an opposing government, it would cease to be a court, and it would be incapable of pronouncing a judicial decision upon the question before it; but, if it decides at all, it must necessarily affirm the existence of the government under which it exercises its judicial powers. But it is manifest that these objections to a state court entering upon such an inquiry are inapplicable to a federal court, which is independent of the state government. The reasoning of the supreme court of the United States in *Luther v. Borden*, 7 How. 1, where the court was asked to decide between two contesting governments in Rhode Island,—the old charter government and the Dorr government,—is as pertinent, it seems to me, to the case of an amendment as to rival constitutions. Indeed, by the language of the court itself, no distinction is made between a constitution and an amendment. Mr. Chief Justice TANEY, speaking for the court, says:

"In forming the constitutions of the different states, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the pro-

posed constitution or amendment was ratified or not by the people of the state, and the judicial power has followed its decision."

On the point of the authority in the constitution for the federal courts to entertain jurisdiction in this class of cases, Mr. Justice WOODBURY, who agreed with the opinion of the court on this branch of the case, says: "Again, the constitution of the United States enumerates specially the cases over which its judiciary is to have cognizance, but nowhere includes controversies between the people of a state as to the formation or change of their constitutions." The case of *Luther v. Borden* is still the law of the federal courts, and it has been followed by the supreme court wherever similar questions have arisen. *White v. Hart*, 13 Wall. 646; *Georgia v. Stanton*, 6 Wall. 50.

In this case the law of the state has provided (act March 10, 1886, c. 550, Pub. Laws) that the question of the adoption of this amendment should be submitted to the people, that the ballots should be counted by the governor, secretary of state, and attorney general, and the result authoritatively announced by the governor by proclamation. So far as the federal courts are concerned, I think that the determination made by the state officers, acting under and in pursuance of this provision, is to be taken as the voice of the people of Rhode Island on the question whether the amendment has or has not been adopted. Further questions might arise if the supreme court of the state should at any time decide to the contrary, but with these questions we have nothing to do in the present case. It is sufficient now to say that since the result of the vote on this amendment has been ascertained by the authority appointed for that purpose by the law of the state, and no other authority or department of the state government has spoken to the contrary, it seems clear to me that the federal government is to take the result as announced by the governor as a final statement of the fact in the case. I am of opinion, both upon reason and authority, that this court has no lawful power to inquire into the validity of article 5 of amendments to the constitution of Rhode Island, and therefore judgment must be entered for the defendant. Judgment for defendant.

HILL v. SCOTLAND COUNTY.

(Circuit Court, E. D. Missouri, N. D. March 5, 1888.)

1. COUNTIES—LIABILITIES AND INDEBTEDNESS—BONDS—BONA FIDE HOLDER.

A purchaser of negotiable bonds of a county is not affected with constructive notice of the pendency of a suit to test the validity of such bonds.

2. SAME—PURCHASER OF BONA FIDE HOLDER.

A purchaser from an innocent holder of negotiable bonds of a county, issued under proper authority in subscription for stock of a railroad corporation, can recover thereon against the county, even though he purchased them with notice of the pendency of a suit to test the validity of such bonds, in which they were adjudged void.

At Law.

F. T. Hughes, for plaintiff.

H. A. Cunningham, for defendant.

THAYER, J. This is a suit on 46 coupons clipped from 40 bonds of a series of 200 bonds of the denomination of \$1,000 each, alleged to have been issued by Scotland county to the Missouri, Iowa & Nebraska Railroad Company in payment for stock of that corporation subscribed in 1870. By stipulation of counsel the case was submitted on the testimony contained in the printed transcript of the record of a case between the same parties, which was tried some years since by my predecessor, Judge TREAT, at St. Louis, Mo., and is now pending on appeal from his decision in the supreme court of the United States. The answer in this case, as I take it, admits that all the coupons sued upon and filed in this case bear the signature of the county clerk of Scotland county, and were detached from bonds which were signed by the presiding justice of the county court of Scotland county, and that his signature is duly attested by the signature of the county clerk and seal of the county court. There is a plea that the coupons declared upon are not the act or deed of Scotland county, but, taken as a whole, it is clear, I think, that the answer puts in issue, not the genuineness of signatures to the bonds, or the existence of instruments purporting to be bonds of Scotland county, such as are described in the petition, but the power of the various county officials to execute such securities, and thereby bind the county. The authority of the county court to issue the bonds in question, notwithstanding the consolidation of the Alexandria & Bloomfield Railroad with the Iowa Southern Railway, thereby forming the Missouri, Iowa & Nebraska Railroad, and notwithstanding the change of the route of the road, is settled, so far as this court is concerned, by the decision in *Scotland Co. v. Thomas*, 94 U. S. 682, where these questions are fully considered and determined.

The answer contains a further plea to the effect that the entire issue of bonds by Scotland county, including, of course, those from which the coupons in suit were detached, have been adjudged void by the supreme court of the state of Missouri, in the case of *Wagner v. Meely*, 69 Mo. 150, and that the plaintiff stands in privity with the defendants in that suit, and is bound by the decree therein, not being himself an innocent purchaser of the bonds, and not having derived title thereto by, through, or under an innocent purchaser thereof. This latter defense was mainly relied upon in the case tried before Judge TREAT, and is particularly invoked in the present suit. In the case of *Scotland Co. v. Hill*, 112 U. S. 185, 5 Sup. Ct. Rep. 93, also in the case of *Warren Co. v. Marcy*, 97 U. S. 96, it was held that purchasers of commercial paper like that now in suit were not chargeable with constructive notice of the pendency of litigation affecting the title or validity of such securities; that to bind a purchaser of such securities by a decree or judgment in a suit affecting the same to which he was not a party, it must appear that he bought

with actual notice of the pending litigation. Following that rule, Judge TREAT held in the former suit between these parties that to preclude plaintiff from recovering upon the coupons then in issue (inasmuch as the supreme court of the United States had decided that the county of Scotland had authority to issue the bonds from which the coupons were detached) it must be made to appear that every holder of the bonds, from the time they left Mety's hands, who, as an agent of the county, delivered them, down to and including the plaintiff, was affected with actual notice of the suit of Wagner against Mety. In other words, it was ruled that, if a single holder intermediate between Mety and the plaintiff bought the bonds in open market, for value, without notice of the suit, and prior to maturity, that such negotiation to an innocent purchaser created a good title, upon which plaintiff might recover, notwithstanding the decree in *Wagner v. Meety*, and notwithstanding any notice which the plaintiff may have had of that suit at the date of his purchase. The ruling of the court on that point is not seriously questioned in the present case. Indeed, it is a well-settled rule of commercial law that title to a negotiable instrument created by a sale of the same to an innocent person, for value, and before maturity, is a title upon which any subsequent transferee can recover, notwithstanding he may have notice of infirmities of title, or of equities or defenses that exist between the original parties. *Commissioners v. Clark Co.*, 94 U. S. 278; *Cromwell v. Sac Co.*, 96 U. S. 59; Story, Prom. Notes, § 191. It is insisted, however, that 23 of the bonds involved in the present case were not involved in the former suit; that the title thereto was not traced in the former suit; that no negotiation of the same to an innocent purchaser was proven; and that, when on the present trial the record in the suit of *Wagner v. Meety* was offered, the burden devolved upon the plaintiff to show that he was himself an innocent purchaser of the 23 bonds in question, or to show a title derived thereto from an innocent purchaser, which, as it is claimed, the testimony in the record wholly fails to establish. With reference to this contention I will say that as the plea relied upon is that of a former adjudication that the bonds were illegally issued, which adjudication is claimed to be binding on the plaintiff merely because he derives title to the bonds under persons who were parties to that suit, and with notice of its pendency, it is doubtful whether the production of that record imposed on plaintiff the burden of tracing the bonds, and showing that they had passed through the hands of an innocent purchaser. As plaintiff was not a party to the suit of *Wagner v. Meety*, and as the bonds involved were negotiable securities, it would seem rather that the decree in that case would not be evidence as against the plaintiff that the bonds were put in circulation fraudulently or illegally, so as to cast the burden of proof upon plaintiff, until the defendant had itself traced the history of the bonds, and given evidence at least tending to show that plaintiff and all preceding holders bought with notice of that suit, and so stood in privity with the defendants therein. Defendant seems to invoke the decree in that case as evidence of fraud

and illegality in the issue of the bonds before laying the necessary foundation to make the decree evidence as against those who were not parties to the suit.

But, be this as it may, assuming for the purpose of this decision that the burden is on the plaintiff to show that the 23 bonds alluded to that were not involved or traced in the former suit have passed through the hands of an innocent purchaser, the testimony, in my opinion, fairly shows such fact. The evidence contained in the printed record upon which this case was submitted, shows that the Missouri, Iowa & Nebraska Railroad Company transferred the entire issue of bonds for value and before maturity to the Iowa Railroad Contracting Company; that the latter company bought without notice of the suit of *Wagner v. Meety*, and without notice of any infirmity of title, and that it subsequently sold the whole issue in open market at about 80 cents on the dollar to various purchasers. Without any reference, therefore, to the question whether the testimony also shows that plaintiff bought with notice of the pending suit, or with notice that a part of the bonds had been put in circulation in violation of an injunction of the state court, it appears to me that the evidence establishes the fact without contradiction that before the bonds reached his (plaintiff's) hands, they had passed through the hands of an innocent purchaser, and that he is not precluded from recovering in this case by reason of any notice or information which he may have had at the date of his purchase. The result is, in my opinion, that judgment should be entered as prayed for by the plaintiff; and it is accordingly so ordered.

MCKINSTRY v. UNITED STATES.

(Circuit Court, S. D. Alabama. March 9, 1888.)

1. UNITED STATES COMMISSIONERS—FEES—COMPLAINT IN CRIMINAL CASE.

A United States commissioner is not entitled to a fee for drawing a complaint in a criminal prosecution, but, such complaint being sworn to and filed, he is entitled to the fee, viz., 10 cents, prescribed (Rev. St. U. S. § 847, par. 1) for administering an oath, and to that, viz., 10 cents, for filing a paper in a cause (Rev. St. U. S. § 847, par. 7, and § 828, par. 3.)

2. SAME—REDUCING TESTIMONY TO WRITING.

Code Ala. §§ 4256, 4257, provides that in the preliminary examination of a criminal the magistrate shall reduce to writing the testimony of the complainant and of such witnesses as he may offer in support of the charge, and styles such testimony a deposition; but the testimony of each witness need only be "signed" by him, and is not required to be certified and filed, nor are the same formalities observed in the proceeding as are prescribed (Id. §§ 2807, 2808) in the taking of depositions. *Held*, that such an examination in the case of one charged with an offense against the United States, reduced to writing by a United States commissioner in Alabama, was not a "deposition" within the meaning of Rev. St. U. S. § 847, par. 5, prescribing a fee of 20 cents a folio "for taking and certifying depositions to file."

3. SAME—WARRANTS AND SUMMONS.

Under Rev. St. U. S. § 847, par. 7, and § 828, par. 1-3, a commissioner is entitled to a fee of one dollar for issuing, and 10 cents for filing, a warrant, and 25 cents for issuing a summons, and 10 cents for filing it when returned.

4. **SAME—ENTERING RETURNS.**

The entering by a commissioner of a return of a warrant or subpoena issued by him, is not a like service as performed by clerks of the United States courts, within the meaning of Rev. St. U. S. § 847, par. 7; and he is not entitled to the compensation (15 cents per folio) provided for those officers by section 828, par. 8; the commissioner not being required by law or order of court to enter such returns, and he having no record on which to make such entries.

5. **SAME—CONTINUANCE—PER DIEM.**

When, by request of the accused, on the day of hearing, a continuance until the next day is granted, without other proceedings, the commissioner is not entitled to the per diem of five dollars, prescribed by Rev. St. U. S. § 847, par. 8, for the day of hearing.

6. **SAME—BAIL—BONDS.**

He is entitled under Rev. St. U. S. § 847, par. 7, and § 828, par. 8, to compensation for drawing bail-bonds at the rate of 15 cents for each folio, but not to a fee for filing such bonds; section 1014 requiring the bonds to be returned to the court before which the accused is bound over to appear.

7. **SAME—ACKNOWLEDGMENT.**

The provision in Rev. St. U. S. § 847, par. 2, allowing commissioners 25 cents for "taking an acknowledgment" does not apply to acknowledgments taken by such officers to bail-bonds.

8. **SAME—OATH TO SURETIES.**

The law of Alabama requiring the magistrate conducting a preliminary examination to justify persons offered as bail, a commissioner in that state, when admitting a person charged with an offense against the United States to bail, is entitled to a fee of 10 cents for each surety to whom he administers an oath. Rev. St. U. S. § 847, par. 1.

9. **SAME—WITNESSES.**

He is entitled to compensation for administering oaths to witnesses as to their mileage and attendance at the rate of 10 cents for each witness, (Rev. St. U. S. § 847, par. 1,) and for each certificate or order issued to a witness for his pay at the rate of 15 cents a folio, (Rev. St. U. S. § 847, par. 7, and § 828, par. 8.)

10. **SAME—DOCKET ENTRIES.**

Rev. St. U. S. § 828, par. 8, provides compensation for clerks "for entering any return, rule, order, continuance, judgment, decree, or recognizance, * * * for each folio, 15 cents." Section 847, after specifying certain fees to be paid commissioners for particular services therein mentioned, provides (paragraph 7) that "for any other service, such compensation as is allowed to clerks for like services." *Held*, that "any other service" meant "service" required of commissioners by law or by order of court, and that, commissioners not being required by law or order of court to enter on their dockets any of the items specifically mentioned in paragraph 8, § 828, they were not entitled to compensation for such entries.

11. **SAME—TRANSCRIPT.**

Where the order of court requires commissioners to forward to the clerk a transcript of the proceedings in each case examined by them, they are entitled to be paid for a copy of the proceedings as entered on their docket at the rate of 10 cents a folio, and for the certificate annexed thereto at the rate of 15 cents a folio. Rev. St. U. S. § 847, par. 7, and § 828, pars. 8, 9.

12. **SAME—MONTHLY REPORT.**

They are entitled under the same sections, and order of court, to compensation for a monthly report in duplicate of all cases instituted or examined before them, at the rate of 15 cents a folio.

13. **SAME—COPIES OF PROCESS.**

They are entitled to 10 cents a folio for copies of the "process" returned by them into the clerk's office of the court, as required by Rev. St. § 1014, providing for the arrest and removal for trial of offenders against the United States; "process," however, signifying only the warrant or writ by which the accused was brought to answer the charge preferred against him. Rev. St. § 847, par. 7, and § 828, par. 9.

At Law. Action by William D. McKinistry, a United States commissioner, for fees disallowed by the first comptroller of the treasury department.

G. L. & H. T. Smith, for plaintiff.

J. D. Burnett, Dist. Atty., for the United States.

TOULMIN, J. The plaintiff is a United States commissioner for the Southern district of Alabama, and brings this suit to recover a balance claimed to be due him on account of services rendered by him as such commissioner for and on behalf of the United States. The accounts sued on run from February 10, 1887, to September 30, 1887, inclusive, and originally amounted to \$1,823.45. They were sworn to, duly presented to and approved by the proper court, and transmitted to the first comptroller of the treasury department for payment. The sum of \$666.46 was allowed and paid on these accounts, but the balance claimed was disallowed and payment thereof refused. The entire account is before the court, and the complaint alleges that the services therein charged for were actually and necessarily rendered, and the charges made therefor are just and according to law. The United States, by the district attorney, interposes a general denial of the allegations of the complaint. The plaintiff submits as evidence in support of his complaint his own testimony; all the papers in the several cases specifically mentioned in the petition, and in which the services charged for are claimed to have been rendered; his accounts as set out in the petition, and the orders of court allowing them; the order of the court requiring dockets to be kept, and his docket.

Officers who are entitled to receive fees for their services can receive only such fees as are specifically prescribed by law. The statutes of the United States prescribe the services for which commissioners are entitled to receive fees, and prescribe the fees that shall be charged. Rev. St. §§ 823, 828, 847, 1764, 1765. Unless we find in the statutes authority for the fees charged in the accounts sued on, they cannot be allowed. *Jerman v. Stewart*, 12 Fed. Rep. 271, 275; Rev. St. §§ 823, 1764, 1765. There is no authority found in the statutes for the charge for a complaint. Neither section 828 nor section 847 prescribe a fee for drawing a complaint in a criminal prosecution, nor for any like service. But, as a complaint is sworn to and filed, I think the petitioner is entitled to the fee prescribed for administering an oath, and for filing a paper in a cause.

While it was admitted in the argument by plaintiff's counsel that there is no fee allowed for the complaint *eo nomine*, it was urged that he should be allowed compensation for taking depositions at the rate of 20 cents a folio, under section 847, Rev. St., inasmuch as he is required, in the preliminary examination of a criminal charge to reduce to writing the testimony of the complainant, and of such witnesses as he may propose in support of his complaint. The Criminal Code of this State requires this, and calls such testimony "deposition." Code of Ala. vol. 2, §§ 4256, 4257. But it does not require such testimony to be

certified and filed by the magistrate. Nor does it require such testimony to be taken with the same formalities as is required by the statute in the taking of depositions. 1 Code Ala. §§ 2807, 2808. The Criminal Code only requires that the testimony shall be signed by the witness. 2 Code Ala. §§ 4256, 4286. That such examination, reduced to writing by the commissioner, is not a deposition in contemplation of section 847, Rev. St. U. S., which prescribes a fee for taking and certifying depositions to file, see *Nail Factory v. Corning*, 7 Blatchf. 16; and also opinion in the case of *Strong v. U. S.*, in the district court for the Southern district of Alabama, filed February 21, 1888, (see *ante*, 17.) But I find as a matter of fact in this case that the testimony of the witnesses examined on the preliminary hearing in the cases mentioned in the petition was not certified by the plaintiff as commissioner, and was not formally filed by him, and there is in fact no charge for taking and certifying depositions in the accounts sued on.

The plaintiff is entitled to a fee for issuing and filing a warrant, and for issuing and filing a subpoena, when duly returned. He is not entitled to a fee for entering return of warrant or subpoena. Section 847 does not provide for any such fee. He is not required by law or by the order of this court to enter such return, and he has in fact no record on which to enter it. So he cannot claim compensation for it on the ground of a like service performed by clerks of the United States courts. Section 828, Rev. St., provides compensation for clerks for entering return. They have records on which to make such entry, and it is their duty to make it. The petitioner did, as a general thing, enter on his docket the return of the warrants and subpoenas in the cases examined by him. But the order of the court, which requires commissioners to keep a docket, does not prescribe among the entries required by it to be made on the docket the entry of return of warrants and subpoenas. It does require specifically certain entries to be made, but omits the return of warrants and subpoenas. There being, then, no law or order of court requiring such service, and no fee provided for a service not necessary or required to be performed, the charge here made cannot be sustained.

No per diem fee is chargeable for a day when there is neither hearing nor deciding on a criminal charge, as when by request of the defendant a continuance is granted without other proceedings. Rev. St. § 847. In the case of Thomas H. Boyles (being the second case mentioned in the account sued on) there is a per diem charge of \$10. I find from the evidence that there was but one day employed in hearing and deciding the charge. On the first day there was a continuance merely by request of the defendant. The petitioner is entitled to but one per diem fee in that case.

Petitioner, as the proof shows, is entitled to fees for only 324 oaths to witnesses examined on the hearing. But this is irrespective of oaths administered to witnesses as to their mileage and attendance.

The petitioner is entitled to compensation for drawing bonds at the rate of 15 cents a folio. The bonds submitted in evidence contain four

folios each. 'There is no oath to them, and none is required by law, and they are not required to be filed by the commissioner; but the law requires that they shall be returned to the court before which the defendant is bound to appear. 2 Code Ala. § 4425; Rev. St. § 1014. Petitioner is therefore not entitled to a fee for oath to and filing of bonds.

The charge for acknowledgment to bonds is unauthorized by law. There is no such thing as taking an acknowledgment to a bond required by law, and the proof fails to show that there were any legal acknowledgments taken to the bonds in evidence. Section 847, Rev. St., provides a fee for taking acknowledgments, but in my opinion this has no reference to a bail-bond, and applies only to an act having reference to conveying. See opinion in *Strong v. U. S.*, *supra*, and authorities therein cited. The statute of this state authorizes the magistrate to justify or qualify the persons offered as bail. In such case an oath is required, and for administering each oath the petitioner is entitled to a fee of 10 cents.

I find from the evidence that petitioner is entitled to compensation for administering oaths to 195 witnesses as to their mileage and attendance at 10 cents each, and for as many certificates or orders issued to said witnesses for their pay at 15 cents a folio. The certificate or order which is designated "pay-roll" for each witness by the commissioner contains less than two folios. The petitioner is not entitled to the docket fees charged. 24 U. S. St. at Large, 274; opinion in *Strong v. U. S.*, *supra*.

There is no law which allows fees for docket entries. Section 828, Rev. St., provides compensation for clerks "for entering any return, rule, order, continuance, judgment, decree, or recognizance, * * * for each folio fifteen cents." And section 847, after specifying certain fees to be paid commissioners for particular services therein mentioned, provides that "for any other service, such compensation as is allowed to clerks for like services." This of course means "for any other service" required of commissioners by law or by the order of court. And they are not required by law or by the order of court to enter on their dockets any of the items specifically mentioned in that clause of section 828 above quoted. I have always considered that compensation for such docket entries as were required to be made was covered by the docket fee formerly allowed commissioners. As they are not now entitled to docket fees, there is no compensation provided for docket entries.

Since the order of the court requires commissioners to forward to the clerk of the court a transcript of the proceedings in each case examined by them, I think they are entitled to be paid for a copy of the proceedings as entered on their docket at the rate of 10 cents a folio, and for the certificate annexed thereto 15 cents a folio. Rev. St. §§ 828, 847. Petitioner is allowed this compensation, but in four cases set out in the petition there are no certificates to the copy of proceedings. In these cases he cannot recover compensation for certificate.

I hold that he is entitled to compensation for a monthly report in duplicate of all cases instituted or examined before him during the month at 15 cents a folio. *Id.* He is required by order of the court to make

this report in duplicate. But he is not entitled to be paid the fees charged for report in internal revenue cases, because no such cases were instituted or examined to be reported as required by said order.

I also find that petitioner is entitled to the fees for copies of the process returned by him into the clerk's office of the court, as required by section 1014 Rev. St. The charges for copies of process are allowed only as to copies of the warrants so returned. Process signifies warrant, or the writ by which the defendant is brought to answer the charge preferred against him. No charge for copies of other papers is allowed.

Judgment will be entered for the plaintiff for \$226.59.

SEIBERT CYLINDER OIL-CUP Co. v. DETROIT LUBRICATOR Co.

(*Detroit Court, E. D. Michigan.* February 14, 1888.)

1. PATENTS FOR INVENTIONS—WHO ARE INFRINGERS—LICENSEES.

A contract whereby complainant agrees not to sue defendant for any future infringements of its patent, in consideration of defendant's accounting for machines manufactured and paying a royalty thereon, is in substance and effect a license, and complainant cannot treat defendant as an infringer by reason of its refusal to account and pay royalties.

2. SAME—LICENSE—BREACH OF CONTRACT—INJUNCTION.

Where complainant had consented that a third party should enter upon the manufacture of its machines, in competition with its own licensee, to whom it had given certain exclusive rights, and such competition had resulted in a large reduction in the price of the machine, *held*, that whether such a consent was a technical violation of its contract with the licensee or not, complainant was not entitled to a preliminary injunction.

(*Syllabus by the Court.*)

In Equity. On motion for a preliminary injunction.

This was a bill to recover damages for an infringement of letters patent No. 138,243, issued April 29, 1873, to John Gates, for an improvement in lubricators. The bill contained the usual allegations of the issuance of the patent, its assignment to plaintiff, proceedings in various suits, in which the validity of the patent was several times adjudicated, and the infringement by the defendant, against which an injunction was prayed. The bill then proceeded to set forth (paragraph 9) that the defendant wrongfully pretended that it had a right to make, use, and sell the said invention by reason of a contract between the plaintiff and defendant, made on the 1st of December, 1883, in which it was agreed that neither party should sue the other under any of the patents now or hereafter owned by them; but in answer to this it was averred that this agreement had been rescinded, and that such rescission was caused by the wrongful act and default of the defendant in failing to make certain returns and pay certain royalties stipulated therein, and for such neglect and refusal, and because of the repudiation by the defendant of the agreement, the plaintiff had elected to rescind it, and that the infringement

complained of was committed subsequent to such rescission. It was further averred that even if said agreement had not been rescinded, the covenant not to sue was no bar to this suit, because the defendant had not observed and performed the covenants contained in such agreement in refusing to make the returns and pay the royalties stipulated therein. The answer admitted the use of the Gates patent by the defendant, and relied upon the agreement mentioned in the bill, which was claimed to be still in force. A copy of the agreement was annexed to the answer. After reciting in substance that the plaintiff was the owner of certain patents granted to Gates, among them the one in suit, for sight-feed lubricators, and that the defendant was the owner of certain other patents to Charles H. Parshall and George H. Flowers for rival inventions, and that contentions had arisen between the parties, growing out of infringements by each of the patents belonging to the other, and the pendency of a suit in the United States circuit court at Boston, wherein the Seibert Company was plaintiff, and one Burlingame, an alleged agent of the Detroit Company, was defendant, and also a certain other suit in the United States court at Detroit, wherein the Detroit Company was plaintiff, and certain vendees of the Seibert Company were defendants, it was agreed that judgment should be entered for the plaintiff in each of such suits, and that full satisfaction of each of said judgments should be duly entered of record in each case. It was further agreed that neither party should make use of the agreement by advertising or otherwise making the same public, so as to injure the business of the other, and that if any part was made public, the whole should be made public; that the agreement should not be exhibited, or a copy be furnished to any one. Following this was the following covenant:

"And so long as the covenants and agreements to be observed and performed by the parties respectively are observed and performed, each party agrees not to sue or directly or indirectly authorize to be sued the other party, its agents or vendees, under any of the letters patent now or to be hereafter owned by it. * * * And it is further agreed that neither party shall imitate the styles or shapes of the lubricators made by the other party."

Following this was a recital that the Seibert Company was the owner of a number of letters patent granted to Nicholas Seibert, which it was claimed the defendant was infringing, which charge of infringement the Detroit Company disputed; and after reciting that it was expedient to settle said disagreement "in consideration thereof, and of a full release by said Seibert Co. from all alleged future infringements of said patents by said Detroit Co., its agents or vendees outside of the New England states, the said Detroit Co. agrees, so long as the covenants and agreements to be performed by said Seibert Co. are performed by it, and so long as this agreement remains in force, to report to the treasurer of the Seibert Co." every month the number of lubricators made and sold by it, and within 10 days thereafter remit a royalty for each lubricator made and sold during the preceding month; "and in consideration thereof, said Seibert Co. agrees not to molest by suit or otherwise said Detroit Co., its agents or vendees, for any alleged infringement of said Nicholas

Seibert patents." Following this were a number of agreements and covenants, none of which were material except those numbered 17 and 19, in the copy of the agreement annexed to the answer, which were as follows: "(17) And said Seibert Co. agrees not to authorize the use of said Nicholas Seibert patents outside of the New England states, except as above." "(19) This agreement shall be binding upon the parties hereto, their respective successors and assigns, and shall continue in force during the terms, respectively, for which said Seibert patents were granted." The answer further claimed a breach of this agreement in the fact that plaintiff had, contrary to its stipulation not to authorize the use of said Seibert patents outside the New England states, contracted with a New York corporation, known as the "Nathan Manufacturing Company," which had made constant use of the sight-feed, and had entered into a sharp competition with the defendant in selling railroad lubricators all over the United States, and that in consequence the defendant had been obliged to reduce its prices to meet the reduction in the price of complainant; that its sales had been much diminished from what they otherwise would have been; and that in consequence it had suffered many thousand dollars damages, which defendant claimed to recoup against the plaintiff's claims for the royalties. The contract with the Nathan Company, which was made February 3, 1885, was substantially as follows: The Seibert Company, for the purpose of extending the manufacture and sale of lubricators outside the New England states, appointed the Nathan Company its manufacturing and selling agent, subject to and in conformity with any existing contracts for the introduction and sale of lubricators to railroads only in the United States, other than the New England states, now binding on the party of the first part, which contracts the party of the second part has examined and understands; the Seibert Company not to be prevented thereby from making and selling, and the Nathan Company agreeing to manufacture and sell locomotives and air-brake lubricators as such agents; the agency to be revocable at any time by 12 months' notice; the Nathan Company to solicit and fill orders, to assume the entire expense, to collect the bills, and to account from time to time, retaining a commission according to a scale provided; and the Nathan Company is to be and shall represent itself as manufacturing and selling agent of the Seibert Company for the said lubricator business to railroads.

C. J. Hunt, J. H. Raymond, and Edmund Wetmore, for plaintiff.

A. P. Hodges and Charles A. Kent, for defendant.

BROWN, J., (*after stating the facts as above.*) This case turns largely upon the construction to be given the agreement between the plaintiff and defendant, and upon the further question whether, regarding the refusal of the defendant to make returns and pay royalties upon the Seibert patents as unlawful, the plaintiff was authorized to treat the contract as rescinded, and sue for an infringement of its patent. Upon a careful reading of this contract, it is quite evident that its purpose was to adjust two controversies between the parties.

The *first*, contained in paragraphs 1 to 7, inclusive, relates to two suits between the parties at Boston and Detroit, with respect to the Gates and Flowers and Parshall patents, and the terms upon which each party should be permitted to use the patents of the other. As bearing upon these the contract provided: (1) That judgments and satisfaction of the same should be entered in both suits; (2) that the agreement should not be used by either party, by advertising or otherwise making the same public, so as to injure the business of the other party; (3) that the agreement should not be exhibited, or a copy furnished to any person; (4) that neither party should imitate the styles or shapes of the lubricators made by the other party. It was further provided in paragraph 6, that "so long as the covenants and agreements to be observed and performed by the parties respectively are observed and performed, each party agrees not to sue, or directly or indirectly authorize to be sued, the other party, its agents or vendees, under any letters patent now or hereafter to be owned by it."

The *second* controversy relates to the alleged infringement by the defendant of the Seibert patents, and this part of the agreement was intended to settle the terms upon which the defendant should be permitted to make and sell these in the future. These terms were that, so long as the covenants and agreements to be performed by the said Seibert Company were performed by it, the defendant should report monthly the number of lubricators manufactured and sold, and should pay a royalty thereon. The contract contained a number of other covenants, (paragraphs 12 to 20,) most if not all of which refer to the Seibert patents alone, though it is possible that Nos. 12, 19, and 20 might be construed as referring to both series of patents.

There is evidently nothing in the two judgments which would bar a subsequent suit by the plaintiff against the defendant, for an infringement of the Gates patent. The suit against Burlingame, of which the defendant had assumed the defense, had passed to a judgment in favor of the plaintiff. This established the validity of the Gates patent as against the defendant, and in the absence of the covenant contained in paragraph 6, we see nothing to prevent the plaintiff from suing for any subsequent infringement of this patent. The judgment in the suit against Metcalf, at Detroit, of which suit plaintiff had assumed the defense, established the validity of the Flowers and Parshall patents as against the plaintiff, but the validity of these patents was not necessarily inconsistent with that of the Gates patent; in fact, the Flowers patent is now admitted to be an improvement upon the Gates. Paragraph 6, however, interposes an obstacle to the prosecution of any suit so long as each party respectively observed its own covenants and agreements. We were at first inclined to the opinion that this paragraph referred only,—so far as respects the plaintiff,—to the Gates patent; but the covenant being not to sue "under any of the letters patent now or hereafter to be owned by it," the inference is strong that all of the patents named in the agreement were intended to be included. In this case the covenants and agreements mentioned in the paragraph must be given an equally broad

interpretation, and held to include not merely those which preceded and were included in paragraph 6, but also those contained in the paragraphs relating more particularly to the Seibert patents. At the same time it seems very singular that while the parties apparently intended to relinquish all remedy for non-payment of royalty on the Seibert patents, by suit upon those patents, they should reserve the right, if such royalties were not paid, to bring suit upon the original Gates patent. For a non-payment of the royalty upon the Seibert patent, it would have been much more natural to reserve the right to sue upon those patents, rather than upon the Gates patent, and the inference is very strong that it was intended, by the entry of mutual judgments upon the Gates and Flowers and Parshall patents, to give each party the right to deal with these patents as if they belonged to it. Had paragraph 6 terminated with the words, "under any of the said letters patent," the inference would be irresistible that it was intended to apply only to those which had been previously mentioned. Notwithstanding the broad language, "under any letters patent now or hereafter owned by it," we still entertain a grave doubt, arising from the connection in which these words are used, whether the refusal to pay royalties upon the Seibert patents was ever intended to authorize a suit upon the Gates patent.

Indeed, the proper construction of this contract is enshrouded with difficulties. One thing, however, is entirely clear. It was never intended to authorize a suit upon either the Gates or Seibert patents, so long as monthly statements were made, and the royalty upon the Seibert patents promptly paid. Conceding that the covenant not to sue, contained in paragraph 6, following the description of the Gates patent, is discharged by the refusal of the defendant to pay royalties upon the Seibert patents, if these covenants amount to a license to use the Seibert patents upon those terms, it is impossible to distinguish this case from that of *Hartell v. Tlghman*, 99 U. S. 547, in which it was held by a majority of the supreme court that a patentee has no right to treat a license as a nullity, and charge the defendant as an infringer. This was also a suit in equity for the infringement of a patent. The bill set out, not a license in terms, but a contract with the defendant for the use by the latter of plaintiff's invention. It charged that defendants paid him a considerable sum for the machines necessary in the use of the invention, and also paid the royalty for several months for the process secured by the patent. It further alleged that after defendants refused to do certain other things charged to have been a part of the contract, plaintiff forbade them further to use his patent process, and sought to charge them as infringers. As in this case, the defendants admitted the validity of the plaintiff's patent, their use of it, and their liability to him for its use under the contract. They set out in a plea the contract as they understood it, and the tender of all that was due to the plaintiff under it, and their readiness to perform it. Although a license was tendered, none was ever signed. The court held that the suit was not one arising under the patent laws, and that plaintiff's only remedy was to sue for his royalty as often as the same became due, bring a suit in equity for

a specific performance, or seek to have the contract annulled and set aside. It was held, however, that plaintiff had no right in himself to abandon the contract, to treat it as a nullity, and to charge the defendants as infringers. "We do not agree," says the court, "that either party can of his own volition declare the contract rescinded, and proceed precisely as if nothing had been done under it. If it is to be rescinded, it can be done only by a mutual agreement, or by the decree of a court of justice. If either party disregards it, it can be specifically enforced against him, or damages can be recovered for its violation. But until so rescinded or set aside, it is a subsisting agreement which, whatever it is or may be shown to be, must govern the rights of the parties in the use of complainant's process, and must be the foundation of any relief given by a court of equity." The case holds in substance that the contract between the plaintiffs and defendants amounted to a license, which neither party could revoke at pleasure; and that plaintiff had no right to treat the defendants as infringers simply by reason of their refusal to pay the stipulated royalties. It must be regarded as practically overruling *Brooks v. Stolley*, 3 McLean, 523, and *Cohn v. Rubber Co.*, 3 Ban. & A. 572.

Now, if a covenant not to sue for future infringements in consideration either that the covenantee shall permit the covenantor to make use of his patent, or that the covenantee shall make returns and pay royalties upon patents owned by the covenantor, be not a license, it is difficult to characterize it. No particular form of words is necessary to constitute a license. Anything which confers upon another the right to do an act, which without such act would be illegal, is sufficient for that purpose. It may be given in express terms, or implied from the conduct of another without the use of any words at all. Mr. Walker, in his work upon Patents, defines a license to be a conveyance of a right under a patent, which does not amount to an assignment or a grant. Section 296. Indeed, mere acquiescence, if founded upon a valuable consideration, is sufficient of itself to amount to a license. It is well settled that a covenant not to sue a debtor operates as a release of the debt, and I see no reason to doubt that a general covenant not to sue for future infringements is as complete a license as if permission were formally given by a written instrument to that effect. That a bill will not lie to annul a license where the only material allegation is that the licensee failed to make a report of his manufactures and sales and pay royalty, was decided in *Densmore v. Tanite Co.*, 32 Fed. Rep. 544, and that plaintiff cannot in such case sue for an infringement was also held in *Purifier Co. v. Wolf*, 28 Fed. Rep. 814.

As the circuit court has jurisdiction of this case by reason of the diverse citizenship of the parties, we do not undertake to say that we might not entertain jurisdiction of a suit to annul and cancel the agreement, as indicated in *Hartell v. Tilghman*.

But again, irrespective of the question of a final recovery under this bill, we think the plaintiff has not made such a case as entitles it to a preliminary injunction. By the seventeenth paragraph of the agreement

it covenants not to authorize the use of the Seibert patents outside of the New England states. Whether in violation of this covenant or not, it entered into another contract with the Nathan Company, under which the latter has embarked in the manufacture and sale of lubricators, and, as clearly shown by the affidavits, the rivalry between the parties has become so fierce that the price has been reduced from \$50 to \$60 a set to \$20 or \$23. In other words, the value of defendant's monopoly (and it was evidently intended by the contract to give it a monopoly outside of the New England states) has been practically destroyed by the act or connivance of the plaintiff. Under these circumstances, as there is no question made with regard to the defendant's responsibility, we think the court cannot properly be called upon to enjoin in a summary way the further continuance of defendant's business.

THE WASP.¹

HUDSON *et al.* v. THE WASP.

(District Court, E. D. New York. March 8, 1888.)

SALVAGE—WHAT CONSTITUTES—PERIL.

The barge Wasp, while being towed up the Atlantic coast by the tug America, encountered a gale, and was anchored inside the Delaware breakwater, the America anchoring about half a mile distant. The water becoming rougher, the Wasp, desirous of changing her position, signaled to the America. Her signal was answered by the tug McCaulley, which went to her, and was informed,—according to the McCaulley's story,—that she had 18 inches of water in her hold. The McCaulley thereupon notified the America, and was told,—as the McCaulley's witnesses testified,—that the America would not go to the assistance of the barge, whereupon the McCaulley returned, and towed her to a place of safety. On these facts the McCaulley claimed to have performed a salvage service, asserting that the refusal of the America to go to the Wasp put the latter in great peril, and that without the aid of some tug the barge would have sunk at her anchor. The Wasp asserted that she had no water in her of any consequence, and that the McCaulley was not told that she had 18 inches; while the America swore that she had never refused to go to the aid of the Wasp, but had told the McCaulley that she would go as soon as she could get up her anchors. *Held*, on the evidence, that the America had not refused to go to the barge, and, as she was bound by her towing contract to render this service, the Wasp was at no time in peril; that the McCaulley's service was therefore not a salvage service, and the libel should be dismissed.

In Admiralty.

Goodrich, Deady & Goodrich, for libelants.

Samuel Park and Butler, Stillman & Hubbard, for claimants.

BENEDICT, J. This is an action against the barge Wasp, to recover for a salvage service claimed to have been rendered that barge in December, 1885, by the tug McCaulley. It appears that in December, 1885, the tug America, while engaged in towing the barge Wasp and the barge

Reported by Edward G. Benedict, Esq., of the New York bar.

Hornet from Norfolk, Va., to New London, Conn., met with heavy weather, which caused her to take her tow into the Delaware breakwater for safety, where she anchored the Wasp about half a mile from the breakwater. A gale from the north-east came on, and afterwards, on the morning of the 27th of December, the wind shifted to the north-west, blowing heavily, and raising a rough sea at the place where the Wasp was anchored. The barge labored in the sea, and one or two of her hatches were stove in, whereby some water passed into her hold. She had on board a competent crew, was not leaking, and her pumps kept the water under control. Her master, however, determined that it was wise to have her moved to a safer location near the ice-breaker, and at about 8 or 9 o'clock on the morning of the 27th set a signal in his rigging to call the tug America to him for the purpose of being moved by her. At this time the America was at anchor about a half a mile away, with sufficient steam up to enable her to navigate. There was also about the same distance away another tug, called the McCaulley. This latter tug, on seeing the signal on board the Wasp, proceeded to her, and tendered her services. According to the testimony of those on board the Wasp, her services were declined, but she was requested to go to the America, and inform her that the Wasp desired to be towed up to the ice-breaker before the tide changed. After having spoken the Wasp, the McCaulley proceeded to the America, and there had a conversation with the master of the America about which there is a conflict of testimony. It resulted, however, in the McCaulley's returning to the Wasp, taking a hawser from her, and holding her up to her anchors until one of her anchors was secured, and then towing her, with one anchor down, to a place near the ice-breaker, where she was sheltered from the wind and waves. This service occupied from one to three hours, according to the estimates. It involved no extraordinary peril to the McCaulley, and was of benefit to the Wasp. The peculiarity of the case consists in this. According to the testimony of the captain of the McCaulley, when he spoke the Wasp the master of the Wasp informed him that she had 18 inches of water in her, and requested him to inform the master of the America of that fact. When he reached the America he did report that fact to the captain of the America, and thereupon the master of the America refused to go to the Wasp, but told the McCaulley to go to her, and do what he could. Accordingly the libelant contends that the refusal of the America to go to the Wasp placed the Wasp in great peril, because without the aid of some tug the Wasp would have sunk at her anchor; that the McCaulley was the only tug able to relieve her, and, having done so, is entitled to salvage reward. On the part of the Wasp the evidence is that she had no water in her of any consequence; that the captain of the McCaulley was not told that she had 18 inches of water in her; that the services of the McCaulley were declined in the first instance, and only accepted in the end because of the further statement of the master of the McCaulley that the captain of the America had directed him to take the Wasp to the ice-breaker. There is also a sharp conflict as to what passed between the McCaulley and the captain

of the America at the time the McCaulley went to the America. The master of the America swears that he never refused to go to the Wasp, but, on the contrary, asserts that when the McCaulley came to him he informed the captain of the McCaulley that he would go to the Wasp as soon as he could get up his anchors; and upon the representation of the master of the McCaulley that the Wasp had already 18 inches of water in her, and was in a sinking condition, he directed him to return to the Wasp, and hold her up to her anchors until the America should come. If the statements of the master of the America be true, there was no peril in the situation of the Wasp, because there was time enough to enable the America to remove her to the ice-breaker before the tide changed, and the America was bound to render this service by reason of her contract of towage.

In determining this issue of fact, some things bearing upon the credibility of witnesses are to be noticed. For instance, the master of the McCaulley states that the master of the America gave as his reason for refusing to go to the Wasp that he had as much as he could do to take care of himself. Such a statement would be palpably false when made, for the America was in no danger, and able to take care of herself without difficulty. It does not seem probable that a statement so evidently false would have been made. The master of the McCaulley also says that the master of the America assigned as a reason for sending the McCaulley to the Wasp that the Wasp would sink before the America could get to her anchors. Such an impression had no foundation in fact, and if formed by the master of the America must have been created by statements made by the captain of the McCaulley tending to give an exaggerated account of the condition of the Wasp. Taking these features into consideration, in connection with the other statements of the witnesses, I have arrived at the conclusion that the America did not refuse to go to the Wasp, as asserted by the McCaulley, but, on the contrary, was willing to go to her, and would have gone to her and moved her as the McCaulley did, before the tide changed. This conclusion is decisive of the case, for if the America was willing to go to the Wasp, and able to remove her before the tide changed, being bound by her towing contract to render this service, the Wasp was in no peril; and the service rendered by the McCaulley was not a salvage service. If the case of the McCaulley were otherwise free from objection, it might be proper to allow her towage compensation for the time employed, notwithstanding the fact that the only claim set forth in the libel is for salvage. But the claim for salvage is made by the libel to depend upon the fact of a refusal by the America to do her duty to the Wasp; and when an assertion like that is found to be contrary to the fact, I do not think it proper to allow her towage even. I have not passed without notice the paper signed by the master of the Wasp the next morning. That paper, however, was signed under the impression that the America had refused to go to the Wasp, and had sent the McCaulley. It has no tendency to confirm the assertion made by the master of the McCaulley that the America had refused to go to the Wasp. The libel must be dismissed, but without costs.

SHORT v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, D. Minnesota. March 12, 1888.)

1. REMOVAL OF CAUSES—LOCAL PREJUDICE.

Where the plaintiff is a citizen of Minnesota, and the defendant is a corporation of Wisconsin, doing business in Minnesota, the circuit court for the district of Minnesota has, under the act of congress of March 3, 1887, amending the "removal act" of 1875, original jurisdiction of the controversy, when that question depends solely on the fact of the diverse citizenship of the parties, and the defendant may remove the case on the ground of local prejudice. Following *Fales v. Railway Co.*, 32 Fed. Rep. 673, and overruling *County of Yuba v. Mining Co.*, Id. 188.

2. SAME—PRACTICE—ACT OF MARCH 3, 1887.

Under the act of congress of March 3, 1887, it is for the circuit court to determine whether or not the prejudice or local influence, for which a removal is sought, actually exists; and until that fact is made to appear no removal can be ordered. Overruling *Fisk v. Henarie*, 33 Fed. Rep. 417.

3. SAME—AFFIDAVIT FOR REMOVAL—SUFFICIENCY.

The defendant, a corporation of Wisconsin, doing business in Minnesota, having been sued in the local courts of Minnesota by a citizen of that state, filed through its proper officer an affidavit for removal in the form prescribed by the act of congress of 1867, viz., that he had reason to believe, and did believe, that by reason of prejudice and local influence he would not be able to obtain justice in that forum. Held, on motion to remand, that the affidavit was insufficient; the inability to obtain justice in the state tribunal for the reasons set out not being "made to appear to the circuit court," as required by the act of congress of March 3, 1887.

4. SAME—FILING AFFIDAVIT IN STATE COURT.

Where a removal is sought under the act of congress of March 3, 1887, on the ground of prejudice or local influence, the affidavit may be filed in the state court, and a certified copy of it in the circuit court.

On Motion to Remand.

Wilson & Bowers, for the motion.

W. H. Norris and Flandrau, Squires & Cutcheon, contra.

BREWER, J. This is a motion to remand. This action was brought by a citizen of Minnesota against this railroad corporation, which is a citizen of the state of Wisconsin. It is an attempt at removal under the act of 1887, on the ground of local prejudice, it being too late for a removal on the ground of difference of citizenship.

One ground of the motion to remand is that this court cannot take original jurisdiction of an action by a citizen of this state against a citizen of another state, and therefore, if it cannot take original jurisdiction of such an action, it cannot by removal acquire jurisdiction. I had occasion to examine that question in the state of Nebraska, and I there came to the conclusion that that proposition cannot be sustained. I think an action can be maintained in this court against a citizen of another state. I am aware that there is a decision in the circuit court of California to the contrary. FIELD, SAWYER, and SABIN, JJ., *County of Yuba v. Mining Co.*, 32 Fed. Rep. 183. I shall not discuss that question at length, from the fact that my brother SHIRAS, in the Northern district of Iowa, has written an opinion upon this point, which will be

published, no doubt; and I will say that his opinion expresses my ideas with respect to that matter. *Fales v. Railway Co.*, 32 Fed. Rep. 673.

The other question is this: An affidavit is filed for removal, in which the affiant states that he has reason to believe, and does believe, that by reason of prejudice and local influence he will not be able to obtain justice in that forum. In other words, an affidavit is made by the proper officers of the corporation in the form prescribed by the act of 1867. That act reads thus:

"When a suit is between a citizen of the state in which it is brought and a citizen of another state, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if, before or at the time of the filing said petition, he makes and files in said court an affidavit stating that he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in said state court."

By that act the removal was granted upon the filing of the affidavit, if in the form prescribed. The removal was absolute, and the actual existence of prejudice or local influence was not a matter for inquiry. In other words, congress cast the burden upon the conscience of the party, and said that if he was willing to make an affidavit that he believed and had reason to believe that from prejudice or local influence he could not obtain justice in the state court, then he should have a removal to the federal court. Nowhere was it left to be determined as to whether or not such prejudice or influence did exist. But whenever any party litigant in the state court, with the proper citizenship existing, felt that he could not obtain justice in the state court, and was willing to express that fact in an affidavit, the right of removal went beyond the power of challenge. The act of 1887 is a complete reversal of that theory. I am aware that Judge DEADY, of Oregon, in the case of *Fisk v. Henarie*, 32 Fed. Rep. 417, has held that this portion of the act with respect to the filing of the affidavit is still in force, but I think he is mistaken. The thought which underlies the matter of prejudice and local influence to-day, and that underlying the act of 1867, are entirely different. While this act of 1867 is not in terms repealed, yet it is familiar law that when a later act covers the same ground, and is obviously intended by the legislature to be its expressed will upon the whole subject-matter involved therein, then, although there may be no terms of repeal, and although there may be some provisions in the earlier not absolutely inconsistent with those of the later act, yet the whole of the earlier act is repealed. To my mind it is obvious that the legislation of 1887, with respect to prejudice and local influence, was intended to supersede entirely the act of 1867, and to plant the matter upon a new basis, and, planting it upon a new basis, to let the act of 1887 take the place of that of 1867. Let us see what the act of 1887 says upon that subject:

"Where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the

United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court."

In other words, before a removal can be had on the ground of prejudice or local influence there must be shown to the circuit court of the United States the existence of such prejudice or local influence. It is not given to the party upon his conscience to say he believes, or has reason to believe, that such prejudice exists, and thereby become entitled to a removal; but there is a question of fact which the circuit court must determine, and it cannot order the removal until it appears that such prejudice or local influence exists. Now, how can that fact be made to appear? How can any fact be made to appear, either by oral testimony or affidavits? The affidavits in this case do not allege the fact. Counsel for plaintiff insists that an affidavit in form simply saying that there does exist prejudice or local influence so as to prevent a fair trial, is not sufficient; that that is a fact which cannot be testified to in a general way; that the affidavits must show a series of isolated and separate facts, from which, taken together, the court can see that such local prejudice does exist. Upon that proposition I am inclined to hold against him so far as the first showing is made. It is not, however, necessary to positively decide that question now. If the question were presented I should be inclined to hold that an affidavit alleging in plain and unequivocal terms that such local prejudice does exist, and that a fair trial cannot be had, would entitle the party to a removal. I think, however, that that fact, like any other fact, may be challenged. After the affidavit has been presented, and a removal ordered, the party opposing it may come in and traverse that allegation of prejudice the same as any other averment of fact; and this need not be done by a plea of abatement. No particular form of procedure is prescribed. The rule has obtained, as is proper, that where a petition for removal is filed on the ground of citizenship, the truth of its allegations should be challenged by a plea in abatement. But under the local prejudice cause no petition need be filed; all that is required is that it shall be made to appear to the circuit court that from prejudice or local influence the party will not be able to obtain justice in such state court; and this showing may be made by affidavit, and if this contains a specific averment, while it may not be conclusive, it is *prima facie* evidence of the fact, and throws the case into this court, leaving the other party to challenge its truth. There being no form, no procedure, prescribed, I think the court in any particular case may prescribe a mode of procedure, or might lay down a general rule applicable to all cases. Such being the conclusion to which I have come, both from the argument here and those had elsewhere, it must be held that this affidavit is insufficient. It is no affidavit at all. It is a form of affidavit that might be used for the verification of a pleading or other purposes when authorized by statute, but as evidence it is nothing. I shall have to sustain the motion to remand, on the ground that there is no evidence before me from which to find the existence of any prejudice or local influence. As a question of practice, and out

of respect to the state court, I think that the affidavit of prejudice or local influence may be filed in that court, and then a certified copy filed in this.

VINAL v. CONTINENTAL CONST. & IMP. CO.

(Circuit Court, N. D. New York. March 19, 1888.)

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—ACT OF MARCH 3, 1887.

A bill of complaint, filed in a state court of New York by a citizen of Massachusetts, against a corporation of Connecticut and a corporation of New York, averred a cause of action, and prayed for damages and an accounting as against the Connecticut corporation alone, for failure to perform a contract. *Held*, that the Connecticut corporation was entitled to a removal under the act of congress of March 3, 1887; the plaintiff and the removing defendant having a separable controversy, they being citizens of different states, and the removing defendant not having been sued in his own state.

On Motion to Remand.

Matthew Hale, for the motion.

Thomas H. Hubbard, *contra*.

WALLACE, J. This suit was brought in the state court by a citizen of Massachusetts against a corporation of Connecticut and a corporation of this state. It was removed upon the petition of the defendant, the Connecticut corporation, and the plaintiff has moved to remand.

Although the suit presents a controversy to which upon a very preposterous theory of legal right the corporation of this state is a necessary party as well as the removing defendant, it also presents a separable controversy between the plaintiff and the removing defendant, because the bill of complaint avers a cause of action, and prays for damages and an accounting as against that defendant alone, for failure to perform a contract. In this respect it is like the case of *Boyd v. Gill*, 21 Blatchf. 543, 19 Fed. Rep. 145. According to the act of March 3, 1887, inasmuch as the plaintiff and the removing defendant have a separable controversy, are citizens of different states, and the removing defendant was not sued in his own state, the case is removable under the act of March 3, 1887. Under the second section of that act any suit of a civil nature is removable by the defendant of which the circuit courts are given jurisdiction by the first section, and by the first section the circuit courts are given jurisdiction of controversies between citizens of different states in which the matter in dispute is of the requisite sum or value. The act is a slovenly piece of patch-work put upon the act of March 3, 1875; but, reading the original and amendatory acts side by side to discover what has been inserted in and what left out of the original act, the meaning of the changes and their effect seem tolerably plain. The first section of the amendatory act, like the first section of the original act, relates exclusively to the original jurisdiction of the circuit court; and the second section of the amendatory act, like the second section of the original act, relates ex-

clusively to the jurisdiction which may be resorted to by removal. It would seem to be the reasonable meaning of the second section in the amendatory act, like the second section of the original act, to permit a defendant to litigate in the circuit court by a removal, any suit which he could litigate there if it was originally commenced in a circuit court. The first section of the original act is a comprehensive grant of original jurisdiction to the circuit courts, and defines (1) the nature and scope of the jurisdiction over the subject-matter of suits; (2) the limitations of the jurisdiction over the person of defendant; and (3) the rule of decision by which to ascertain when an assignee occupies a different position, as respects diversity of citizenship, from his assignor. The second section of that act authorizes a removal by either party of any suit brought in a state court which could have been tried in a circuit court if it had been brought there originally because of the subject-matter involved. The first section of the amendatory act changes the first section of the original act, so that (1) the sum or value of the matter in dispute requisite to jurisdiction of the subject-matter must now be \$2,000, exclusive of interest, instead of \$500, not exclusive of interest, and does not otherwise change it in respect of jurisdiction of subject-matter; (2) restricts the jurisdiction over the person of defendants, so that a defendant can no longer be served with original process wherever he may be found, and must be served in the district of which he is an inhabitant, unless the suit is one where the jurisdiction of the subject-matter is founded only upon diversity of citizenship, in which case he may be served either in his own district or in the district of the plaintiff, if he can be found there, and does not otherwise change it in respect to the jurisdiction of the person of defendants; and (3) changes the rule of decision for ascertaining when an assignee occupies a different position, as respects diversity of citizenship, from his assignor. The second section of the amendatory act restricts the right of removal so as to confine its exercise to a defendant who is a non-resident of the state in which he is sued in a state court, and makes no other change in the second section of the original act. Ambiguity has been introduced into the second section of the amendatory act by limiting the right of removal to suits "of which circuit courts are given jurisdiction by the preceding section." It has been thought by some that this phrase restricts the right of removal to suits in which the particular circuit court to which a defendant seeks to resort has not only jurisdiction of the subject-matter but also jurisdiction over the person of the defendant. This is not a necessary, and does not seem to be a sensible, construction of the section. That phrase was apparently used to dispense with a recapitulation of the several conditions which determine the jurisdiction of the subject-matter in the first section. The word "jurisdiction" refers to jurisdiction over the subject-matter, to the general jurisdiction of circuit courts, and means a jurisdiction which would enable any circuit court to entertain and determine the controversy if the parties were before it. It will serve no useful purpose to state at length the reasons which have led to this conclusion, as the recent reports abound in opinions in exposition of the act.

TIFFANY v. WILCE.

(Circuit Court, W. D. Michigan, S. D. March 19, 1888.)

REMOVAL OF CAUSES — CITIZENSHIP OF PARTIES — REMOVAL BY NON-RESIDENT DEFENDANT.

Under act Cong. March 3, 1887, defining the jurisdiction of federal courts, which provides that where jurisdiction is founded on the fact that the action is between citizens of different states, suit shall be brought only in the district where either the plaintiff or defendant resides, an action by a citizen of Michigan, brought in the state court of plaintiff's district against a non-resident defendant, may be removed to the federal court by the defendant.

Motion to Remand to State Court.

McAlvoy & Grant, (Edgar Terhune, of counsel,) for plaintiff.

Ramsdell & Benedict, for defendant.

SEVERENS, J. This case being brought on for trial, a question arises upon the jurisdiction of the court,—the defendant being a citizen of another state. The facts appearing upon the record are that the suit was originally brought in the circuit court of the state for the county of Manistee, by the plaintiff, who is a citizen of Michigan, against the defendant, who is a citizen of Illinois; and that the defendant, upon a petition showing this diversity of citizenship, and the additional requisite conditions, together with the giving of the proper bond, procured the removal of the cause into this court. The petition was filed, and the removal had, since the enactment of the law of March 3, 1887, defining the jurisdiction of this court in original and removed causes. The same question was presented in the case of *Manley v. Olney*, 32 Fed. Rep. 708, the facts being the same; but as the case was remanded upon another ground, it was not necessary to pass on this point. As is known to the profession, the decisions upon it are not harmonious. Upon a careful study, after the law of 1887 was passed, entered upon with a purpose of ascertaining what, upon comparison and reconciliation of its various provisions, the law had effected relative to the jurisdiction of the circuit courts, my impression of it was that where jurisdiction was vested in the court upon the ground of the different citizenship of the plaintiff and defendant, suit might be brought in the district of either of the parties. The construction given to the act by the circuit court in the Ninth circuit was, however, to the contrary. *County of Yuba v. Mining Co.*, 32 Fed. Rep. 183. It was there held that the act only authorized cognizance of the case when it was brought in the district where the defendant resided; and, as the law only permits removal when the case is one in which the suit might have been brought originally in the federal court, it would follow that, when the defendant in the state court was a non-resident, the case could not be removed. That case was decided by a very able court, and the decision being concurred in by a justice of the supreme court and the circuit and district judges, is entitled to the highest respect. The construction there given to the act was a very rigid one, and, it is obvious,

would curtail the jurisdiction of the circuit court in a very serious manner. The courts of the United States in the Second, Seventh, and Eighth circuits have not acquiesced in that construction, but have held notwithstanding it, that in such cases the suit may be brought in either the plaintiff's or defendant's district. *Railroad Co. v. Railroad Co.*, 33 Fed. Rep. 385; *Mining Co. v. Markell*, Id. 386; *Loomis v. Coal Co.*, Id. 353; *Fules v. Railway Co.*, 32 Fed. Rep. 673; *Telegraph Co. v. Brown*, Id. 337; *Gavin v. Vance*, 33 Fed. Rep. 84; *Short v. Railway Co.*, Id. 114. So far as I am aware the point has not been ruled in this circuit, and it is open. The subject has been so much discussed that I do not think it desirable to go into it at length. The pith of the inquiry is whether the declaration in the first section of the act that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," is not to be construed as modified by the language immediately following: "But where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." The circuit court in California held in the *Yuba Co. Case*, that the former clause furnished the limitation, and that the latter clause did not enlarge it. The court say that the last-quoted language is prohibitory in form, and does not confer jurisdiction in a case otherwise expressly prohibited. Page 185. This construction renders this whole clause practically nugatory, and seems to me to violate the familiar and always recognized rule of construction which requires us to give effect, where possible, to every part of the statute. The application of this rule requires that we should restrain what is general to give effect to provisions about particulars. If this clause is listened to at all, it seems clearly to furnish the rule of jurisdiction in the particular class of cases mentioned in it. It seems impossible to resist the conclusion that the court in the *Yuba Co. Case* gave too rigid an effect to the general language of the act, and needlessly silenced a clear exception. With great deference, therefore, it must be held that when, as in this case, the suit is between citizens of different states, it may be brought in the district of either of the parties; and when it is brought in the district of the plaintiff, the defendant may remove it into the federal court,—the other conditions, of course, existing. When this question was pending before, I felt it prudent to confer with the circuit judge upon it. The communication then received authorizes me now to say that Judge JACKSON concurs with me in the construction of the statute indicated in this opinion.

It is held that the court has jurisdiction, and the case will proceed.

EDISON ELECTRIC LIGHT CO. v. WESTINGHOUSE *et al.*

(Circuit Court, D. New Jersey. January 10, 1888.)

CORPORATIONS—CONSOLIDATION—ACTIONS—ABATEMENT AND REVIVAL.

Act N. Y. May 23, 1884, (Laws 1884, c. 867, p. 448.) authorizing the "consolidation of manufacturing corporations," provides that no action to which the old corporation was a party, shall be abated by reason of such consolidation pending suit, but that the cause shall proceed as if the consolidation had not taken place, or that the new corporation shall be substituted by order of court. *Held*, on motion to dismiss a bill filed by a corporation subsequently consolidated on the ground that plaintiff's corporate existence was terminated by the consolidation, and that a bill of review was necessary under equity rule 56, and on counter-motion to substitute the consolidated corporation, that the suit did not abate, the provisions of the New York statute being binding upon the federal courts, and that the latter motion should prevail.

In Equity. On motion to dismiss bill.

R. N. Dyer, J. C. Tomlinson, and C. A. Seward, for complainant.

L. E. Curtis, S. A. Duncan and W. Bakewell, for respondents.

WALES, J. The bill in this cause was filed on the 22d day of December, 1886, and contains the usual allegations of infringement by the defendants. On the 4th of April, 1887, the defendants filed a plea and answer, setting up various defenses, but not denying infringement. A replication was duly filed, and upon the record thus far the defendants are conceded infringers. The defendants now move "that the bill of complaint herein be dismissed, for the reason that the corporate existence of the corporation complainant herein terminated on or about the 31st day of December, 1886, by a consolidation and merger of the said complainant with the Edison Company for Isolated Lighting, by virtue of certain proceedings had under the laws of the state of New York." The laws cited are contained in the statute of New York of the 22d of May, 1884, known as chapter 367 of the laws of that year. The defendants insist that by the act of consolidation the complainant company ceased to exist, and that, therefore, as in the case of the death of a natural person, *pendente lite*, the suit abated, and it is necessary that the proper parties, whoever they may be, should be substituted to carry on the suit, under the provisions of equity rule 56 of the supreme court.

Under the New York statute it appears that there is no termination of the existence, or a dissolution of the complainant in relation to actions, in which it was a party, pending at the time of the consolidation. The provision relating to this matter is in these words:

"And no such action or other proceeding then pending before any court or tribunal in which any corporation that may be so consolidated is a party * * * shall be deemed to have abated or been discontinued by reason of any such consolidation, but the same may be prosecuted to final judgment in the same manner as if the said corporation had not entered into the said agreement of consolidation; or the said new corporation may be substituted as a party in the place of any corporation so consolidated, as aforesaid, with any other corporation or corporations, and forming such new corporation by order of the court in which such action, suit, or proceeding may be pending."

The defendants, however, interpose the objection that the provision just cited is for the government of the New York courts alone, and can have no control over the equity practice in the federal courts. On such examination as we have given to the matter and to the authorities cited in the briefs of counsel, we cannot assent to this view. No good reason has been assigned, nor does there appear to be any, why this court should not recognize the statutory provision of New York, and apply it to the pending suit between these parties. The question would seem to involve something more than a mere rule of practice; it embraces the legal and equitable rights of the plaintiff under the laws of the state which created it, and prescribed the terms and conditions on which it might be consolidated with one or more corporations of the same state. In *Banking Co. v. Georgia*, 92 U. S. 665, it was held that the consolidation of two companies does not reasonably work a dissolution of both, and the creation of a new corporation. Whether such be its effect depends upon the legislative intent manifested in the statute under which the consolidation takes place. And so, in *Bank v. Colby*, 21 Wall, 614, the supreme court of the United States recognizes the doctrine that the existence of a corporation, whose chartered life had come to an end by forfeiture of charter, or lapse of time, may be prolonged by statute for the purpose of conducting pending suits to judgment; nor was the idea anywhere entertained in that case, as intimated by defendant's counsel, that it would make any difference whether the corporation had been created by an act of congress or by the law of a state legislature. If the statute of New York was in contravention of any law or policy of the United States, there would then be substantial grounds for allowing this motion; but it has not been shown, nor does it appear to be, objectionable in this respect.

The motion to dismiss the bill is therefore refused; and the motion on behalf of the complainant, founded on the defendants' papers, to substitute the consolidated company as complainant, is granted, although there would seem to be no valid objection to prosecuting the suit as it now stands of record, as the act authorizing the consolidation permits either course to be taken.

EVANS *et al.* v. LAWTON *et al.*

(Circuit Court, E. D. Missouri, N. D. March 5, 1888.)

1. PRINCIPAL AND AGENT—CONTRACT OF AGENCY—ALTERATION—RIGHTS OF AGENT'S GUARANTOR.

A contract of agency in writing provided that the agent was to conduct a lumber-yard for the principals, they to supply him with stock, which he was to sell; sales, however, for "cash in all cases." K. indorsed this agreement, guarantying the "due performance" by the agent "of his obligations in the above contract." Shortly after the yard was opened, the agent began selling on credit, and continued to do so for several years, when he defaulted. The principals not only knew of these sales, but they warned the agent "to be cautious in giving credit," and told him "to watch his book-accounts, and keep

them closely collected." They also made him shipments under the contract, which they authorized him in express terms to sell on credit. *Held*, that the contract of employment had been materially altered, and that the guarantor was discharged.¹

2. SAME—LIABILITY OF GUARANTOR—CONSTRUCTION OF CONTRACT.

Where the contract of agency makes it the duty of the agent to pay over whatever money was received in the course of the agency, a guaranty of the agent, in which the guarantor agrees generally that the agent will duly perform all the obligations imposed upon him by the contract of employment, is not to be construed as an assumption by the guarantor of a personal liability in any event for all money received by the agent, and not accounted for, simply because such accounting is "particularly" mentioned in the instrument out of abundant caution.

3. SAME—LIABILITY OF AGENT TO PRINCIPAL—ACCOUNTING.

Under a contract of agency it was provided that the agent was to open a yard for the purpose of selling the principals' lumber, which they undertook to supply him, and which he was to sell "for cash in all cases." The agent was to account for the wholesale price of the lumber, for his services, and for all expenses of running the yard, including freight, and he was to receive whatever the lumber sold for in excess of the wholesale price at which it was billed to him. Shortly after the business was opened, the agent, with the knowledge and subsequent ratification of the principals, made sales on credit. *Held*, on an accounting, that the agent was entitled to credit for the wholesale price of all lumber covered by outstanding bills as to which he had exercised due care in giving time, but not for money laid out by him for taxes and insurance.

In Equity.

Frank Hagerman, for complainants.

Smoot & Pettingill, for respondents.

THAYER, J. This is a bill for an accounting, brought by complainants against defendant Lawton, who at one time acted as their agent in selling lumber, and also against defendant Kellogg, who assumed the liability of a guarantor for the performance by Lawton of his duties as agent. The agreement under which Lawton acted as agent was entered into December 3, 1880. By the terms of the agreement Evans & Sheppard appointed Lawton their agent at Memphis, Mo., to conduct a lumber-yard. They agreed to supply the yard with lumber, laths, shingles, doors, etc., which Lawton was to sell for account of Evans and Sheppard on the following terms, to-wit, sales were to be made for cash in all cases. Lawton was to render full and true accounts of all sales made, and of all moneys received, and on the 15th and 30th days of each month he was to remit to Evans & Sheppard whatever moneys were in his hands received from the sale of lumber, etc. Lawton was to account to his principals for the wholesale price of the lumber shipped to him, and for his services, and for all expenses of running the lumber-yard, including freight, he was to receive whatever the lumber sold for in excess of the wholesale price at which it was billed to him. On the back of the agency contract was indorsed the following guaranty:

"In consideration of Evans & Sheppard now entering into the above contract, and in further consideration of one dollar to me paid by said Evans & Sheppard, the receipt whereof is hereby acknowledged, I do hereby guaranty

¹ See note at end of case.

the due performance on the part of said George H. Lawton, Senior, of his obligations in the above contract, and particularly that he shall duly account for and pay over to said Evans & Sheppard all moneys which shall be received by or paid to said George H. Lawton, Senior, for lumber and other merchandise hereafter furnished by Evans & Sheppard and sold and disposed of by said Lawton, Senior. Signed at the same time as the above contract, to which this guaranty refers, as witness my hand.

[Signed]
[Signed]

"A. A. KELLOGG.
"L. MOTT."

The principal question for determination is whether Kellogg has been discharged from all liability by reason of a change in the terms of the agreement between Evans & Sheppard and the their agent, made without his (Kellogg's) consent. The agreement required sales to be made for "cash in all cases." Defendant Kellogg insists that the agreement was subsequently modified without his knowledge or consent, so as to permit Lawton to sell on credit, and that he did so sell to a large extent. On this ground he founds his claim to be discharged from all liability.

Preliminary to a discussion of the main issue it is necessary to dispose of some incidental questions. It is suggested by complainants' counsel that Kellogg has not pleaded his right to a discharge on the ground above stated. This point, I think, is not well taken. All the facts on which the defense depend are clearly stated, and in view of such facts, and other matters also alleged, defendant Kellogg asks to be discharged without day. This is sufficient to render the defense available. Furthermore, it is said that "the guaranty was twofold," and that Kellogg "absolutely bound himself to pay all money received by Lawton," and the case of *Benjamin v. Hilliard*, 23 How. 149, is cited in support of the position. This statement is rather mystifying, and is not elaborated. The case cited does not explain what is meant. In that case a guaranty was given which counsel insisted should be read in the alternative as requiring the guarantor to stand responsible for the doing of one of two things. The court, however, construed it, not in the alternative, but as requiring the performance of both obligations. I fail to see that the case referred to has any application to the case at bar. The guaranty involved in this case is one by which Kellogg agrees generally that Lawton will duly perform all the obligations imposed upon him by the contract creating the agency, and particularly that he will account for and pay over all money received for lumber, etc. The last clause with reference to accounting for and paying over money did not impose any obligation in addition to that imposed by the first clause of the guaranty. As the agency contract made it the duty of Lawton to pay over whatever money was received from the sale of lumber, (or rather to pay over the wholesale price,) the first clause of the guaranty was as effectual as the last to secure the performance of that duty. The last clause of the guaranty was really unnecessary, and was probably inserted, not as imposing an additional obligation, but merely out of abundant caution. It will be observed from the form of the guaranty that the guarantor did not bind himself with Lawton to discharge all or any of the duties imposed by the agency contract. He guaranteed that Law-

ton would duly perform all of the obligations assumed. Kellogg's undertaking was purely collateral. He was not a joint promisor; and it goes without saying that he was only bound for the due performance by Lawton of the precise contract to which the guaranty referred; and if that has been changed or modified to any extent without Kellogg's consent, he is discharged. Permission given by the complainants to their agent to sell lumber on credit to any extent, instead of for "cash in all cases," as the contract originally required, would clearly discharge the guarantor. The authorities on this point are, of course, numerous. I only mention *Miller v. Stewart*, 9 Wheat. 680; *Grant v. Smith*, 46 N. Y. 93; Baylies, Sur. 260, and cases cited.

This brings me to the main controversy,—whether the agency contract was modified by the parties thereto without the guarantor's consent. It appears from the testimony, without contradiction, that a large quantity of lumber was sold by Lawton on credit. Such sales began shortly after the agency was established, and continued for a period of several years, and until the agency was terminated. During almost the entire period complainants had knowledge that he was selling lumber on credit. That they had such information appears from their correspondence at an early period of the agency, and the fact is otherwise expressly admitted by them. There is a further admission by the complainants that in some few instances they expressly authorized sales to be made on credit. It is also admitted by one of the complainants that in conversation with Lawton he told him that "he must be cautious in the manner in which he gave credit," and that "he must watch his book-accounts, and keep them closely collected." Complainant's counsel contends, however, that mere knowledge of the fact that sales were being made on credit is something entirely different from a formal consent given that sales might be so made, and does not prove an alteration of the contract. In this he is right. The obligation to sell for "cash in all cases" was an obligation assumed by Lawton. If he violated that undertaking in some instances, and complainants were aware of the fact, they were not bound to terminate the agency on that account, or to sue him for a breach of the contract. They had a right to overlook occasional violations of the contract of that nature, and to continue further business relations under the contract, and by so doing the contract was not altered, or the guarantor discharged. So much may be conceded. *Kirby v. Studebaker*, 15 Ind. 45. But in this case the evidence shows something more than knowledge on the part of complainants that their agent was selling lumber on credit. In the light of the testimony it will not do to say that they were merely passive observers of occasional or repeated violations of the contract, which they were privileged to overlook without impairing their right to hold the guarantor. Lawton, as before stated, made a practice for several years of selling on credit; and such practice was not only known to the complainants, but on certain occasions they warned him "to be cautious in giving credit," and "to watch his book-accounts, and keep them closely collected." Only one inference, as it appears to me, can be drawn from such a course of dealing, and from such language, and that is that they

were willing to allow him to sell on credit if he exercised caution, and sold to trustworthy persons, and was vigilant in making collections. To this extent, in my judgment, the evidence shows that the contract was modified by consent of the parties thereto. Then, again, the plaintiffs admit that on several occasions they in express terms authorized lumber to be sold on credit, which appears to have been consigned to Lawton to be sold and accounted for under the terms of the agency contract; that is to say, he was to have all that was realized over and above the wholesale price at which the lumber was charged to him by complainants. This, as it appears to me, was also a departure by consent from one of the provisions of the contract, which required sales to be made for "cash in all cases." Upon the whole, and especially in view of the general permission which seems to have been given to sell to trustworthy persons on short credit, I conclude that Kellogg cannot be held under his guaranty. It is not a question whether he was prejudiced by the manner of making sales, but whether there was in point of fact such change assented to by the complainants, and not assented to by Kellogg. Of this I entertain no doubt, and accordingly dismiss the bill as to the guarantor.

From what has been said it follows that in stating the account between complainants and Lawton the latter should be given credit to the amount of the wholesale price of all lumber covered by bills now outstanding as to which it appears that Lawton exercised due care in extending credit. He is not entitled to any credit on account of overcharges on lumber consigned to him by the plaintiffs, as there is no evidence of any such overcharges. He is not entitled to credit on account of taxes and insurance, as those were expenses of the business which he assumed to pay out of his profits. With respect to the additional credit of \$100, claimed for the two lots of land, it is sufficient to say that the evidence will not warrant a finding that they were worth more than \$400, the sum already credited on that account.

A final decree may be drawn in accordance with these views, and submitted for approval; or, if the parties fail to agree in stating the account, a reference will be ordered to a master to state the same as herein indicated.

NOTE.

WRITTEN INSTRUMENTS—ALTERATION. A material alteration of a contract of guaranty will release the surety. *Osborne v. Van Houten*, (Mich.) 8 N. W. Rep. 77. Material alteration made by one of the parties without knowledge or consent of the other, after signing, but before delivery, is fatal. *Pew v. Laughlin*, 3 Fed. Rep. 39. No recovery can be had on a promissory note that has been materially altered. *Bank v. Clark*, (Iowa,) 1 N. W. Rep. 491, even though innocently done, *Davis v. Eppler*, (Kan.) 16 Pac. Rep. 798. But where the alterations have been erased before transfer, a *bona fide* holder may recover thereon. *Shepherd v. Whetstone*, (Iowa,) 1 N. W. Rep. 753. Writing changing indorser into guarantor is material alteration. *Belden v. Hann*, (Iowa,) 15 N. W. Rep. 591. Adding seal to name of maker is material where it affects nature of contract, or the running of statute of limitations. *Rawson v. Davidson*, (Mich.) 14 N. W. Rep. 565. Adding figure "7" to indicate rate of interest, when note was not to bear interest, is material, *Davis v. Henry*, (Neb.) 14 N. W. Rep. 523; or adding, "after maturity shall draw ten per cent. interest," *Wyerhauser v. Dun*, (N. Y.) 2 N. E. Rep. 274; or erasing "order" and inserting "bearer" after execution, *Needles v. Shaffer*, (Iowa,) 14 N. W. Rep. 129. Alteration of note by being signed by one as joint maker, after execution by the original maker, is material, and will defeat the instrument. *Sullivan v. Rudisill*, (Iowa,) 18 N. W. Rep. 856. Alteration by writing in place of payment, is material, *Charlton v. Reed*, (Iowa,) 16 N. W. Rep. 64; *Townsend v. Wagon*

Co., (Neb.) 7 N. W. Rep. 274; or any alteration of the contract of the indorser in a part which may in any event become material, is fatal. *Id.* Where a contract which is written on same paper modifying the note is detached, and the note transferred, this is a material alteration, and there can be no recovery. *Davis v. Henry*, (Neb.) 14 N. W. Rep. 523. Where a material alteration is apparent on the face of a promissory note, offered in evidence, the question as to whether such alteration was made before or after the execution and delivery is for the jury. *Bank v. Morrison*, (Neb.) 22 N. W. Rep. 782. Where the payee of a note altered the same and transferred it before due to a *bona fide* purchaser, it was held that such alteration vitiated the note, and there could be no recovery thereon. *Bank v. Shaffer*, (Neb.) 1 N. W. Rep. 980; *Horn v. Bank*, (Kan.) 4 Pac. Rep. 1022. Adding the name of another maker to a note, without the consent of those already bound, is a material alteration. *Singleton v. McQuerry*, (Ky.) 2 S. W. Rep. 652. Where no explanation is given of a material erasure of a note for the payment of money there can be no recovery thereon. *Hood's Appeal*, (Pa.) 7 Atl. Rep. 137. See, also, as to what is a material alteration, *Coles v. Yorks*, (Minn.) 10 N. W. Rep. 775; *Osgood v. Stevenson*, (Mass.) 9 N. E. Rep. 825; *Crawford v. Bank*, (N. Y.) 2 N. E. Rep. 881; *Johnson v. Moore*, (Kan.) 5 Pac. Rep. 406; *Stephens v. Davis*, (Tenn.) 2 S. W. Rep. 382. Where a promissory note has been rendered void by a material alteration, made without fraudulent intent, the payee may recover upon the original consideration, and may establish the indebtedness as though no note had been executed therefor, by any evidence he may have, either written or oral, which has not been vitiated by the alteration. *Gordon v. Robertson*, (Wis.) 4 N. W. Rep. 579; *Morrison v. Huggins*, (Iowa.) *Id.* 854; *Sullivan v. Rudisill*, (Iowa.) 18 N. W. Rep. 856. Immaterial alterations, as filling blanks in a contract with the name of the party thereto, will not avoid the contract, not changing its legal effect. *Briacoe v. Reynolds*, (Iowa.) 2 N. W. Rep. 529; *Rowley v. Jewett*, (Iowa.) 9 N. W. Rep. 353; *Canon v. Grigsby*, (Ill.) 5 N. E. Rep. 382; *Bank v. Carson*, (Mich.) 27 N. W. Rep. 589. An interlineation made by a stranger, of the words "or bearer" after the name of the payee, in a note, has no effect upon the rights or liabilities of the parties. *Andrews v. Calloway*, (Ark.) 7 S. W. Rep. 449. Figures in margin of promissory note are no part of it, and alteration does not vitiate. *Harvester Co. v. McLean*, (Wis.) 15 N. W. Rep. 177; and it has been held that obtaining the signing of another name, as co-surety is not material alteration, and will not relieve the first surety. *Ward v. Hackett*, (Minn.) 14 N. W. Rep. 578. It has been held that where a mortgage was executed by husband and wife of her land for the accommodation of a partnership of which the husband is a member, and as security for the payment of a negotiable promissory note made by the husband to his partner, and indorsed by the partner for the same purpose, and to which note the partner, before negotiating it, adds the wife's name as a maker without the consent or knowledge of herself or husband, such note is not thereby avoided as against one who, in ignorance of the note having been so altered, lends money to the partnership upon the security of the note and mortgage. *Mersman v. Werges*, 5 Sup. Ct. Rep. 65. If an alteration of a promissory note is not material, it matters not with what intent it was made, for under no circumstances can it in any way affect the liabilities of the parties. *Fuller v. Green*, (Wis.) 24 N. W. Rep. 907. The extension by alteration of the time of payment of a promissory note is not such an alteration of the note as will avoid it, the maker being free to pay the note on or before such day, and the payee being restrained from compelling payment before that time. *Drexler v. Smith*, 30 Fed. Rep. 754. The burden of proof as to an alteration is upon the party asserting it. *Odell v. Gallup*, (Iowa.) 17 N. W. Rep. 502; *Gordon v. Robertson*, (Wis.) 4 N. W. Rep. 579; *Cox v. Palmer*, 8 Fed. Rep. 16. In a civil action a preponderance of evidence is all that is necessary to establish a fraudulent alteration. *Coit v. Churchill*, (Iowa.) 16 N. W. Rep. 147. See, also, on the general subject of the alteration of written instruments, *Sawyer v. Perry*, (Iowa.) 17 N. W. Rep. 497; *Woodworth v. Anderson*, (Iowa.) 19 N. W. Rep. 296; *Scotfield v. Ford*, (Iowa.) 9 N. W. Rep. 309; *Martin v. Insurance Co.*, (N. Y.) 5 N. E. Rep. 338; *Church v. Fowle*, (Mass.) 6 N. E. Rep. 764; *Martin v. Insurance Co.*, (N. Y.) 5 N. E. Rep. 338; *Martin v. Mining Co.*, (Nev.) 8 Pac. Rep. 488; *Arguello v. Bours*, (Cal.) 8 Pac. Rep. 49; *Pereau v. Frederick*, (Neb.) 22 N. W. Rep. 235.

ZERINGUE v. TEXAS & P. R. Co.

(Circuit Court, E. D. Louisiana. March 10, 1888.)

1. SPECIFIC PERFORMANCE—STIPULATIONS OUTSIDE OF CONTRACT.

The owner of some land, expropriated for a railroad sold by notarial act the land to the company, after judgment, for the amount specified in the condemnation, the railroad undertaking as a further consideration to do and not to do certain things for the benefit of the rest of vendor's land. Vendor filed a bill for specific performance and damages on the ground that the railroad had failed to carry out the agreement. The bill also alleged neglect of other considerations assured vendor and not contained in the decree of condemnation or act of sale. *Held*, that the contract between vendor and the railroad was to be found either in the decree or the act of sale, and that all the allegations not so embodied should be eliminated from consideration, and that a motion to suppress evidence in relation to these allegations should be granted.

2. SAME—REQUISITES OF CONTRACT—DEFINITENESS.

In a deed of sale and compromise was the stipulation that the vendee or his assigns "shall build and keep in repair such bridges as may be necessary over the lands herein acquired." *Held*, that this stipulation was too indefinite to be the subject of a bill and decree for specific performance, because there was no sufficiently defined agreement to enforce.¹

3. SAME—PRACTICE—DAMAGES—DISMISSAL OF BILL.

Where a bill in the federal court for specific performance of stipulations in a contract fails to make out a case for such relief, but only a case for damages for breach of such stipulation, the bill will not be retained in equity to award such damages, but will be dismissed without prejudice to an action at law on the same cause of action.

Bill in equity for specific performance and damages.

On the 19th of March, 1870, Camille Zeringue, by public act, donated to the New Orleans, Mobile & Chattanooga Railroad Company the right of way and passage over and through his plantation lying in Jefferson parish, and said company thereupon entered upon the lands, and constructed thereon the road, etc. On the 3d of May, 1870, the railroad company instituted proceedings to expropriate a certain portion of said plantation, aggregating 192.10 acres. A decree was rendered expropriating said land for the use of the said company, condemning the said company to pay therefor the sum of \$45,000, and also to build boundary fences; place boundary posts or stones; to drain said lands for the use and benefit of the remaining lands of Zeringue; to build and keep in repair bridges across the drainage canals; and to maintain a roadway over and through the lands expropriated of a width of 25 feet, free access to and use of same being reserved to said Zeringue, his heirs and assigns. This judgment was reversed by the supreme court and case remanded for a new trial. On the 19th of March, 1872, a second had in the meanwhile died, in order to avoid further litigation, and to decree was rendered in said proceedings expropriating said land, con-

¹ Equity will not specifically enforce a contract wanting in definiteness or mutuality. *Bourget v. Monroe*, (Mich.) 25 N. W. Rep. 514; *Hall v. Loomis*, (Mich.) 30 N. W. Rep. 374; *Moses v. McClain*, (Ala.) 2 South. Rep. 741; *Recknagle v. Schmalz*, (Iowa,) 33 N. W. Rep. 335; *Durkee v. Cota*, (Cal.) 16 Pac. Rep. 5; *Fogg v. Price*, (Mass.) 14 N. E. Rep. 741; *Appeal of Holthouse*, (Pa.) 12 Atl. Rep. 340; *Magee v. McManus*, (Cal.) 13 Pac. Rep. 451; *Johnston v. Trippe*, 33 Fed. Rep. 530; *Stembridge v. Stembridge*, (Ky.) 7 S. W. Rep. 611; *Gallagher v. Gallagher*, (W. Va.) 5 S. E. Rep. 207; *Angel v. Simpson*, (Ala.) 2 South. Rep. 758; *Duff v. Hopkins*, 33 Fed. Rep. 599.

demning the company to pay therefor the sum of \$29,000, and to do and permit certain things. Thereupon the heirs of C. Zeringue, who settle the matter at issue, entered into an agreement with said company evidenced by a notarial act passed May 25, 1872, by which they ceded, transferred, and assigned to said company, on the terms and conditions set forth in said judgment, said land so sought to be expropriated for the consideration of \$29,000, and the further consideration that the said company would erect boundary posts or stones at least 100 yards apart on the division or boundary lines of said land expropriated; a boundary fence along the whole of the boundary, from the river-bank to the intersection of the said boundary with the drainage canals on said plantation; and that the said heirs and their assigns should have free ingress and egress, to be forever maintained to and from the said plantation and the Mississippi river, and the usufruct of the said lands, so that the drainage canals on said plantation running from said plantation through the conveyed lands should in no manner be ever obstructed; and a roadway of at least 25 feet along the canals and across said lands so conveyed should be forever reserved; and that said company would build and keep in repair bridges over and across the drainage canals,—all of which is expressly set forth in said act. Further, the said heirs were particularly induced to make said agreement by the statements publicly made by the said company, and specially made to the said heirs by the said company, that the lands sought to be expropriated were designed for and would be used for the terminus of said company, and that the company would immediately erect thereon work-shops, machine-shops, warehouses, storehouses, depots, wharves, etc., necessary for conducting the business of the company at such terminus; which would have the effect of greatly enhancing the value of the remaining lands of said heirs. The value of the lands conveyed at date of conveyance was \$60,000. As \$29,000 was the amount paid in cash, it follows that the various considerations for which the conveyance was made were estimated to be equal to \$31,000. On the execution of the said deed said company entered into possession of said land, and through the said company the Texas & Pacific Railroad Company now hold, and for many years have held, the same, subject to all the obligations originally assumed by and binding on the said New Orleans, Mobile & Chattanooga Railroad Company. These obligations have never been complied with. They have been entirely disregarded; no boundary posts or stones have been erected; an insufficient fence was constructed, but it was destroyed by fire a number of years since; no roadway has been laid out; no bridges built, so as to enable the owners of the plantation to have free ingress and egress; no drains or waterways have been constructed, and, on the contrary, the drains and canals which were on said plantation and extended through said land expropriated to the swamp, have been obstructed; and, as a result of these acts of nonfeasance and malfeasance, great damage has resulted to the owners of the plantation, to the extent of at least \$2,000 per annum,—this damage resulting principally from want of drainage. The nature and extent of this damage is shown by

testimony of J. F. Zeringue, Robert Sharp, J. P. Thompson, and M. J. Ferguson. One witness says that the damages caused by the want of drainage is the total ruin of the plantation, and that the damage so caused in a single year amounted to \$10,000. Indeed, it is known of all men that a plantation on the lower Mississippi is utterly valueless unless it is properly drained. The defendants introduced as their witness H. W. B. Smith, an engineer in their employ. He says the opening in the road "struck him" as being sufficient to carry off an ordinary rain-fall; that with a drainage machine in the rear of the place powerful enough to draw the water off the swamp side of the place, the water which stood on the river side of the track would flow through the openings under the track, and also go back to the rear. Of course it would, if there were any openings at all,—even a few feet wide and a few inches deep; but all the same the plantation could not be thereby drained so as to be cultivated. The railroad runs through this land expropriated in a general way parallel to the river; the road-bed is raised, there are no culverts at all along the entire line,—some 5,950 feet,—and only one bridge,—No. 1,185,—the ditch which it crosses being about 18 feet wide. There is another bridge,—No. 1,184,—but this is a bridge in the swamp and in the woods; it is not in the cleared plantation at all. The counsel for the defendants asked witness about bridge 1,183. The witness replied that 1,183 was a small bridge about 10 feet long; but he does not say that this opening has any effect whatever in draining the plantation. Mr. Smith has calculated that these openings are sufficient, with the aid of a draining machine, to drain the water resulting from an ordinary rain-fall. His calculations may or may not be theoretically correct, but the positive fact remains that the plantation is not and has not for many years been drained, and in consequence of defective drainage cannot be cultivated. The positive fact remains that the drainage power of the three canals which drained this land at the time the railroad company acquired this land has been diminished at least 50 per cent. These canals are obstructed with pilings, etc., necessary in the construction of railroad bridges, and choked up with dirt and sand, so as to destroy the drainage. (Testimony of Zeringue, Sharp, and Thompson.) Repeated demands were made on the railroad company to comply with its obligations, without effect. As to the loss resulting to the complainants in consequence of the failure of the defendant to make its terminus on the land expropriated, and there construct its depots, store-houses, warehouses, machine-shops, etc., it is difficult to fix the amount accurately. If the agreement had been carried out, it is clear that the value of the plaintiff's lands would have been greatly enhanced. It is shown beyond doubt, by the testimony of Zeringue and Illsley, that this agreement was entered into, and constituted a portion of the consideration for which the said lands were originally conveyed; and it also appears from the petition of the railroad company for the expropriation. The land was worth \$60,000 at the date of the original conveyance, and, only \$29,000 being paid in cash; it must have been considered that the enhancement would amount to at least \$31,000.

Leonard, Marks & Bruenn, for plaintiff.
Howe & Prentiss, for defendant.

PARDEE, J. The foregoing is the statement of facts as made and claimed by the counsel for plaintiff, and, although incorrect in several points, for the purposes of this present case, and this case only, may be taken as correct in every particular. It is well settled that all representations, declarations, and considerations passing between the parties prior to the reduction of a contract to writing are, in the absence of frauds, merged in the written contract or deed of the parties; and to the written contract alone can we look in order to find what the parties have obligated themselves to do or not to do. The contract, then, in this case is to be found either in the consent judgment and decree entered into and rendered in the Second judicial district court of Jefferson parish, or in the notarial act passed before GUYAL, notary, in pursuance of said judgment, or in both. This eliminates from this case all consideration of that part of the bill relating to representations and considerations that the lands sold and conveyed were to be used as a terminus of the railroad, and the location of shops and warehouses, and a town or city,—all to the enhancement in value of the other lands of the plaintiffs. And the motion to suppress the evidence in relation to this subject should be granted.

An examination of both of the aforesaid contracts shows that the obligations assumed by the New Orleans, Mobile & Chattanooga Railroad Company were as follows: (1) To pay the price; (2) to cause boundary posts or stones to be placed at a distance of 100 yards between the property acquired and the remainder of the Zeringue plantation; (3) to cause to be erected along the boundary line, from the river to the intersection with the draining canal, a division fence; (4) to build and keep in repair such bridges as may be necessary over the lands thus acquired; (5) to pay a proportion of the taxes, and all costs of court. The vendors (present plaintiffs) reserved in favor of the remaining Zeringue plantation certain rights and privileges in the nature of servitudes on the lands conveyed, to-wit, free ingress and egress to the river over the *batture* and wharves of said company; the free use and usufruct of the lands, so that the draining canal running through the said lands should in nowise be obstructed; and a road at least 25 feet wide along the said draining canal. There is no question that the price, taxes, and costs of court were paid as agreed. The contract provides, as to the boundary stones and division fence, nothing as to maintaining them, but that, if the vendee failed to erect the stones or fence within the delay stipulated, then that the vendors were authorized to have the same done at the expense of the vendee, who should be bound to pay the same. The servitude reserved in favor of the Zeringue plantation allowing free ingress and egress to the river front over the *batture* and wharves of the railroad company, has not been denied to the plaintiffs, and there is no complaint on this point. The provision in the deed and compromise judgment reserving a servitude in favor of drainage is, in terms, as follows:

"That the said plantation of the vendors shall have forever the free use and usufruct of the lands thus sold and conveyed to the said company, so that the draining canal of the said vendors running through the said lands shall in nowise be obstructed." By this stipulation the vendee did not undertake or agree to construct nor to keep open any drainage canal, but did agree to permit the vendors, and their successors in the ownership of the Zeringue plantation, to keep open and unobstructed the said drainage canal. Neither the bill nor the evidence shows that this right to open and keep unobstructed the said drainage canal has ever been hindered or denied by the defendants or by their grantors, and the same may be said as to reservation of a road along the canal. It remains, then, that the only stipulation in the said deed and compromise judgment that the vendee or his assigns should perform any act or thing remaining unperformed, is the stipulation that they "shall build and keep in repair such bridges as may be necessary over the lands herein acquired." This stipulation is too indefinite to be the subject of a bill and decree for specific performance, for there is no sufficiently defined agreement to enforce. The bridges to be built and kept in repair, as to size, capacity, construction, and place are all to be determined by necessity, and the necessity of one time may not be the necessity of another. For the text-book law on this subject see Pom. Spec. Perf. §§ 5, 6.

There seems to be no case here for a specific performance, and it seems to be also no case for equitable relief. The learned counsel for plaintiffs, however, contend that although no specific performance can be decreed on the case made, yet the case is one of equitable cognizance, and that the court can and should award full compensation in damages. Counsel rely on 5 Wait, Act. & Def. p. 831, § 3, where it is said:

"It is now well settled that where a court of equity clearly has jurisdiction of the subject of controversy, jurisdiction for compensation or damages will always attach where it is ancillary to the relief prayed for. Thus, when the court has jurisdiction of the case, and it is a case proper for specific performance, it may, as ancillary to specific performance, decree compensation or damages. * * * Compensation is to be awarded when it appears from a view of all the circumstances of the particular case it will subserve the ends of justice."

This authority does not sustain the claim for damages in this cause, because, as I have shown, it is not a case proper for specific performance, and more particularly because this court, as a court of equity, does not have clear jurisdiction. Section 723, Rev. St. U. S. provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." Under no head of chancery jurisdiction can a court of the United States sustain a bill in equity to obtain only a decree for the payment of money by way of damages when the like amount can be recovered at law. See *Parkersburg v. Brown*, 106 U. S. 500, 1 Sup. Ct. Rep. 442; *Ambler v. Choteau*, 107 U. S. 586, 1 Sup. Ct. Rep. 556; *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. Rep. 820; *Buzard v. Houston*, 119 U. S. 352, 7 Sup. Ct. Rep. 249. The complainants' whole case

under the bill and evidence looks to a money decree as the only adequate relief attainable, for it is made up almost entirely of injuries suffered, and damages therefrom. A court of law can, as well as, if not better than, a court of equity, assess any and all damages the plaintiffs are entitled to recover in the premises; and a judgment for damages in money furnishes to the plaintiffs a plain, adequate, and complete remedy.

A decree will be entered dismissing complainants' bill with costs, but without prejudice to the right to proceed at law on the same grounds of action.

BEERS *et al.* v. WABASH, St. L. & P. Ry. Co. (CHICAGO, B. & Q. Ry. Co., Intervenor.)

(*Circuit Court, N. D. Illinois.* March 14, 1888.)

1. CARRIERS—COMMON CARRIERS OF GOODS—RECEIVERS—DUTIES—BOYCOTTS AND STRIKES.

The petition of the Chicago, Burlington & Quincy Railway Company, intervenor in the *Wabash Case*, represented that the receiver appointed by the court had issued an order in violation of his duties as a common carrier, and of a custom prevailing between the two roads, instructing his agents and subordinates to receive no more through freight cars of the petitioner, and that, in pursuance of such order, freight of that character offered by the petitioner had been refused, although the proper and usual tender of expense bills had been made with the offer. It also alleged that the Brotherhood of Locomotive Engineers had commanded a strike on petitioner's road, and, in order to boycott it, had issued instructions to its members on the Wabash and other connecting systems not to handle any of petitioner's freight. The prayer was for a peremptory order on the receiver to compel him to take such freight, for an injunction on the Brotherhood to prevent it from interfering with the Wabash engineers, and for a rule on the officers of the Brotherhood to show cause why they should not be punished for contempt. The answer of the receiver admitted the issuance of the order complained of, but set out that it was intended to be temporary only, and was, as a matter of fact, rescinded two days after the petition was filed, and another order made establishing intercourse on the old basis, and that this order was meant to be permanent. It was denied that the receiver or any of his engineers had been interfered with in any manner by the Brotherhood, or that the first order was promulgated under moral duress of that association. *Held*, that the objectionable order having been permanently rescinded, and no interference by the Brotherhood having been proven, neither the peremptory order, nor the injunction, nor the rule asked for should issue, but that the petition should remain on file for further action should any occasion therefor arise.

2. SAME.

The fact that a railroad is in the custody of the court does not render the receiver appointed by the court any the less a common carrier, and he cannot, as such carrier, refuse to receive from and deliver to a connecting road loaded or empty freight cars of that company because, by doing so, his own road may become involved in a strike of locomotive engineers, whose associates have "gone out" on such connecting road, and who are attempting to boycott it.

3. SAME—EMPLOYEES OF RECEIVER—RIGHTS AND LIABILITIES.

While the locomotive engineers of a railroad in the hands of a receiver cannot be compelled by the court having the road in custody to remain in the service of the receiver, neither they, nor the "Brotherhood" to which they belong, will be permitted to interfere with or disturb the receiver or his subordinates in the possession and operation of the property.

In Equity. *In re* petition of the Chicago, Burlington & Quincy Railroad Company.

Wirt Dexter and *Henry Crawford*, for intervenor.

Isham, Lincoln & Beale, and *George W. Smith*, for receiver.

GRESHAM, J. The Chicago, Burlington & Quincy Railroad Company, with leave of the court, filed its petition in this suit, charging that until a recent date the receiver of the Wabash property freely interchanged cars with the petitioner, and all other companies having lines of road entering the city of Chicago; that on the 6th of March the petitioner tendered to the receiver's usual agent, at the usual place of delivery at Chicago, eight cars loaded with grain, the same being destined for delivery at points on, or to be shipped over the lines in the receiver's custody; that some of these cars belonged to the petitioner, some to other companies, and one to the receiver, and all were loaded for continuous passage, either at points in Illinois, and destined to points outside of that state, or loaded at points outside of the state of Illinois, and destined for continuous passage to points within the state, the proper expense bills being tendered to the receiver's agent, who, acting under express orders of the receiver, refused to receive, transport, or deliver such cars, or any others; that this action of the receiver's agent was in obedience to instructions from the receiver directing his agents and employes to receive no loaded cars from, and to deliver no loaded cars to, the petitioner, and to cease all traffic relations with it; and that the receiver's agents at other points of junction of the railways under his charge and those of petitioner, when applied to, informed the agents of the petitioner that they were under specific orders to neither deliver to nor receive from the petitioner cars loaded with freight. The petition further charges that the receiver's agents and employes gave as the sole reason for refusing to so interchange freight that the receiver's switching and other engineers had notified him that they would handle no freight cars coming from or going to the lines of the petitioner; that such engineers belonged to the Brotherhood of Locomotive Engineers, whose grand chief engineer, or Committee of Grievance, had notified all engineers belonging to such Brotherhood to refuse to handle cars coming from or going to the petitioner, and that in compliance with this action of such engineers the receiver had issued the instructions already named; that the Brotherhood of Locomotive Engineers have secretly resolved that a boycott shall be put into effective force against the petitioner over all its system, and all intercourse or exchange of cars between it and other connecting railroads, including the lines in the custody of this court; that P. M. Arthur, as the chief executive officer of the Brotherhood, has been in Chicago for 10 days, giving aid and direction to the members of the Brotherhood; and for the purpose of injuring the petitioner's business, and rendering it impossible for it to discharge its duties as a carrier, he has issued instructions to the members of the Brotherhood employed by the receiver not to allow their engines to be used in hauling cars going to or coming from the petitioner's line of railroad; and that the action of the receiver and his subordinates, in

refusing to exchange loaded freight cars with the petitioner, was the result of moral duress thus created by the Brotherhood, including the engineers in the receiver's service. The prayer of the petition is that a peremptory order be issued directing and requiring the receiver and his subordinates to interchange business with the petitioner according to usage; and to abstain from the declared policy of non-intercourse with the petitioner; also that the Brotherhood of Locomotive Engineers, its officers, agents, and committees, be enjoined from issuing any orders or instructions to any of the engineers in the service of the receiver as to what cars they shall haul over the Wabash tracks, and that such association and its officers, and especially P. M. Arthur, be required to show cause why they should not be punished for contempt in interfering with the property in the custody of the court.

The receiver's answer admits the existence of the usage of interchanging loaded cars between himself and the petitioner, but avers that such interchange has been small; the receiver's receipts therefrom during the month of January being less than \$500. The answer avers that the petitioner owns and operates a system of railways occupying much of the territory tributary to the lines of the Wabash Company, and that the two systems are directly competitive at many important points. The answer admits that the receiver's agents declined to receive and haul the eight cars tendered as stated in the petition; but avers that at the time of such tender and refusal the receiver had issued no orders, and given no instructions whatever to his agents or employes, with respect to the interchange of business with the petitioner; but admits that on the day following such tender and refusal the receiver issued instructions to his agents to receive no cars of the petitioner for the present, but to transfer from the cars of the petitioner all freight tendered to the Wabash, and to take no freight originating on the petitioner's system, except as local freight. These instructions were issued, the answer avers, because there was danger that a continuance of interchange of business would cause the Wabash engineers to leave the receiver's employment, and thus inflict great injury upon the property in his custody; that the instructions were for only a temporary suspension of interchange of cars between the receiver and the petitioner, and that the receiver never announced any absolute and permanent policy of non-intercourse; that on the 10th of March (two days after the petition was filed) the receiver promulgated to the officers and employes in his charge the following order:

"All orders and directions heretofore given by me, or by any officer or agent of this road, which have been understood as limiting the interchange of cars or traffic with the Chicago, Burlington & Quincy Railroad, or any of the roads in that system, are hereby rescinded. The business of receiving and exchanging cars and traffic by this road with the C. B. & Q. Railroad Company, and all of the roads of that system, will go on upon the same terms and conditions as those upon which similar business is done by this road with other connecting railroads."

It is averred in the answer, and by the receiver and his counsel in open court, that this order will be enforced in the future. It is further

averred that the receiver consulted no one except his subordinates as to the propriety of issuing and enforcing the rescinded instructions; and that he has had no communication or conversation with P. M. Arthur, or any one representing him, respecting the operation of the Wabash Railway; and it is denied that the receiver has acted under moral duress exercised by P. M. Arthur, or anybody representing or connected with him, or that Arthur has ever in any manner obstructed the management or operation of the property in custody of the court. The answer concludes with the statement that the receiver believes this proceeding was originated, not so much from a desire to procure a resumption of the unimportant traffic of the petitioner with the respondent, as in the hope that the filing of the petition, and action thereon, would render the receiver incapable of managing the Wabash property, and that a large amount of the business now done by it would go to the petitioner as a competitor.

Although the property of the Wabash Company is in the custody of the court, it is operated by the receiver as a common carrier. His rights and duties are those of a carrier. He is bound to afford to all railroad companies whose lines connect with his equal facilities for the exchange of traffic. It is his duty to receive from and deliver to other connecting roads both loaded and empty cars. He cannot discriminate against one road by maintaining a policy of non-intercourse with it. More need not be said on this question, as the receiver has wisely rescinded the instructions which discriminated against the petitioner, and declares he has no purpose or desire to deny to the petitioner any of its legal rights. Although the petitioner has accomplished its chief purpose in invoking the aid of the court, it is urged by its counsel that persons belonging to the Brotherhood of Locomotive Engineers, and especially P. M. Arthur, who is the chief officer of that organization, have interfered with the receiver and his subordinates in the management of the Wabash property, and that they should be punished for their illegal and contumacious conduct. The receiver and his counsel make no such complaint. On the contrary, the receiver declares that there has been no such interference with him. While the affidavits submitted in support of the petition show that Mr. Arthur sent a telegraphic message to the engineers of the Union Pacific Railroad Company at Omaha, directing them to haul no cars of the petitioner, it does not fairly appear from the evidence that the engineers in the service of the receiver received such orders by telegraph or otherwise. For the present it is sufficient to say that the court will protect the property of the Wabash Company in its custody. The employes of the receiver cannot be obliged to remain in his service against their will, but neither they nor others will be permitted to interfere with or disturb the receiver or his subordinates in the possession and operation of the property in his custody. Lawless interference with the receiver and his employes in the discharge of their duty will not be tolerated. It is proper to state, however, in justice to the Wabash engineers, that they do not desire to maintain an attitude of defiance to the law, and that they are now willing to aid the receiver in the lawful and successful administra-

tion of his trust. The receiver's answer renders it unnecessary for the court to do more than direct that the petition remain on file for future action should there be occasion for it.

HOFFMAN v. BULLOCK *et al.*

(Circuit Court, S. D. New York. March 16, 1888.)

CORPORATIONS—OFFICERS AND AGENTS—FRAUDULENT COMBINATIONS—RIGHTS OF THIRD PARTIES.

An assignee for a valuable consideration of all the claims and rights of action at law or in equity of a corporation against its former directors and trustees, who, by a fraudulent combination with outsiders, succeeded in wrecking the concern, and appropriating its property to themselves, and who, by collusion and malpractice, secured the dismissal of *bona fide* suits instituted by the corporation against themselves to recover the property, has no standing in a court of equity as against such trustees, in the absence of allegation and proof that he is a creditor or stockholder of the corporation.

In Equity. On demurrer to bill.

B. C. Chetwood, for complainant.

Charles Sherwood, for respondents.

LACOMBE, J. The complainant avers that the defendants, heretofore directors and trustees of the *Ætna Axle & Spring Company*, a Connecticut corporation, did, by a fraudulent and corrupt combination with outside parties, carry out a secret conspiracy to wreck the company; that they misappropriated its funds and property to their own use, and defrauded and despoiled its creditors and stockholders, realizing by their misappropriation upwards of \$175,000 of the assets of said company; that the company has attempted, in good faith, to recover the moneys thus misappropriated, by causing actions for the same or some part thereof to be brought in its behalf against some of the defendants; but "by collusion and malpractice said suits have been dismissed, discontinued, or otherwise corruptly disposed of to the great injury of the company, its creditors, and stockholders." The bill then avers that complainant is "assignee for a valuable consideration * * * of all and singular its claims, demands, and rights of action, * * * either in law or in equity, against the defendants." By such an assignment complainant obtained no proper title to institute such a suit as this. *Graham v. Railroad Co.*, 102 U. S. 148. It was claimed on the argument that he is a creditor and a stockholder of the company. There is no such averment in the bill. If he has rights in that character he may no doubt avail of them, but he has not set out any such cause of action in this bill.

The demurrer is sustained, with leave to amend the bill.

COOK *et al.* v. COOK *et al.*

(Oswest Court, S. D. New York. March 17, 1893.)

1. EXECUTORS AND ADMINISTRATORS—INVESTMENTS—IN BONDS OF FOREIGN CORPORATION.

An investment of trust funds by a New York administrator with the will annexed, in mortgage bonds of a Pennsylvania corporation, made without order of court, is not good as against the New York beneficiaries; and if such bonds prove to be worthless, the administrator, or, he being dead, his estate in the hands of his sole legatee and devisee, is liable for the loss.

2. SAME—WASTE—LIABILITY OF EXECUTOR'S ESTATE—MEASURE OF RECOVERY.

A bill by the life-tenant and remainder-men in fee of a sum of money, to subject the estate of the administrator in the hands of his sole legatee and devisee to the payment of a *devastavit* wrought by him, set out the loss at \$8,000. The answer of the administrator's executor, and of his co-administrator, admitted that that was the amount received, but the answer of the legatee-devisee put it at "about \$7,000." The *corpus* of the fund was \$7,072.02, and there was no positive proof that the administrator in fault had received more than that sum. It was in evidence that the last payment of interest to the life-tenant was made in 1884. *Held*, that the measure of recovery against the estate in the hands of the legatee and devisee was the original *corpus*, viz., \$7,072.02, with lawful interest thereon for 1884 and each year thereafter, compounded annually.

3. SAME—MARSHALING ASSETS.

Where the sole legatee and devisee of a defaulting administrator has disposed of all the real estate gotten under his will, and the personal estate remaining in her hands is sufficient to make good the *devastavit*, a decree will not go against the real estate, and this is especially so where the grantee of such real estate is not a party to the bill.

4. SAME—RIGHTS OF CO-ADMINISTRATOR.

A decree in favor of the life-tenant and his children, remainder-men in fee of a sum of money, went against the estate of the administrator with the will annexed for a *devastavit* wrought by him. To this bill a co-administrator was a party, but there was nothing beyond his refusal to proceed against the estate to show that he was not a proper person to receive the money awarded by the decree. In addition, the trust fund was to go over upon the death of the life-tenant without children. *Held*, in New York,—where the appointment and removal of such administrators, and the proper management of the funds in their hands, are for the surrogate's court,—that the federal circuit court would not take the matter out of the surviving administrator's hands in advance of any action by the surrogate, but that the money should be paid to him.

5. DESCENT AND DISTRIBUTION—LIABILITIES OF HEIRS AND DEVISEES—EQUITY PRACTICE IN FEDERAL COURTS—FOLLOWING STATE LAWS.

Under Code Civil Proc. N. Y. §1841, for a creditor of the estate to recover against a legatee it is only necessary to show that no assets have been delivered to a surviving consort or next of kin, and under sections 1844, 1848, 1849, to recover against a devisee it must be shown that three years have elapsed without grant of letters, or after such grant, before suit, and that the debt cannot be collected of any heir, or in the surrogate's court, against the executor or against any other distributee, with any degree of diligence. *Held*, that these provisions did not, except so far as the rights of the parties arising therefrom were concerned, govern the practice in equity in such cases of the federal courts sitting in that state.

6. SAME—ACTION AGAINST SOLE LEGATEE—PLEADING.

A bill by the life-tenant and remainder-men in fee of a sum of money alleged that the will creating the trust fund had directed that it be invested; that H., who, with C., was administrator with the will annexed, had put the money in United States bonds, which he subsequently sold and then reinvested the proceeds in mortgage bonds of a foreign corporation, and that these bonds turned out to be worthless; that H. had died testate, one N. being his sole legatee and devisee, and that his estate had been wound up and turned over to said

N., leaving the debt to the trust fund unpaid, and that C., the surviving administrator, had refused to proceed. To this bill, which was brought more than three years after the grant of letters upon H.'s estate, C., N., and the executor of H. were all made parties. There was no demurrer, and the answer admitted the allegations of the bill. *Held*, that the estate in the hands of N. was liable and that the bill was sufficient, under the laws of New York, to support a decree against her; it being apparent that no assets had gone to a wife or next of kin that ought to be reached before the interest of N., and that the debt could not be collected of any heir or in the surrogate's court against the executor of H., or against any other distributee, with any degree of diligence.

In Equity. Bill for the appointment of a receiver or trustee.

L. A. Fuller, for complainant, W. H. H. Cook.

Chas. P. Buckley, for defendant George I. Cook.

John Vincent, for defendant Deborah C. Newton.

WHEELER, J. The pleadings and proofs show that the defendant George I. Cook and John C. Hewitt were administrators with the will annexed of Mary Cook, who had died at New York, and in her will had directed that one-third of her estate, found to be \$7,072.02, be invested, and the interest of it paid annually to the orator during his life, and the principal to his children, if any, at his decease; that it was invested in United States bonds, which were in the hands of Hewitt, and which he converted into money, and invested the money in eight mortgage bonds of the Kemble Coal & Iron Company, a corporation of the state of Pennsylvania, of \$1,000 each, purporting to bear interest at 7 per cent.; that he paid the interest of these bonds to the orator while he lived; that he died on the 17th day of December, 1882, leaving a will of real and personal estate devised and bequeathed solely to the defendant Deborah C. Newton, his sister, and making the defendant Wight executor; that Wight became qualified as executor, and took possession of the estate, including these bonds, on January 20, 1883, and paid the interest from them of that year to the orator, and offered them to him as belonging to the trust, and they were refused; that they were worthless, and no interest was paid on them in 1884, and they were delivered to the officers of the company to be used in reorganization; that the defendant Newton received as legatee of Hewitt in money \$3,782.15; in other personal property, \$4,935; in all of personalty, \$8,717.15; and as devisee a house and lot, No. 136 West Twenty-Third street, which she has sold and conveyed for \$29,500; that this was all that remained of the estate after payment of other debts and expenses; and that the orator requested the defendant Cook to proceed as surviving administrator to recover this fund of the estate of Hewitt, which, under the advice of counsel, he refused to do. This suit was brought April 11, 1887, to compel the defendant Newton to refund or pay this amount, with arrears of interest, and to charge it upon the real estate, and for the appointment of a receiver or trustee to carry out the bequest.

Counsel on behalf of the defendant Newton insist that none of the trust property has come to her hands; that the bill does not allege any misapplication of the fund, and that, therefore, no relief can be granted upon

that ground; that the liability of legatees and devisees for debts or obligations of the testator is wholly statutory, and that the requirements of the statutes are not followed in this case. The case does not show that she has received any specific trust property; therefore, she is not chargeable on that ground.

The bill alleges that Hewitt had the fund, and invested it in bonds of the United States; that the bonds were paid to him, or he sold them, whereby he received \$8,000; that the avails of them went to Wight as executor; and that the estate of Hewitt went to Newton as devisee and legatee. Relief must be granted, as is argued, upon these allegations, if at all. If the bill is defective, or is not sustained by the answers or proof to the extent necessary for affording relief, it must fail. This is elementary. The investment in bonds of the United States was a proper one. A bill which alleged that Hewitt sold or collected the bonds, and then resigned, or was removed, and refused to pay over the proceeds to the remaining administrator, would have been good. This bill alleges the same, except that it alleges that he died, and thereby the trust as to him was terminated, instead of by either of the other modes, and that the executor refuses to pay over the fund, but lets it go to the legatee. This would be a good bill against the estate if it remained in the hands of the executor, if maintained by answer or proof. The investment in the bonds of the foreign corporation is not claimed to be good so as to bind the *cestuis que trust* to it. As to them, it was the same as no investment, and left him chargeable with the fund. The bill alleges what he did according to its legal effect; and properly enough omits what he did that was of no effect. The bill charges the money into his hands, and the answers admit this, without setting up anything that exonerates him or his estate. This part of the bill is therefore good, and is well maintained; and these facts make this administrator individually liable. 2 Story, Eq. Jur. § 1280; 1 Perry. Trusts, § 417; 4 Bac. Abr. "Executors," D; *Brazer v. Clark*, 5 Pick. 96; *Peter v. Beverly*, 10 Pet. 532. His estate in the hands of his executor would likewise have been liable.

At common law, from the earliest times, legatees have been liable to refund such part of their legacies as should be necessary to meet debts and obligations of the testator. Bract. bk. 2, c. 26, fol. 61; 2 Bl. Comm. c. 32; 6 Bac. Abr. "Legacies," H; 2 Redf. Wills, § 56. The testator had no right to dispose of, and the legatee acquired no right to have, what was necessary for the payment of debts. Heirs and devisees were not liable for debts of the ancestor or testator on account of lands unless named in the obligation. This is changed by statute in England, and in this country lands appear always to have been holden for the debts of the ancestor or testator. 1 Washb. Real Prop. c. 3, § 73; *Watkins v. Holman*, 16 Pet. 25. These liabilities appear to be recognized and enforced by statute in New York; as to legatees and distributees by section 1837, and as to heirs and devisees by section 1843, of the Code of Civil Procedure. The neglect to present the claim to the administrator or executor does not impair the right (section 1837) to recover against a legatee; it is only necessary to show that no assets have been delivered to a surviving hus-

band or wife or next of kin, (section 1841.) To recover against heirs or devisees it appears to be necessary that three years elapse without grant of letters, or after such grant, before suit, (section 1844;) that there is a deficiency of assets, (section 1848;) and that the plaintiff cannot with due diligence collect his debt in the surrogate's court against the executor or administrator and distributees; and against devisees that the debt cannot be collected of the heir, (section 1849;) and when the same person is liable successively, only one suit need be brought, (section 1860;) and when the land has been conveyed there may be a personal judgment, (section 1854.) The bill does not allege that three years had elapsed without grant or after grant of letters, before suit; but it does allege the time of grant, and more than three years from that time had elapsed before the suit was brought. This appears to be a statute of limitation on the right to commence suit, not affecting the bringing of the suit when the time for it arrives. It is not necessary to allege in any suit that it is brought within a statute of limitations.

The bill alleges that the defendant Newton is sole legatee and devisee, that estate real and personal has been received by her, and that there is not remaining in the hands of the executor any greater sum than \$500. The proof shows that she has received the whole estate, and that there is nothing remaining in his hands. This shows clearly enough that no assets have gone to a wife or next of kin that ought to be reached before this legacy, and fixes her liability as legatee. It also shows that the debt cannot be collected of any heir, or in the surrogate's court against the executor, or against any other distributee with any degree of diligence. The Code of Procedure of the state does not govern at all as to practice in cases in equity in the courts of the United States. Rev. St. U. S. § 913. The proceedings in such cases are the same in all the states, whatever the procedure of the courts of the state may be. *Boyle v. Zacharie*, 6 Pet. 648; *Gaines v. Relf*, 15 Pet. 9. But all the rights of the parties arising out of any local law must be observed. *Insurance Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct. Rep. 236. General allegations in bills in equity in these courts are ordinarily sufficient. *St. Louis v. Knapp Co.*, 104 U. S. 658. There was no demurrer to this bill pointing out any allegations of the bill as defective; but it was answered, and it appears now to be sufficient as a basis for a decree.

The case is not very clear in respect to the amount for which Hewitt was liable. The bill alleges that he received \$8,000 for the government bonds. The answer of Cook admits this on belief. The answer of Wight admits that there were \$8,000 of the corporation bonds; and the answer of Newton admits that he received about \$7,000 for the government bonds. The answer of Cook is not evidence against her; and there is no testimony on the subject. Her answer must govern, and it is taken to mean by about \$7,000, the amount of the fund, which is about that sum. There is no showing as to the exact time to which interest was paid to the orator. Her answer shows nothing further than that the interest was paid to the orator during the life of Hewitt by him, and by his executor afterwards as received from the bonds; and the testimony

shows that payment of interest on the bonds ceased in 1884. On the whole the orator appears to be entitled to have the fund restored to the estate of Mary Cook, and to interest on the fund at the lawful rate for the year 1884, and each year after, with interest on each year's interest from the end of that year. No earlier day can be fixed upon from anything in the case. The orator has prayed that a receiver or trustee be appointed in place of Cook. But this fund still belongs to the estate of Mary Cook. The orator's right to the interest is established, but where it may go at his decease cannot now be determined. If he leaves children,—lawful issue,—it is to go to them; if not, it is to go somewhere else, according to her will; or, if not disposed of by that, it is to be distributed to whomsoever may under the law be entitled to it. It is necessary, therefore, that it be in the hands of an administrator with the will annexed. The appointment and removal of such administrator, and the keeping of the estate in his hands securely, properly appertains to the surrogate's, or other probate court of the state. If there was just ground to suppose that it would not be safe in the hands of Cook as such administrator until proper action could be taken there, a receiver might be appointed; but no such ground appears. He would not proceed to recover the estate, but left the orator to do so. That does not appear to be sufficient ground for taking the matter out of his hands in advance of proceedings in the surrogate's or other proper court.

The orator appears to be entitled to a decree against the defendant Newton, for the payment of the amounts of the annual interest, with interest thereon, directly to himself; and for the payment of the amount of the fund, \$7,072.02, to the defendant Cook, as administrator of Mary Cook with the will annexed, and for his costs. This amount will not go much, if any, beyond the personal assets, and, if not, no decree against the real estate would appear to be proper. Besides this, the grantee of that is not a party before the court, and a decree charging it with payment would not be in order, without that party.

Let there be a decree for the payment by the defendant Newton to the defendant Cook, as administrator, of the sum of \$7,072.02, and for the payment by her to the orator of the interest on that sum from the beginning of the year 1884 until it is paid, with interest on the interest from the end of each year, with costs to the orator; and dismissing the bill as to defendant Wight, without costs.

CENTRAL TRUST CO. OF NEW YORK *et al. v.* WABASH, ST. L. & P. RY.
Co. *et al.*, (St. Louis, K. & N. W. Ry. Co., Intervenor.)

(*Circuit Court, E. D. Missouri, E. D. March 19, 1888.*)

CONTRACTS—INTERPRETATION—ACTS OF PARTIES.

Where a contract between two railway companies operating a joint line does not expressly provide how cars shall be obtained or supplied for the use of the line, the fact that one company for several years after the contract was entered into paid the other for the use of its cars will be considered as a construction placed on the contract by the parties, and the courts will enforce such payment as a part of the contract.

In Equity. On exceptions to master's report. *In re* intervening petition of St. Louis, Keokuk & Northwestern Railroad Company.

H. H. Trimble and Palmer Trimble, for petitioner.

H. S. Priest, for receivers.

THAYER, J. The question which arises on the intervening claim of the St. Louis, Keokuk & Northwestern Railroad against the receivers of the Wabash Railway Company must be determined with reference to the provisions of a contract entered into on February 4, 1879, between the St. Louis, Kansas City & Northern Railroad as party of the first part, and the intervenor as party of the second part. That contract recited "that the intervenor desired to complete its line of railway from Clarksville, Missouri, to a connection with the railway of the first party at or near Dardenne, now St. Peters, and form a joint line between the railroad companies from St. Louis over the railroad of the first party to the proposed connection, and from thence over the railroad of said second party to Keokuk, Iowa, for the purpose of transporting passengers, freight, mail, and express cars on terms mutually advantageous to both parties. In consideration of the premises, and the undertaking on the part of the second party to construct and complete its road, and make such connection and provide the necessary facilities for such joint business at said connection, the first party agreed with the second party to form such joint line of railway from St. Louis, Missouri, to Keokuk, Iowa, for passenger, freight, mail, and express business, the arrangement to commence as soon as the second party had completed its tracks from Clarksville to the connection aforesaid, and to continue for 50 years. The party of the first part agreed to furnish all depot and terminal facilities at St. Louis for the joint-line business; also all the motive power to haul the trains of such joint-line business between St. Louis and the junction aforesaid at or near St. Peters, pay all bridge tolls over the St. Charles bridge on the trains and business of the joint line, and give the business of the joint line the same care, attention, and facilities that it gave its own. It was also mutually agreed between the parties that for the services, facilities, motive power, and bridge tolls aforesaid, including station work at the city of St. Louis for such joint line, the said first party should receive thirty-five hundredths of all the earnings of the joint line, and the

second party should receive sixty-five hundredths thereof. It was mutually agreed that, as far as practicable, time-cards should be arranged so that the trains of the second party might be hauled to and from St. Louis with the trains of the first party, but when not practicable, the first party was to furnish motive power, and haul the trains of the second party on the time of the second party. It was furthermore agreed that settlements should be made monthly between the parties on or before the 15th day of each month, and that all minor details not mentioned in the contract should be arranged between the parties in a spirit of equity and fairness, and with a due regard to economy." Such were the material provisions of the contract. After intervenor's railroad was completed to St. Peters, operations began under the contract, and have been continued to the present time by the St. Louis, Kansas City & Northern Railroad and its successors, to-wit, the Wabash, St. Louis & Pacific Railroad, and the receivers of the last-named corporation. From the commencement of traffic over the joint line until June 1, 1885, the Kansas City & Northern Railroad, and each of its successors, allowed and paid the intervenor mileage on all its freight, baggage, and passenger cars employed in the business of the joint line, between St. Peters and St. Louis. The mileage so allowed the intervenor was the usual mileage paid by all railroads on foreign cars which pass over their roads when they have an interest in the earnings of the foreign cars, and are not simply paid a certain sum for hauling them. In June, 1885, a year after the receivers of the Wabash, St. Louis & Pacific Railroad were appointed, they resolved to pay no more mileage on the intervenor's passenger and baggage cars, claiming that the contract under which the joint line was operated did not obligate them to pay such mileage. They continued, however, to pay mileage on freight cars the same as before, and continued to do so up to the time of the hearing. The present claim is for mileage on passenger and baggage cars, belonging to the intervenor that passed over the joint line between St. Peters and St. Louis from June 1, 1885, to April 1, 1886. The sum claimed is \$3,544.80, and the same was allowed by the master. The receivers have excepted to the allowance.

The fact that the St. Louis, Kansas City & Northern Railroad and its successors, while acting under the contract, paid mileage on all the intervenor's freight, baggage, and passenger cars until June, 1885, and that mileage was thereafter paid by the receivers on freight cars, creates a strong presumption that the payment of such mileage was within the contemplation of the parties who made the contract, and that, as they construed it, the contract required the payment of such mileage, either by reason of some provision of the agreement, or because of some usage applicable to the subject-matter of the contract, in the light of which they supposed that the contract ought to be, and would be, interpreted. The agreement being executory, the practical construction adopted by the parties thereto, and by their successors, during a period of several years, is entitled to great, if not controlling, influence in determining what is the proper interpretation of the same, as was held in *Topliff v. Topliff*, 122 U. S. 121, 7 Sup. Ct. Rep. 1057, and *Chicago v. Sheldon*, 9 Wall.

54. It is well understood that the practical construction of a contract adopted by the parties thereto will not control or override language that is so plain as to admit of no controversy as to its meaning. In all such cases the intent of the parties must be determined by the language employed rather than by their acts, but if the language employed is of doubtful import, or if the contract contains no provisions on a given point, or if it fails to define with certainty the duties of the parties with respect to a particular matter or in a given emergency, then beyond all question it is proper to consider how the parties have construed the instrument with respect to such debatable points. If both parties to an agreement for a considerable period, and while free to act, treat a contract as imposing certain duties or obligations, such conduct ought to settle the construction of the instrument if its provisions with reference to such matters are to any extent uncertain, obscure, or incomplete. "A construction of a contract adopted and acted upon by both parties will be regarded as worked into the contract," says Dr. Wharton in his work on Contracts, vol. 1, § 206, if such construction does not conflict with its express provisions. The manner in which a construction of a contract adopted and acted upon by both parties may, so to speak, be worked into a contract, is well illustrated in *Topliff v. Topliff*, above cited, and also in the case of *Robinson v. U. S.*, 13 Wall. 363. In the latter case Robinson had contracted to deliver a certain quantity of barley, but whether the delivery should be made in bulk or in sacks was not specified. For a period of six months the barley was delivered in sacks. The court refer to this fact as a proper reason for construing the contract as requiring a delivery in sacks, rather than in bulk. It will rarely be found, we apprehend, that a court will go far astray in arriving at the actual intent of the parties to a contract (which, after all, is the purpose of all rules of construction) by adopting that interpretation which the parties, without compulsion, have themselves adopted and acted upon. None of the foregoing propositions are directly controverted by the receivers' counsel. The contention on their part seems to be that it matters not how the parties have construed the contract now in question, because its provisions, as they claim, are too plain to admit of any reference to the manner in which they may have interpreted it. Their view seems to be that in the matter of paying mileage the St. Louis, Kansas City & Northern Railroad and its successors not only made payments by way of gratuity, which the contract clearly did not require them to make, but that they have actually paid mileage on cars between St. Peters and St. Louis which the contract obligated the intervenor to furnish free of charge. We remark, in the first place, that it is at least singular that such payments should have been made for several years if the contract on its face really bears such unmistakable evidence that the payment of mileage on intervenor's cars was not contemplated when the contract was made. It is urged, however, that such payments were made without any reference to the contract, and through oversight; but even if that be so, it is certainly the duty of any person, who at this late day contests intervenor's right to mileage under the terms of the contract, to point out some provision

or provisions which in clear and unmistakable language show that such payments were not contemplated. We think that the receivers' counsel have signally failed to make such showing. Instead of pointing us to any provision of the contract which clearly made it the duty of the intervenor to furnish freight, baggage, and passenger cars free of charge for the business of the joint line between St. Peters and St. Louis, we are favored with an elaborate argument, the purpose of which is to show that by reason of the situation of the parties at the time the contract was made, and in view of certain provisions of the contract, we ought to infer (although it is not directly expressed) that in point of fact it was the intention of the parties that no compensation should be paid for the use of intervenor's cars between the points last named. Possibly, we might so infer, and adopt that as the correct exposition of the contract, if the parties themselves (who certainly ought to know what they did intend) had not adopted a different construction of the agreement, and acted upon it consistently for a series of years. The fact is that the contract under consideration, while it is explicit in some of its provisions, and while it provides clearly what contributions shall be made by the respective parties to establish the joint line, and in what way the earnings of the joint line shall be divided, wholly fails to provide who shall supply cars over the entire joint line, or any part of it for any class of business transacted by such line. Obviously, the line could not be operated without cars. The parties must have had some intention with respect to the supply of rolling stock. But for some reason the contract does not in terms provide who shall furnish it. This matter was left open by the explicit provisions of the agreement, and is to be determined, if at all, by implication. On the one hand, as has been before remarked, it is contended that it ought to be inferred from what is expressed that it was intervenor's duty to supply rolling stock between St. Peters and St. Louis free of mileage charges. On the other hand it is argued with much plausibility and force that no such inference can properly be drawn. It is urged that the parties intentionally omitted to bind either party to supply all or any specified number of cars for use on the joint line in view of the inherent difficulty of carrying out any such provision, if made. It is furthermore urged that the parties to the contract intended to leave the matter of car supply to be regulated by the exigencies of business, and that, having left the matter to be so regulated, they also intended to allow mileage charges on all of intervenor's cars that were used on the joint line between St. Peters and St. Louis, according to a custom that then prevailed among railroads. The conduct of the parties accords with the latter view. We refer to the controversy between counsel as to the proper interpretation of the contract, not with a view of deciding which interpretation ought to prevail if the question was *res integra*, but as evidence of the fact that the contract considered by itself is fairly susceptible of different interpretations, because it does not in terms provide how cars shall be obtained or supplied for the use of the joint line. Such being the case, and a controversy having now arisen as to the construction of the agreement, we have no doubt that we are authorized to settle the con-

troversy by adopting that construction which the parties have themselves adopted and acted upon invariably for a series of years. We do not hold that the conduct of the St. Louis, Kansas City & Northern Railroad and its successors in paying mileage creates an estoppel against it and its successors, but we do hold that the interpretation so put upon the agreement should determine its true construction, unless it is at variance with the express provisions of the instrument, which in this instance does not appear to us to be the case.

In our opinion, the finding of the master was for the right party, and we accordingly overrule the exceptions, and confirm the report.

BREWER, J., concurs.

HENRY *et al.* v. TRAVELERS' INS. Co.

(Circuit Court, D. Colorado. March 19, 1888.)

EQUITY—PRACTICE—DECREE—MODIFICATION.

Where a decree finds a contract regarding various loans made by defendant, and directs an accounting thereof, a motion to modify the decree so as to except certain of the loans will be denied, although an appeal has been allowed, since the decree, if interlocutory, can be corrected on the coming in of the master's report, and, if final, by the supreme court.

On Motion to Modify a Decree. The original opinion is reported in 83 Fed. Rep. 132.

J. P. Brockway, for complainants.

Wolcott & Vaile, for defendant.

BREWER, J. On the 13th of January, 1888, a decree was signed and entered, and now a motion has been made for a modification of that decree. Notice was given to complainants, who, however, failed to appear, presenting by mail several objections, such as insufficiency of notice, irregularity of modifying a decree upon motion, as well as that the facts did not justify any such modification. The defendant wishes the decree modified in two respects: one, by the insertion of a clause excluding the private debts of the complainants Henry and the Colorado Loan & Trust Company; and the second, by excluding two loans,—one of March 10, 1884, for \$60,000, and one of April 1, 1884, for \$20,000, secured by deeds of trust upon some farm lands belonging to two of the ditch companies. So far as the first matter is concerned, it is clearly unnecessary. The decree does not include the private debts referred to, and when the decree was being prepared the language of the draft as presented to me was changed purposely, and with the knowledge of counsel, so as not to include such debts. The opinion which I filed indicated that they were not included, and their omission from the decree is fully as potent as a special clause excluding them. The provision in the decree for a state-

ment by the master of the account between complainants and defendant was made under the belief that when the whole account was stated, if any single item was challenged by either party as improperly placed, either among Mr. Henry's private debts or among those of the ditch companies, the matter could be separately inquired into by the court, and the error, if any there was, corrected without a further reference to the master.

With regard to the other matter I am not so clear, and cannot positively determine without re-examining at some length the volumes of testimony. I do not feel that it is incumbent on me to make that examination, for I think the rights of both parties can be preserved without any present modification of that decree. I regard the decree as an interlocutory one. True, on the application of the defendant, I allowed an appeal as though it were a final decree, for the question whether it is final or interlocutory is one which the appellate court must finally decide. I feel in duty bound to render every assistance to a party against whom I rule to enable him to present that adverse ruling to the supreme court in such manner as he deems best. Of course, if it is to be a final decree, and there was error in finding, as I did, the existence of a contract, the supreme court will reverse the decree *in toto*. If, on the other hand, they sustain my finding as to the existence of the contract, but hold that it did not include these farm mortgages, then the decree will be reversed *pro tanto*. So, if it should be adjudged, as I think it will, that this is a mere interlocutory decree, then, on the coming in of the report of the master, the matter now presented in this application for a modification can be fully considered, and a final decree entered according as the facts require; for it is abundantly settled that up to the time of the final decree the case is within the control of the court, and an error or mistake in any interlocutory matter or decree can be then corrected. So, without attempting now to decide whether these farm mortgages were included within the terms of the contract, the application will be overruled.

CENTRAL TRUST CO. *et al.* v. WABASH, ST. L. & P. RY. CO. *et al.* (GILMAN *et al.*, Intervenor.)

(Circuit Court, E. D. Missouri, E. D. March 19, 1888.)

1. RAILROAD COMPANIES—INSOLVENCY AND RECEIVERS—LEASED LINES—CLAIMS FOR RENT—PRIORITIES.

The property of defendant railway company was made up of the consolidation of a number of lines, some of which were taken by purchase, and some by lease. Nearly all of these lines were subject to prior mortgages, and there was also two general mortgages on the consolidated system. Defendant filed a bill confessing insolvency, and asking the appointment of receivers to administer its assets among its creditors. The lessor companies were made defendants, and an order was made appointing receivers to operate the entire system. It was also provided that any lessor might at any time assert his right to possession of lines leased by him for unpaid rent. *Held*, that the taking possession of leased lines by the receivers did not make them assignees of the leases, so as to make the rentals due under such leases prior to the mortgages.

2. SAME.

On the petition of the receivers of an insolvent railway system, showing that one branch of the system had earned more than operating expenses, an order was made that out of the profits of that branch the rental thereon be paid, until otherwise directed. *Held*, that the lessor had a right to rely on this order, and the receivers would be required to pay the rental from the time specified.

In Equity. On exceptions to master's report.

In re intervening petitions of Theodore Gilman and Charles H. Bull, trustees; Quincy, Missouri & Pacific Railway Company; George I. Seney, trustee, and St. Joseph & St. Louis Railroad Company.

Hough, Overall & Judson, for Gilman & Bull, trustees, and the Quincy, Missouri & Pacific Railway Company.

Theodore Sheldon, for George I. Seney.

Pattison & Crane, for St. Joseph & St. Louis Railroad Company.

Wells H. Blodgett, H. S. Priest, and *Geo. S. Grover*, for receivers.

Before BREWER and THAYER, JJ.

BREWER, J. These are three intervening petitions, in each of which is presented the question of liability for rentals during the receivership. The master denied the petitions, exceptions were duly taken, and the question is now before us on these exceptions. The first two cases are so nearly alike that the statement of the facts in one will bring the question clearly before us. In August, 1879, the Quincy, Missouri & Pacific Railroad Company leased its road to the Wabash Railroad Company for a period of 99 years. By subsequent consolidations the Wabash Railway Company became merged into the Wabash, St. Louis & Pacific Railway Company. The latter company, of course, succeeded to all the obligations of the former. The conditions of the lease material to this inquiry were substantially that the lessee would pay taxes, and keep the road in repair, and also pay as rental a given percentage of the gross earnings, guarantying that such percentage should at all times be equal to the interest at 6 per cent. on the bonds of the lessor company issued at the rate of \$9,000 per mile. At the beginning of the receivership the outstanding bonds of the lessor amounted to \$1,204,000. Gilman and Bull were the trustees in these bonds, and the intervening petition was filed by them as well as by the Quincy Railway Company. On the 29th of May, 1884, the Wabash, St. Louis & Pacific Railway Company filed its bill in this court confessing its insolvency, and praying the appointment of receivers. This bill showed that the complainant's property was a system made up by the consolidation of various independent lines, some of which were taken in by lease and some by purchase; that nearly all of these independent lines were subject to underlying and prior separate mortgages. It also showed the two general mortgages,—one on the system as consolidated, and the other on terminal facilities, and certain other properties. It averred that the value of these properties consisted largely in the preservation of the system intact, and that to permit the breaking up of the system by separate foreclosures of these underlying mortgages would largely impair the value of the properties. It made the lessor companies

party defendant. It prayed, among other things, "that after paying such claims as were required to be paid in order to prevent a forfeiture of orator's rights and interest in all rolling stock and equipments, the residue or surplus of all incomes, revenues, and earnings of said railroads, and all other assets coming into their hands as such receivers, be applied to the discharge of all debts, obligations, and liabilities of orator, according to the rights and legal and equitable priorities of all concerned as creditors or otherwise, under the direction of the court." The order appointing the receivers directed them to take possession of all these lines of road merged in this one system, and also as follows:

"It is further ordered that the said receivers, out of the income that shall come into their hands from the operation of said railroad, or otherwise, proceed to pay all balances due or to become due to other railroads or transportation companies on balances growing out of the exchange of traffic, accruing during six months prior thereto. That said receivers also in like manner pay all rentals accrued, or which may hereafter accrue, upon all leased lines of said complainant, and for the use of all terminals or track facilities, and all such rentals or installments as may fall due from said complainant for the use of any portion of road or roads or terminal facilities of any other company or companies, and also for all rentals due or to become due upon rolling stock heretofore sold to complainant and partially paid for. That said receivers also pay in like manner out of any incomes or other available revenues which may come into their hands, all just claims and accounts for labor, supplies, professional services, salaries of officers and employes, that had been earned or have matured within six months before the making of this order. It is further ordered that said receivers pay all current expenses in the operation of said road, collect all the revenues thereof, and all choses in action, accounts, and credits due and to become due to the company. That such receivers keep such accounts as may be necessary to show the source from which all such income shall be derived, with reference to the interest of all parties herein and the expenditures by them made."

In pursuance of this order the receivers took possession of the Quincy road with the other properties. On the 26th of June, 1884, the receivers filed their petition in the court asking its instructions as to how they should dispose of the earnings of certain lines, among them the Quincy road, which lines they believed did not earn enough to pay operating expenses and the rental; and on the 28th of June an order was entered as follows:

"*Third.* It is further ordered that the receivers herein, until otherwise directed, keep the accounts of all the earnings and incomes from, as well as the accounts of all the operating expenses, costs of maintenance, and taxes upon the following lines or divisions of said property, separately, to-wit."

On the 15th of October, 1884, upon the report of the master recommending that the receivers be directed to pay interest on a certain division, the court, in granting the order, made this announcement:

"*The Court.* I have stated at an early day, and Judge BREWER has gone over that matter, (and we are in accord with regard to it,) that I am not going to take the money that belongs to the underlying mortgages to pay interest on non-earning branches. If they have got to fail, they must fail. I will protect the underlying mortgages especially, and they haven't got enough here

to do it. *Mr. Smith.* Then I ask that the matter be referred to the master, and we will introduce testimony showing the actual earnings of the road in the past three months. *The Court.* That is the important element. If this branch is earning enough to pay its own interest, that is another inquiry; but certainly I am not going to sit here and order that the earnings that belong to other branches in this consolidated system shall be taken to pay concerns that do not pay earning expenses. Let them collapse."

And on April 16, 1885, after receiving the reports of the receivers in respect to several lines, the Quincy road among them, and after notice to the various parties in interest, an order was entered to this effect:

"*First.* That the subdivisional accounts must be kept separately. 'That was an order,' said the court, 'passed by Brother TREAT at the very outset of this receivership, in order that the particular equities of each one of these divisions, as between themselves, might be ascertained.' *Second.* Where any subdivision earns a surplus over expenses, the rental, or subdivisional interest, will be paid to the extent of the surplus, and only to the extent of the surplus. *Third.* Where a subdivision earns no surplus,—simply pays operating expenses,—no rent or subdivisional interest will be paid. If the lessor or the subdivisional mortgagee desires possession or foreclosure, he may proceed at once to assert his rights. While the court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee, whose rent or interest is unpaid, to insist upon possession or foreclosure, will be promptly recognized. *Fourth.* Where a subdivision not only earns no surplus, but fails to pay operating expenses, as in the St. Joseph & St. Louis branch, the operation of the subdivision will be continued; but the extent of the operation will be reduced with an unsparing though a discriminating hand."

And on July 15, 1885, the court, on the application of the trustees, Gilman & Bull, made an order directing the receivers to surrender the Quincy road to them, which was done. As a matter of fact the earnings of the Quincy road during the time it was in the hands of the receivers were insufficient to pay the operating expenses; and at the time the receivers took possession of the property, there was due by the company, of floating debts, (which, by the rulings of the supreme court, were preferential debts, and entitled to payment, prior to the mortgages,) over \$3,000,000. The gross receipts of the entire system during the receivership were insufficient to pay the operating expenses, and discharge all of this floating and preferential indebtedness; and the purchasers, in addition to the sum bid by them, have, as required by the orders of this court, paid the balance of said preferential and floating indebtedness. The purchasers have taken possession of the property within the jurisdiction of this court, though it is true the court, in the order surrendering possession, reserved the right to retake it, if the purchasers failed to pay all claims and demands which should be adjudged prior in lien to the mortgages. The intervenors' claim, of course, is that the rentals due them are preferential debts, and should be paid prior to the mortgages. I believe these facts present the question fully.

We start with this fact, that prior to the appointment of the receivers, intervenors' claim was subordinate to that of the mortgagees. It was a claim, of course, good against the income, but not against the corpus; at

least not good against the *corpus* until after the payment of the mortgages; and the first question is whether the action of the receivers in taking possession, or of the court in ordering possession, changed the *status*, and gives to intervenors' claim a higher position than it theretofore had. It is strenuously insisted by intervenors that it did; and they say that by taking possession of this leased property the receivers became virtually the assignees of the lease, and therefore bound by its terms, and bound to an extent which binds the property in preference to the lien of the mortgagees. A multitude of citations are made from the text-books and decided cases, to the effect that where a mortgagee institutes foreclosure proceedings, and upon his application a receiver is appointed, and such receiver takes possession of property leased by the mortgagor, such taking of possession is an acceptance of the lease, and binds the receiver as assignee, and binds so as to concede a preference to the lessor in respect to his rental. In other words: If A., a mortgagee, commences foreclosure proceedings against B., a mortgagor, and a receiver, appointed at his instance, takes possession of the property of C., leased by B., such possession of the leased property is an acceptance by the receiver of the lease, makes him an assignee of the lessee, and binds both him and A., the mortgagee, to the full amount of the mortgaged property, to the payment of the rents. High thus states the rule:

"As a rule, receivers are not liable upon the covenants of the persons over whose effects they are appointed, but become liable solely by reason of their own acts; and receivers who have been appointed over a corporation, and who have accepted the trust and taken possession of the assets, do not thereby become liable for the rent of the premises held by the company under a lease; nor can they be held liable until they elect to take possession of the premises, or until the doing of some act which would in law be equivalent to such an election. But when a receiver enters upon and occupies premises which had been leased to a corporation over which he is appointed, he thereby becomes liable for the rent due under the lease; the liability in such cases being the common-law liability of an assignee of a lease, and not for the debt due from the corporation. And in such case, the facts being undisputed, it is proper for the court to direct the receiver to make payment to the lessor without a reference to determine the matter." High, Rec. (2d Ed.) § 273.

This proposition, fortified as it is by ample citations, is conceded; but is it applicable? This receivership was upon the application of the mortgagor,—a party in possession of various properties,—some owned, some leased, and all subject to various obligations. Could the action of the mortgagor, or the decision of the court upon his application, change the relative rights of the mortgagee and the lessor? Was it in the power of the court upon the application of the mortgagor alone to charge the mortgagee with obligations to which he never assented? That this bill was filed by the mortgagor is, of course, conceded; and that its theory was not the preservation of any single creditor's rights, but that of all its creditors, secured and unsecured, is evident from these extracts from the bill:

"That all, or nearly all, of said mortgages embraced all rolling stock to be thereafter acquired by the companies executing such mortgages; but that, as such original companies and those lines of railroad have been gradually ab-

sorbed in orator's vast system, the rolling stock of said entire system has become so intermingled as to be incapable of division according to the original ownership of the said several lines of road according to said several mortgages. And any attempt to control or dispose of portions of such rolling stock by any court or courts not having jurisdiction of the whole, and not competent to deal with orator's entire property as a unit, would produce great confusion and uncertainty, and would result to great loss to all persons interested in said rolling stock, or in orator's property or securities. * * * And orator avers that the interest of the orator in said road, and of all its creditors and holders of the bonds aforesaid, are greatly imperiled by the existing prospect of the disruption of said road on the happening of the default impending as aforesaid, and the interests of all parties can only be protected by the interposition of a court of chancery. That if said lines of railroad are broken up, as aforesaid, and the fragments thereof placed in the hands of various receivers, and the rolling stock, materials, and supplies seized and scattered abroad in the manner above indicated, the result will produce irreparable injury and damage, not merely to orator, but to all persons having any interest in said lines of road, and the securities thereof."

The idea which underlies this bill is that which underlies the action of a voluntary bankrupt under the bankrupt law. Finding himself insolvent, he surrenders his property to the court, to be disposed of for the benefit of his various creditors. Such action in no manner changes the relative rights of his various creditors. They stand subsequent to this action as they did before, and their various rights and equities are determined, not by his action in surrendering his property to the custody of the court, but by the terms and obligations of the contracts theretofore entered into. Narrow the question in this way: Suppose A. is the owner of a mill and the lessee of an adjacent farm. Having mortgaged both his mill and his leasehold interest, and finding himself insolvent, he applies to the court by bill for the appointment of a receiver to take possession of his property and dispose of it for the benefit of his creditors, can it be that his action in filing the bill, or the action of the court in appointing a receiver, makes the claim for rental an unsecured obligation, paramount to the secured lien of the mortgage? The proposition will be startling, if true. It would put it in the power of a mortgagor to dispossess the vested lien of the mortgagee, and render such lien subordinate to unsecured claims. It is true that after the appointment of a receiver the mortgagee came in with an application for a foreclosure; but the assertion of his rights to a foreclosure was not different from that of the assertion of the lessor to his claim for rent. Each took what rights were given him by his prior contract, and neither by his action waived any of his rights or consented to a subordination of his priority. It is true, also, that the holder of the general mortgage prayed the court to extend the receivership over a part of the property to it as a mortgagee. Perhaps if that application had been granted, some different question might now arise; but the court expressly decided against the application, leaving the receivership to stand as it was in the first instance,—one granted on the application of the mortgagor, and one whose appointment it was believed would in no manner change the relative rights of any creditor. It may be said that the theory of the bill was novel; that sel-

dom it is that the mortgagor, the debtor, applies for a receivership. This may be true, though this is not the first instance in the judicial history of this country that such an application has been made and sustained. The New York & New England road was upon a like application placed by the circuit court of Connecticut in the hands of a receiver; and in bankrupt cases, though that was specially authorized by statute, such a proceeding was common. But the question is not now upon the propriety of the action of the court in appointing a receiver on the application of the mortgagor, but upon the effect of such action. The propriety of this proceeding was long since challenged in this court, and its opinion, with the concurrence of both judges, was in favor of its propriety and validity. That question being settled, it would seem to be logical and necessary that no action of the court at the instance of the mortgagor, no action of the receivers in direct obedience to the orders of the court, could change the relative rights of the creditors *inter sese*.

Again, if the action of the court in making the appointment, and of the receivers in taking possession, did not of itself create a new and legal obligation against the mortgagees, are there any equitable reasons why the claim of the lessor should be given priority to that of the mortgagee? The lessor was defendant as well as the mortgagee; each knew his rights; each summoned into court was at liberty to assert his rights; neither was told directly or by implication that he would gain aught by the action of the court in making the appointment. As the mortgagee might come in, and did come in, asking foreclosure of his mortgage, so the lessor might come in, and many did, demanding the surrender of the leased property for non-payment of rent. These very intervenors after the lapse of some months came in and asked possession of their property, which was promptly surrendered. Why should the mortgagee be compelled to pay the lessor any more than the lessor be compelled to pay the mortgagee? Each was summoned into court, each was called upon to make a showing of its claim, and each did so in time and manner that suited it. Because there were various properties covered by separate mortgages all merged in one system, and as such covered by one subordinate mortgage, is there any equitable reason why the court, seizing upon all of the properties at the instance of the common debtor, can be said to have created any new and different equities between these various creditors? Did not each stand upon his legal rights,—rights as they existed before the receivership, and rights which could be asserted at any time, and were in fact asserted as soon as each party saw fit? There was certainly nothing in the action of the court or the various orders made by it which gave to any party the right to expect other than his legal claims. Of course, the order in the first instance was to pay rentals out of the income, and that income, as we have seen, is all exhausted in preferential debts and operating expenses. Early in the history of receivership the order of the court was to keep separate accounts of the earnings of the different lines, and the clear intimation of all the orders and opinions, as well as the express language of many, was that the income from any property, part of the general system, would be appropri-

ated to the specific claims upon that property. It is undoubtedly true in railroad foreclosures that, by the decisions of the supreme court, certain claims have been adjudged preferential and superior to mortgage and secured liens. So far as these rulings have been made this court has unhesitatingly followed them; but it cannot be that the security of a mortgage deed, even if it be a railroad mortgage, is open to displacement by every unsecured creditor. Only the cogent public reasons, which have been so carefully considered and well stated by the supreme court, justify any postponement of the priority of a mortgage debt. So far as I am individually concerned I am unwilling to go a step beyond the matters and rules laid down by the supreme court. As to all outside of those matters I believe the sacredness of mortgage obligations should be observed, and that secured debts should be given the priority which the contracting parties awarded to them. In that view the claims of the intervenors in respect to the Quincy road and the St. Joseph & St. Louis road are without foundation, and the exceptions to the master's reports will be overruled.

With respect to the claim of George I. Seney, the trustee in the mortgage upon the Clarinda Branch, a somewhat different state of facts existed. On June 28, 1884, upon the petition of the receivers and the representations by them that the Clarinda Branch was important to the system, and had earned more than operating expenses, the master recommended an order, which was duly entered by the court, as follows:

"It is ordered that, until otherwise directed, the receivers herein, from the incoming rents and profits of said property, after meeting such other obligations as they have been directed to discharge by the former orders of this court, pay as the same shall from time to time mature, from whatever balance may remain in their hands, * * * on the first days of February and August (or as soon thereafter as practicable) the semi-annual interest at six per cent. per annum, then due on two hundred and sixty-four (264) bonds of one thousand dollars each, issued in July, 1879, and secured by mortgage on the Clarinda and St. Louis Railroad, (otherwise known as the Clarinda Branch,) amounting to \$7,920."

The intervenor, though made a party defendant, entered his appearance, and first became a party to the proceeding on January 4, 1885. He was notified by the receivers of an application for a new order in respect to the Clarinda Branch, which was entered upon April 16th. The rental was in fact paid to August 1, 1884. Now, the rental from August 1, 1884, to April 16, 1885, stands, we think, upon a different footing. There was an express order of the court in reference to that branch, and couched in such language that the intervenor had a right to rely upon it, and expect the payment of his rent, until some other order was made. Wherever a specific order is entered after showing and petition by the receivers, it would seem as though the party stood upon a different footing, and was not called upon to assert his rights as lessor to the surrender of the leased property. Whatever might have been the reasons, and however much mistaken the receivers may have been, they acted upon their best judgment, and the court seems by that order to have given express assurance to the intervenor that the interest of the system required the

payment of that rental, and the preservation of that property in the system; so that the order will be that the exceptions to the report of the master will be partially sustained, and the receivers directed to pay the rental for the time specified with interest. So far as the subsequent rental is concerned there is nothing to distinguish this case from the other two heretofore considered, and the report of the master will be sustained. It is unnecessary to add more. We have had these matters under consideration for some months, and have given to them the most careful consideration. The arguments and briefs of counsel have been most full and elaborate, and the questions presented not easy of solution. The amounts in each case are so large that if our conclusion is erroneous, a review may be had by the supreme court.

THAYER, J. I shall only add a few words to what has already been said. We are asked by the intervenors to make an order in this matter the practical effect of which will be to give an unsecured claim priority over a mortgage debt. As there are no funds at our disposal derived from the income of the property lately in the hands of the receivers, if we allow the claims in the desired form we must enforce payment out of the mortgaged property by retaking it, unless the purchasers under the mortgage see fit to discharge the lien which we impose. It is proper, therefore, that we should consider carefully both the legal and equitable grounds upon which such action can be predicated and justified. No lawyer would, for a moment, doubt that an assignee in bankruptcy would be liable for rent if he took possession of leasehold premises held by the bankrupt, and used them for the purpose of administering on the assets in his hands. In that event the assignee would become personally bound by the covenants of the lease, so long as he remained in possession, and the court would be bound to protect him against the covenant to pay rent, by allowing him for all rent, disbursements as an expense of administration. *In re Merrifield*, 3 N. B. R. 98, and *People v. Insurance Co.*, 30 Hun. 142. The same principle holds good, of course, in its application to public liquidators under the English Winding Up Acts, and receivers of copartnership estates and the like. *In re Colliery Co.*, 21 Ch. Div. 330; *In re Granite Co.*, L. R. 6 Ch. 462; and *Com. v. Insurance Co.*, 115 Mass. 278. If such officers use property held under lease for the purpose of advantageously administering on property committed to their charge, they must pay rent as stipulated in the lease, and the amount paid is an expense of administration, and is chargeable against the fund undergoing administration. The rule as applied in such cases has never operated, however, so far as we can find, to disturb the priority of claims,—that is to say, so as to give an unsecured debt a preference over one that is secured. It is also well settled that if mortgagees, in a proceeding to foreclose a mortgage, procure the appointment of receivers, and cause them to take possession of property held under lease by the mortgagor, to which their mortgage does not extend, they thereby bind the mortgaged property for the payment of rent that accrues, so long as the receiver remains in possession. Such was the rule applied in the case of

Woodruff v. Railway Co., 95 N. Y. 609; *Mittenberger v. Railway Co.*, 106 U. S. 286, 1 Sup. Ct. Rep. 140. The principle which underlies all of the cases cited appears to be substantially the same; that is to say, if an assignee in bankruptcy, public liquidators, receivers of insolvent corporations, or receivers appointed under proceedings to foreclose mortgages, take possession of the property of a third party, held under a lease, and use it ostensibly for the purpose of administering advantageously on the assets in their hands, or at the instance of, and for the benefit of, mortgagees, full rent must be paid for the use of such property, out of any funds within the control of the court, and that without reference to the question whether the use of the leased premises proves to be beneficial or otherwise. There is, in fact, no difficulty in deciding what the law is. The difficulty lies in making a correct application of it to the particular case under consideration; or rather it lies in determining whether the present proceeding was of such an exceptional character that the principle invoked to establish the liability in question is applicable.

Attention has already been called to the fact that the bill in this case was filed by the mortgagor, against all persons and corporations, including the lessors, who were interested in the various roads forming the complainant's railroad system. As I understand the bill of complaint, the complainant professed to be acting, not alone in the interest of mortgagees, but in the interest of all the corporations, whose roads had become an integral part of the system, whether by lease, consolidation, or otherwise. It was substantially represented by the bill that the affairs of the complainant had become so complicated, by the various mortgages that had been executed, the consolidations that had taken place, and the leases made or assumed, and by the admixture of rolling stock, that the best interests of all parties concerned demanded the appointment of receivers over the whole system, as the only feasible method of working out the equities appertaining to each. It was on account of such representations that the receivers were appointed and ordered to take possession of the whole system. In other words the receivership was not created for the benefit or protection of any one interest, or class of interests, but for the benefit of all parties to the suit who were in anywise interested in the system. The lessor companies, whose roads went into possession of the receiver, were advised of such facts by the form of the bill, and by the prayer for relief. They were at liberty, at any time after it was filed, to show that the extension of the receivership over the leased lines was not necessary to the protection of any interests of the lessor companies, or that it was detrimental to such interests. If such showing had been made, (and it appears to me that the lessor companies were cited into court to confess or deny the averments of the bill in that behalf,) the leased lines would unquestionably have been released at any stage of the proceeding. Intimations to that effect, and of the theory on which the court was proceeding, appear to have been given during the progress of the case from time to time. But so long as the lessor companies acquiesced in the averments contained in the bill, and on the faith of which receivers were appointed, it appears to me that the re-

ceivership continued to stand for their protection, and for the protection of the interests of all persons and corporations who were parties to the proceeding; and that, so long as that state of affairs existed, the relative rights of the parties were not changed, and that the mere possession by the receivers of the leased lines did not have the effect of making the rentals a charge on the body of the mortgaged property, superior in rank to the mortgage debt. The case, as I conceive, bears some analogy to the case of the *Bridge Water Engineering Co.*, 12 Ch. Div. 181, where, inasmuch as a public liquidator had retained possession of rented premises for the mixed accommodation or benefit of the landlord and the liquidator, the chancellor refused to allow the rents as a part of the cost of administration. The question before us should not be determined, in my opinion, with any reference to the question whether it was in fact necessary for the protection of the interests of the lessor companies to extend the receivership over the leased lines, although, if we were at liberty to consider that matter, it seems probable, in view of the condition of one of the leased roads, that if it had not been taken in hand by the receivers it would have suspended operations, for a time at least, and put the public to great loss and inconvenience, even if it had not incurred a forfeiture of its franchises. But, be this as it may, the question is not to be determined by considering whether the representations of the bill were erroneous in so far as the leased lines were concerned. We must consider what the bill did in fact allege; upon what theory it was drawn; and for what purpose the court appointed receivers, and for whose benefit; and whether, in the light of such facts, and the subsequent acquiescence of the lessor companies, they can now legally or equitably insist that, because the receivers took possession of their road under an order of court, the rentals which accrued during the period of such possession must perforce take precedence over the mortgage debts, although such leased lines during the period in question did not pay operating expenses. In my opinion, this question must be answered in the negative. The case is so exceptional in its character that the principle invoked to establish the liability in question, in my judgment, is not applicable.

In the course of the argument something was said about the receivers having exercised an election to take possession of the leased lines. On the one hand it was argued that, as they elected to take possession, they became personally bound as assignees of the lease by all its covenants. On the other hand it was argued that they acted under the orders of the court, and exercised no election or discretion. It appears to me that the receivers did not elect to take the leased lines in the sense in which that term is used in the books, but at the same time I do not regard the question as to whether their action was voluntary or enforced as at all material. They had possession of the leased lines, and operated them. If the court ordered them to take possession of the same for the benefit of any particular interest or class of interests involved, and without any reference to the protection of the rights of the lessor companies themselves, then those interests for whose advantage the leased lines were taken and operated by the receivers should stand the expense of the

rental, and the court would be bound to so order. The court has no more right than an individual to use one person's property for the exclusive benefit of another without paying for its use. But from the record and proceedings in this case it does not appear to me that any property was so taken and used. The entire system was taken in hand at the instance of the general owner to protect the interests of all parties concerned. The court, through its receivers, at all times adopted that line of policy which seemed to be conducive to the best interests of all parties as then foreseen. Among other things done for the protection of all parties to the litigation, at an early day it made an order to prevent the earnings of the numerous roads composing the system from becoming confused. It appears to me that such order, so far as it related to the leased lines, was a most explicit avowal that the court did not regard the rentals that from time to time accrued as an expense of administration, and that it did not regard the receivership as having been created for the benefit of the mortgagees, or any particular class of creditors, but for the mutual advantage of all parties concerned, the lessor companies included.

In conclusion I will add that in any light in which I have been able to view the question, it appears to me that the report of the master should be confirmed in the respects indicated in the main decision, and I accordingly concur in the order already announced.

ROGERS v. RIESSNER *et al.*

(*Circuit Court, S. D. New York. March 27, 1888.*)

1. EQUITY—PRACTICE—REHEARING.

An application for a rehearing must be denied where it is based solely on evidence already before the court, and passed upon adversely to applicant on rehearing before another judge, and no manifest error is shown.

2. PATENTS FOR INVENTION—PRACTICE—FINDINGS OF MASTER—SUFFICIENCY OF EVIDENCE.

In a reference to find and report the number of cans made by defendants under a patent on which royalties should be paid, the decree directed the master to take an account of all cans made and sold by defendants since January 1, 1888, (to which date royalties had been paid,) "which embody or make use of the improvements patented." The master called for an account of all cans made and sold by defendants since January 1, 1888, which purport to use the letters patent. Defendants furnished such account, stating that the cans included therein were all similar to those made by them under their license, and on which they had paid royalties down to January 1, 1888. *Held*, that there was sufficient evidence on which to base the master's report as to the amount of royalties unpaid.

On Rehearing. See 30 Fed. Rep. 525, 531.

Geo. C. Lay, for complainant.

Jas. A. Whitney, for defendants.

LACOMBE, J. The elaborate and exhaustive argument of defendants' counsel may be grouped under two heads. He first seeks to secure a rehearing of the case, and a determination thereon different from that rendered on final hearing. With the exception, however, of testimony touching the kind of oil-can manufactured since January 27, 1885, no new facts were proved before the master. The evidence as to what kind of cans were made subsequent to January 27, 1885, is, however, immaterial, as the complainant abandoned all claim for royalties thereon, and the master has not included them in his report. The facts upon which a rehearing is asked were fully set forth before Judge WHEELER, (see his opinion, March 28, 1887, 30 Fed. Rep. 525,) and were again considered by him upon a motion for reargument April 9, 1887, (Id. 531.) Subsequently another motion for rehearing was made before the same judge, who, in September, 1887, denied the motion, with the statement that the whole subject had been fully considered. The present application being based solely upon evidence already before the court, and three times passed upon adversely to the defendants, must be denied; no such manifest error being shown as would warrant the disturbance of the judgment at final hearing, which must therefore be taken as settling the law of the case.

In the second place, defendants attack the master's report as to the number of cans on which royalties should be paid, claiming that no manufacture or sale by defendants of cans such as are contemplated by the order or decree is shown. The decree directed the master to take the "account of all incased glass vessels manufactured and sold by the defendants from the 1st day of January, 1883, (down to which date royalties had been paid,) which embody or make use of the improvements patented," etc. The master called upon the defendants to produce an account of all glass vessels manufactured and sold by them from January 1, 1883, to the date of the decree, which purport to use the letters patent. The defendants furnished such an account, and upon the statements of quantity therein contained the master's report is based. As to the kind of cans covered by this account the defendants therein stated that they were "all similar to defendants' Exhibit No. 1." This exhibit was before the court on final hearing, and testified to as a sample of the cans made by defendants under their license, and upon which they paid royalties down to January 1, 1883. Inasmuch as the decree under which the master acted was directed to ascertaining what license fees were unpaid, there was certainly before him, by defendants' own concession, sufficient facts on which to base his report.

The exceptions are overruled, the master's report confirmed, and judgment directed for complainant for amount found due.

COUSINERY v. SCHELL.

(Circuit Court, S. D. New York. December 21, 1887.)

CUSTOMS DUTIES—ACTIONS TO RECOVER PAYMENT—VALUATIONS IN DEPRECIATED CURRENCY—FAILURE TO SHOW PRODUCTION OF CONSULAR CERTIFICATE.

In an action to recover an excess of duty paid on an importation valued in depreciated foreign currency, where it appears that a bond was given by the importer under authority of the treasury regulations of February 1, 1857, § 226, for the production of the consular certificate of its valuation in Spanish or United States silver dollars, the plaintiff cannot recover if he fails to show that such certificate was produced within the time prescribed in said bond.

At Law. Action to recover back customs duties.

The plaintiff's firm of F. Cousinery & Co., on March 27, 1860, by the ship Pace, and on April 17, 1860, by the ship Union, imported into the port of New York from Trieste, Austria, certain merchandise. This merchandise was subject to an *ad valorem* duty, and was invoiced in depreciated Austrian paper florins, which were issued and circulated under the authority of the Austrian government, and whose value was not fixed by any law of the United States. Augustus Schell, the defendant's testator, as collector of customs, converted these florins into United States money at the rate of 48½ cents per florin, and exacted duty on the merchandise in question upon the basis of such valuation of the florin on the respective days of its importation. Against this valuation the plaintiff's firm made protests under the act of February 26, 1845, (5 U. S. St. at Large, 727,) claiming that the true value in United States money of such florin was less than 48½ cents, and as certified in the certificate of the United States consul at Trieste, attached to their invoices of this merchandise, and that they were entitled to recover the duty exacted on the difference between the value of the florin as taken at 48½ cents and its value, as certified by the consul. Thereafter, on April 13, 1861, plaintiff's firm brought this suit to recover the duty claimed by them in their protests.

The laws and treasury regulations in force at the time of these importations were as follows: Section 2 of the act of March 3, 1801, (2 U. S. St. at Large, 121,) which provided that "the invoices of all goods imported into the United States, and subject to a duty *ad valorem*, shall be made out in the currency of the place or country from which the importation shall be made," etc; section 61 of the act of March 2, 1799, (1 U. S. St. at Large, 673,) which provided, besides other things, "that it shall be lawful for the president of the United States to cause to be established fit and proper regulations for estimating the duties on the goods, wares, and merchandise, imported into the United States in respect to which original invoice shall be exhibited in a depreciated currency issued and circulated under the authority of any foreign government;" paragraphs 216, 226, 714, 715, and 716 of treasury regulations, issued February 1, 1857, which provided that:

"Where the value of the foreign currency is not fixed by any law of the United States, the invoice must be accompanied by a consular certificate showing its value in Spanish or United States silver dollars."

"The consul's certificate of the value of the foreign currency in which the invoice is made out, when depreciated, or its value not fixed by the laws of the United States, will be according to form 224 of these regulations, and must be attached to the invoice in a manner that will best secure it from loss or removal."

"When in such case the certificate is not produced, the importer is required to give a bond to produce such consular certificate, whether the import be subject to duty or not. This bond will be in the following form, and, if the merchandise be dutiable, in a penal sum equal to the amount of duties assessable thereon, but, if free of duty, in the penal sum of one hundred dollars:

"(Form No. 75)

"BOND TO PRODUCE CONSULAR CURRENCY CERTIFICATE.

"Know all men by these presents, that we, ———, are held and firmly bound unto the United States of America in the sum of ——— dollars, to be paid to the said United States; for payment whereof we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents; sealed with our seals, dated this ——— day of ———, in the ——— year of the independence of the said United States, and in year of our Lord one thousand eight hundred and ———. Whereas, the above-bounden ——— entered certain goods, wares, and merchandise, imported by ———, in the ship ———, whereof ——— is master, from ———, the amount of duties charged whereon is the sum of ———; and whereas, the invoice of the said goods, wares, and merchandise, presented on the entry thereof, was made out in a foreign currency, the value whereof is not fixed by the laws of the United States, and which invoice was not accompanied by a certificate from the consul of the United States at ——— aforesaid, being the place of exportation of the said goods, wares, and merchandise, showing the value of the currency wherein the invoice was made out in United States or Spanish silver dollars: Now, therefore, the condition of this obligation is such that if the above-bounden ——— shall well and truly pay or cause to be paid unto the collector of customs for the district of ———, for the time being, the sum of ———, or shall produce such certificate as aforesaid within ——— months from the date of these presents, then the above obligation to be void; otherwise to remain in full force and virtue.

"——— [Seal.]
"——— [Seal.]"

"Sealed and delivered in presence of ———.

"Invoices of *ad valorem* or free goods, when made out in a foreign depreciated currency, or a currency the value of which is not fixed by the laws of the United States, whether the importer or owner resides in this country or abroad, must in each case be accompanied by a consular certificate showing the value of such currency in United States or Spanish silver dollars, according to the annexed form:

"(Form No. 224.)

"OF CONSULAR CERTIFICATE OF THE VALUE OF CURRENCY.

"I, A. B., consul of the United States of America, do hereby certify that the true value of the currency of the kingdom of ———, in which currency the annexed invoice of merchandise is made out, is ——— cents, estimated in United States or Spanish silver dollars.

[Signed]

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"A. B.

"The consular officers will either make their certificate upon the invoice itself, or give such details, where it is attached as a separate document, as to the names of the shippers, consignees, vessels, and captains, the nature of the merchandise, and the total amount, as will fully identify the invoice annexed, instead of giving, as heretofore, their certificates in such general terms as to admit of the deception—which the department is informed has been practiced—of substituting another invoice in place of the one for which the certificate was originally issued."

"They are also especially enjoined to observe great caution in granting certificates, where application shall be made for the same, for former shipments which were unaccompanied by said certificates, until they are fully satisfied by the correctness of the invoices presented to them for that purpose, as the very omission of the certificates with the invoices at the time of entry is in many cases presumptive evidence that a fraud was intended, if not practiced, upon the public revenue."

These regulations were held, in *Dutilh v. Maxwell*, 2 Blatchf. 541, to be the regulations of the president, under the aforesaid law of 1799.

All of the invoices, except two, of the merchandise imported by the Pace, and all of the invoices except one of the merchandise imported by the Union, had each attached thereto, or subsequently and duly produced, prior to July 20, 1860, consular certificates; and in case of the invoices with consular certificates so attached or produced a refund was made July 28, 1860, to the plaintiff's firm of the duty exacted on the difference between the value of the florin as taken by the collector at 48½ cents in United States money, and its value as certified by the consul. In case of the two invoices by the Pace, and of the one by the Union, which were without consular certificates, plaintiff's firm, according to the usual course of business at the custom-house, were required to give and did give bonds for the production of such certificates, although neither of such bonds nor a copy thereof was produced by the plaintiff, nor any evidence given by him of the time within which such consular certificates were required thereby. As to the two invoices by the Pace, a consular certificate dated September 11, 1860, was presented to the collector, after the giving of a bond for the production of the same; but it did not in any way appear that a consular certificate was ever presented in compliance with the bond given in the case of the one invoice by the Union, or that suit was ever brought on any bond given in the case of either the invoice by the Pace or by the Union. At the close of the plaintiff's case, the defendant's counsel moved for a direction of verdict in favor of the defendants, on the grounds, besides others: *First*, that there was no proof in the case that plaintiff's firm ever gave the bond required by the aforesaid treasury regulations for the production of a consular certificate in case of either of the two invoices by the Pace or of one by the Union; *second*, that if such bond was given in the case of either of such invoices, there was no proof that a consular certificate was ever produced in compliance therewith; *third*, that if such consular certificate was produced in case of either of such invoices, there was no proof that it was produced within the time required by the bond given for its production; and, *fourth*, that the plaintiffs had not proven facts sufficient to entitle them to recover as to either of such invoices.

A. W. Griswold, for plaintiff.

Stephen. A. Walker, Dist. Atty., and *Thomas Greenwood*, Asst. Dist. Atty., for defendant.

LACOMBE, J., (*orally*.) The importer, under the statutes, had no claim to have the valuation of his goods reduced to the equivalent of a depreciated currency, except in the manner indicated at the close of section 61 of the act of 1799. The way there pointed out was that the president might make regulations for the appraisement and valuation of goods that were invoiced or purchased in a depreciated currency. The only regulations made under the authority of that section which are produced are the treasury regulations of 1857, and the plaintiff must make out a case, in the manner indicated therein, entitling him to a valuation at the reduced amount, before he can recover. The regulations, as read in evidence, comprise a number of sections or articles. All of them, except section 226,—and in fact the first part of section 226, also,—plainly contemplate and require that a consular certificate of depreciation shall be attached to the invoice and must accompany it. The only provision of the regulations to which the plaintiff can point which relieves him from the obligation of producing that certificate attached to the invoice at the time of entry, is that calling for the bond which is provided for in section 226 and form 75. There is, in my opinion, sufficient evidence here to show that whatever bond was called for by the regulations, and was asked for by the indorsement on the entry, "Take currency bond," was given; but there is a failure to prove within what time that bond required the consular certificate to be produced, and in the only case where the consular certificate was produced it was so produced only after a lapse of a period of about five months and a half.

There has, therefore, been, in my opinion, on the part of the plaintiff, a failure to prove his case,—a lack of proof sufficient to bring him within the provisions of the latter part of section 226,—even assuming—and I do not mean now to pass conclusively on that question—even assuming that the giving of the bond and the subsequent production of the certificate within the time required by the bond, would be sufficient to entitle him to a refund, where he had paid the duties before the certificate was produced. I shall therefore direct a verdict for the defendant.

ROY v. LOUISVILLE N. O. & T. R. Co.

(Circuit Court, W. D. Tennessee. March 7, 1888.)

INFANCY—RIGHT TO SUE IN FORMA PAUPERIS.

Neither the pauper's oath of an infant plaintiff nor that of his next friend can entitle them to sue without security for costs.

At Law. *Ex parte* application by an infant to sue *in forma pauperis*.
O. P. Lyles, for the motion.

HAMMOND, J. This is an *ex parte* application by an infant plaintiff to sue *in forma pauperis*. He is a citizen of Arkansas, and his declaration, presented with his application, alleges that he was personally injured by the negligence of the defendant company, while traveling as a passenger on its train. He accompanies his application with an oath of his own poverty, and also the oath of his next friend as to his poverty, likewise; and he presents a certificate of a good cause of action by a reputable attorney, as required by our ruling in *Bradford v. Bradford*, 2 Flip. 280.

It is thoroughly well-settled in Tennessee, even under the liberal statutes of our state, that an infant plaintiff cannot sue *in forma pauperis*. Mill. & V. Code, §§ 3912, 3913; Thomp. & S. Code, § 8192; *Green v. Harrison*, 3 Sneed. 131; *Brooks v. Workman*, 10 Heisk. 430; *Cargle v. Railroad Co.*, 7 Lea, 717; *Sharer v. Gill*, 6 Lea, 495. We held in *Bradford v. Bradford*, *supra*, for sufficient reasons, that the Tennessee statute was not binding on the federal court. Not because the state practice is not binding on us, but because, as we thought, it is not a question of practice at all, but a statutory privilege or right conferred upon a party, which was limited in legislative authority to the state courts—the right, namely, of the party to determine for himself the fact of his poverty, and that he had a reasonable cause of action. Outside the statute, those were matters of judicial determination by the court, and we thought the legislature of the state could not deprive the federal courts of the right to determine for themselves the facts of the case, or prescribe for them a statutory rule of judgment. It is now insisted that under that decision the above-cited cases are not binding on us, and that the plaintiff has the right to sue in this court *in forma pauperis*. At common law no plaintiff had any such right, it being a purely statutory privilege. But here costs and fees must not be confounded, for at common law no such thing as costs was known, the right to them being likewise a statutory privilege; that is to say, the right of a party to the suit, either plaintiff or defendant, to recover, if prevailing in the suit, the expenses of his own side of the litigation, was unknown to the common law. So, too, the right to demand security for those costs after the statute of Gloucester (6 Edw. I. c. 1) was unknown to the English law, except in two cases—*First*, where a *prochein ami* was suing in behalf of an infant he was required to give security for costs; and, *secondly*, if the plaintiff resided, or was about to go out of the jurisdiction. At common law, indeed,

an infant could not sue except by his guardian, and it was by a statute that the privilege of suing by a *prochein ami* became established; and one of the conditions of the privilege was that the *prochein ami* should give security for costs. As to fees,—that is, as to one's own expenses of litigation, whether plaintiff or defendant,—they were always to be paid as the cause progressed to the officers or others entitled to them for the services rendered, and the litigant could no more expect to get these services for nothing, or on a credit, than he could expect to so obtain other work or labor performed for him. But by the statute 11 Hen. VII. c. 12, for the first time paupers were allowed to sue as plaintiffs without paying these fees, which privilege they obtained by petition upon their affidavit of poverty and certificate of counsel that there was a good cause of action. Hence these applicants were not to be relieved of giving *security for costs*, but to be allowed "to carry on the cause" without paying the *fees* due for one's own expenses of litigation. But not only were infants not allowed this privilege, but their *prochein ami* was required to secure to the other side his costs, as we have seen; and this was one of only two or three instances where any plaintiff was required to give such security. Moreover, if an irresponsible person were admitted as next friend of an infant, the court would substitute one that should be responsible, and be able to give the security to the other side. 2 Sell. Pr. 64, 82, 428-449; 1 Tidd, Pr. 98-100; 3 Chit. Pr. 633; 7 Bac. Abr. (Bouv. Ed.) 420, tit. "Pauper;" 2 Jac. Fish. Dig. 2679, tit. "Costs;" Id. 2854; 5 Jac. Fish. Dig. 6467, tit. "Infant;" Id. 6471; 6 Jac. Fish. Dig. 9843, tit. "Pauper;" *Lees v. Smith*, 5 Hurl. & N. 631; *Watson v. Fraser*, 8 Mees. & W. 660; *Mann v. Berthen*, 4 Moore & P. 215; *Selby v. Alston*, 1 Term. R. 491; *Anonymous*, 1 Wils. 130; *Noke v. Windham*, 2 Strange, 694; *Throgmorton v. Smith*, 2 Strange, 932. Some of the latest cases seem to intimate that under some circumstances this rule might be relaxed, but I find no case where it was done by admitting a pauper next friend to sue, though there may be cases where the court refused to remove one becoming insolvent after suit brought. Some of the cases cited in the digest are not accessible to me for examination. The chancery court was more liberal, and it is difficult to answer the argument there made that, if infants were to be deprived of the benefit of the statute allowing paupers to sue *in forma pauperis*, a great injustice might sometimes be done to them. But even in that court there was a difference of opinion as to the correct practice. 1 Daniell, Ch. Pr. (1 Eng. Ed.) 103, 40; Id. (1 Amer. Ed.) 41, 99, and notes; 1 Smith, Ch. Pr. (2d Amer. Ed.) 550; 1 Hoff. Ch. Pr. 67; Story, Eq. Pl. § 50. So, too, courts of admiralty are far more liberal. *Bradford v. Bradford*, *supra*, note. Still, the reasoning of the common-law courts for excluding infants from the benefit of the statute is not without much force. Not only frivolous and unsubstantial, and therefore vexatious, suits might be brought by irresponsible next friends of infants, but even their good causes of action may be prejudiced by the intermeddling of such irresponsible persons, while if left till they arrive at age, they being meantime protected by the statute of limitations in its

saving clauses, they could sue with more effect; though it must be admitted that loss of evidence from such lapse of time would be dangerous, oftentimes, perhaps, fatal. Nevertheless, we cannot make the law here. The plaintiff not being entitled to sue *in forma pauperis*, either under the state statute or under the general law, in suits at law, we cannot by judicial action confer the privilege. Application refused.

ROGERS L. & M. WORKS v. SOUTHERN RAILROAD ASS'N.

(Circuit Court, S. D. New York. March 12, 1888.)

RAILROAD COMPANIES—BONDS OF MORTGAGES—POWER TO GUARANTY BONDS OF OTHER COMPANIES.

A railroad corporation, which has power by its charter to issue its own bonds, has power to guaranty the bonds of another railroad corporation, which it receives in payment of a debt due to it, and which it sells for value, or transfers in payment of its own debts, the guaranty being given as the means of augmenting the credit of the bonds, or to enable it to obtain an adequate price for them.

At Law.

Benj. H. Bristow, Anthony Higgins, and David Wilcox, for plaintiff.
Bangs & Stetson, for defendant.

SHIPMAN, J. This is an action at law, in which, by written stipulation signed by the parties, a jury was waived, and the cause was tried by the court. Upon such trial the following facts were found to have been proved, and to be true: The averments of the first, second, third, fourth, fifth, sixth, seventh, and ninth paragraphs of the complaint are true, except that the guaranty described in the seventh paragraph was not indorsed upon the bonds by resolution of the stockholders of the defendant, and with the omission of the words "for good and valuable consideration" in said paragraph. The facts in regard to the consideration for the said guaranty are hereinafter specially stated. The Mississippi Central Railroad Company, hereinafter called the "Mississippi Company," had become indebted to the defendant before January 26, 1874, in a large amount, for advances which were made to said company for the purpose of completing its road. In settlement of that debt the said Mississippi Company delivered to the defendants its coupon bonds, for the sum of \$1,000 each, known as "Income and Equipment Bonds," to the amount of \$5,000,000. These bonds include the 447 bonds which are particularly described in the complaint. At a meeting of the directors of the defendant, held on January 26, 1874, the following resolutions were unanimously adopted:

"Resolved, that when the said bonds are delivered to this company by the said the Mississippi Central Railroad Company, the corporate seal of this company, attested by the signatures of the president and secretary, be affixed to a

guaranty to be indorsed on each of the said five thousand bonds in the following form: 'For valuable consideration the Southern Railroad Association guaranties to the holder of the within bond the punctual payment of the principal and interest thereof when and as the same shall fall due, according to the terms and promises of the said bond. Witness the corporate seal of the said company, this 26th day of January, A. D. 1874.'

"Resolved, that the treasurer of this company be authorized to appropriate such number as may be required of the said bonds which shall have been taken by this company on account of advances made to the Mississippi Central Railroad Company, to the purchase of from twenty-eight to thirty thousand (28,000 to 30,000) shares of the capital stock of the New Orleans, Jackson & Great Northern Railroad Company; provided, that in making the said purchase the bonds, with the coupon of 1874 detached, be taken at par, and the price of the shares not to exceed seventy-five dollars per share for the full-paid shares of one hundred dollars each."

Said guaranty was thereupon indorsed upon each of said \$5,000 bonds.

At a meeting of the stockholders of the defendant, on June 22, 1874, at which meeting 18,798 of the 20,000 shares into which the capital stock of the defendant was divided was represented, the proposed consolidation of the Mississippi Company with the New Orleans Company under the name of the New Orleans, St. Louis & Chicago Railroad Company, hereinafter called the "St. Louis Company," was approved, and it was voted that the executive officers of the defendant sell to said last-mentioned railroad company their interest in the lease of the Mississippi Company, upon such terms and on such conditions as may be agreed upon. The following preamble and resolutions were adopted:

"Whereas, it is advisable to raise the sum of eight hundred thousand dollars to pay the floating indebtedness of this company, and it is believed that the object can be attained most advantageously for the interests of the stockholders of this company by offering to each one the option or privilege of purchasing certain of the assets of this company at a price sufficient to secure the required sum: Therefore, be it resolved—*First*. That each stockholder of this company who shall, before the 1st day of July next, pay to the treasurer of this company, either in cash or in the notes or obligations of this company, a sum equal to forty per cent. of the par value of the stock of this company standing in the name of such stockholder on the first day of July, 1874, shall be entitled to receive mortgage bonds of the Mississippi Central Railroad Company of the issue known as the 'Consolidated Mortgage Gold Bonds,' to an amount equal at the par thereof to the said payment, and also mortgage bonds of the said Mississippi Central Railroad Company of the late issue, known as 'Income and Equipment Bonds,' to amount equal at the par thereof to the amount at par of the stock of this company standing in the name of such stockholder on the books of this company at the closing of the books on the first day of July, A. D. 1874. *Second*. That the secretary be directed to forward a copy of the above resolution to each of the stockholders of this company."

The plaintiff was the owner of 2,767 shares of the capital stock of the defendant, which stood in the name of Jacob S. Rogers, and Jacob S. Rogers, trustee. Mr. Rogers was president of the plaintiff, and was one of the directors of the defendant, and was present at the directors' meeting of January 26, 1874, and at the stockholders' meeting of June 22, 1874. After June 22, 1874, the defendant, for value, transferred and

delivered 220 of said income bonds, guarantied as aforesaid, to the St. Louis Company, and said company thereafter, for value, transferred and delivered same 220 bonds to the plaintiff, which still holds and owns the same. One hundred and forty of said bonds were numbered 4,361 to 4,500, to each of which said numbered bonds were and are attached 18 coupons beginning with coupon No. 5, falling due January 1, 1876, and including coupon No. 22, falling due December 1, 1884, the date of the maturity of the bonds. The residue of the said 220 bonds were numbered 4,501 to 4,580. To each of said last-mentioned and numbered bonds were and are attached 19 coupons, beginning with coupon No. 4, falling due December 1, 1875, and including coupon No. 22, falling due as aforesaid. Pursuant to the said resolutions of June 22, 1874, and after said date, the said Rogers, acting in behalf of the plaintiff, elected to pay the defendant 40 per cent. assessment upon the whole or a portion of its stock; and the plaintiff paid the same by surrendering to the defendant its notes for \$90,680, which had been given by the defendant to the plaintiff for locomotives bought by the defendant, and the plaintiff thereupon received from the defendant consolidated bonds of the Mississippi Company to the amount of \$90,000, and income and equipment bonds of said company to the amount of \$226,700, being bonds numbered 3,501 to 3,726, inclusive, and \$700 of bond No. 4,598. The additional \$300 of the latter bond was acquired by a purchase for cash of scrip to that amount. To each of said bonds were and are attached 20 coupons, beginning with coupon No. 3, falling due June 1, 1875, and including coupon No. 22, falling due December 1, 1884. The plaintiff still owns said bonds and coupons. To each of said bonds said guaranty was attached. On June 22, 1874, and subsequently, the consolidated bonds of the Mississippi Company had a market value, but as they were not listed upon the New York Stock Exchange, their value is not now easily ascertained. Testimony was given that a quantity of these bonds was sold in February, 1874, at 85½ per cent. to another railroad company, which was assisting in building an extension of the defendant's railroad system for the purpose of enabling its own railroad to reach New Orleans. This cannot be considered as evidence of the market value of said bonds. I find that the bonds had a substantial market value, but I am unable to ascertain the price at which they could have been sold for cash. I find that in the sale of the income bonds to the stockholders the guaranty of the defendant was not a portion of or an incident of the property which was sold, and in and by the sale it was not understood that the purchasing stockholders were to receive and have the benefit and the promise of the guaranty. And further find that in the sale of the income bonds to the St. Louis Railroad Company the guaranty was an incident of and a valuable part of the property which was sold. The reasons for the difference in the findings with respect to the two sets of bonds are given hereafter.

The conclusions of fact and of law upon the foregoing findings of fact are as follows: The defendant corporation, which has power by its charter to issue its own bonds, has the power to guaranty the bonds of an-

other railroad corporation, which it receives in payment of the debt to it of said last-named railroad corporation, and which bonds it sells for value, or transfers in payment of its own debts; said guaranty being given as the means of augmenting the credit of said bonds, and enabling the defendant corporation to obtain an adequate price or equivalent for them. *Railroad Co. v. Howard*, 7 Wall. 392; *Arnot v. Railway Co.*, 67 N. Y. 315. The guaranty was originally placed upon the bonds for the purpose of augmenting their value, and enabling some of them to be used towards the purchase of the stock of the New Orleans Railroad. It is not important whether, when the guaranty was actually written upon the bonds, a consideration had been received for the promise, because whenever the bonds were thereafter sold to a *bona fide* purchaser, for value, or transferred in payment of the debts of the guarantor, the defendant had the legal right to guaranty their payment; and the bonds being delivered with the guaranty upon them, and no evidence existing, either in the nature of the transaction or from any other quarter, that the guaranty did not pass with the bonds as a part of the purchase, it is to be treated as if it was written at the time of the sale. *Arnot v. Railway Co.*, *supra*. It follows that the defendant is liable upon its guaranty of the 220 bonds which were sold or transferred for value to the St. Louis Company, and were afterwards transferred, for value, to the plaintiff. There was no infirmity in the title of the St. Louis Company to the bonds, and no lack of power in the defendant to give the guaranty. The same result would follow in respect to the 227 bonds which were delivered to the plaintiff, if the guaranty did in fact pass with the bonds as a part of the purchase. If, in the absence of fraud, the defendant sold and the plaintiff bought a guaranteed bond, the defendant would be liable upon the guaranty, although it had made an improvident bargain. The question of fact is whether the guaranty was sold with the bond, and arises between the purchasing stockholder and the selling corporation. No question of law exists as to the rights of a purchaser from the stockholder.

The defendant was in pecuniary straits, and owed a floating debt of \$800,000. It had as or among its assets consolidated bonds of the Mississippi Company, which had a substantial value, and were worth, perhaps, 50 cents on the dollar; and had also the income bonds of said company, which were worth very little without the guaranty of the defendant. To its stockholders, who would advance a sum equal to 40 per cent. of the par of their stock, it offered to transfer consolidated bonds equal in amount to the cash payment, and income bonds equal to the par of the stock. Thus, in addition to the consolidated bonds, the stockholders would receive income bonds of twice and one-half the amount of his cash payment, and, if the guaranty passed with the bonds, the defendant obliged itself, in order to pay a floating debt of \$800,000, to pay \$2,000,000 at 7 per cent. interest. Instead of owing \$800,000, it owed \$2,000,000, and had parted also with a valuable portion of its assets. The idea that the transfer of the guaranteed bonds was a gift to the stockholders is unworthy of credit. The transaction was a sale,

with or without the guaranty; and the fact that the guaranty was not erased when the bonds were delivered raises a strong presumption that it was intended to be annexed, and to be a continuing obligation of the seller. This presumption is attacked by the inherent improbabilities of such a transaction, and by the fact that the resolutions which authorized the sale were silent in regard to the guaranty, a circumstance which furnishes no affirmative evidence on the subject. It is not credible that the defendant entered into the sale with the belief that it was undertaking to deliver guaranteed bonds. Such a transaction would be too improvident, and too nearly akin to fraud upon any non-assenting stockholder, to commend itself to the judgment of the stockholders, and strong proof is required to compel a finding that they were willing to imperil the existence of the company by such a ruinous agreement. Notwithstanding the fact that the guaranty was not erased, and was delivered with the bonds, I am not able to believe that the contract of sale, as between the stockholders and the corporation, was that of a guaranteed bond, but rather that the existence of the guaranty was deemed to confer no rights upon the stockholder against the company. I cannot find that a sale, which was made for the ostensible purpose of paying a debt of \$800,000, was intended to increase it to \$2,000,000, and bound the seller to the payment of the latter sum.

Judgment is ordered to be entered for the plaintiff for the amount due upon the 220 bonds numbered from 4,361 to 4,580, inclusive, and upon the unpaid coupons attached thereto, and the interest thereon, and the interest upon the principal sum after the maturity of said bonds.

PEARCE v. HUMPHREYS *et al.*

(Circuit Court, E. D. Michigan. March 12, 1888.)

RAILROAD COMPANIES—LIABILITIES FOR NEGLIGENCE—ACCIDENTS AT CROSSINGS.

Plaintiff was driving a truck along a private way through defendant's yard, which was commonly used by teams in going to and from an elevator, and which crossed a large number of railway tracks. His view of the main track used by passenger trains was obstructed by a line of freight cars standing upon the next track, which had been opened at the crossing of the private way to form a passage for teams to cross the tracks. Plaintiff was about to cross the main track. He did not stop, but listened for the approach of trains. Hearing no signal, he attempted to cross, but was struck by an engine which had just left the passenger station, and was proceeding at a speed of 10 or 12 miles an hour. There was evidence that there was no signal given of its approach. *Held*, that the question respectively of the negligence of the plaintiff and defendants was properly submitted to the jury.¹

(*Syllabus by the Court.*)

¹On the general subject of the duty of a traveler approaching a railroad crossing, see *Durbin v. Navigation Co.*, (Or.) 17 Pac. Rep. 5, and note. As to the duty of railroad companies at crossings, see *Railroad Co. v. Schuster*, (Ky.) 7 S. W. Rep. 874, and note.

On Motion for a New Trial.

This was an action by Herbert Pearce, for personal injuries received in the yard of the Wabash Railway Company in Detroit, of which company the defendant Solon Humphreys and another were the receivers. Plaintiff was the driver of a pair of horses attached to a heavy truck, which he had driven into defendant's yard to deliver some tobacco at the freight depot. A surveyed plan of the yard produced in court shows it to be a parallelogram; upon the north side of which is Woodbridge street, the east side Twelfth street, and the south side the Detroit river. The freight depot at which the tobacco was delivered was in the south-easterly corner formed by Twelfth street and the river, and access to the depot is afforded by a drive-way leading from Twelfth street along-side the freight house. The yard extends to the west some 2,000 feet, with some 20 tracks, and near the westerly end, and about 1,700 feet from the freight-house, there is an elevator, and a private way leading northerly from the elevator across the tracks to Woodbridge street, this way being nearly parallel with Twelfth street, and about 1,700 feet distant. Freight cars standing upon the tracks are opened at this private way, which was used solely for the convenience of persons doing business at the elevator, and was maintained by the elevator, and not by the railway. Plaintiff drove into the yard by the way of Twelfth street, delivered his freight at the freight house, but instead of turning about and coming out by the way he came in, drove westward through the yard, parallel with the tracks, until he reached the private way running from the elevator northerly to Woodbridge street, when he turned northerly upon this road between the cars of a divided freight train, and, while passing across the main track, was struck by a locomotive coming down from the passenger station, which was also upon Twelfth street. He did not stop before crossing the track, but listened as he approached it. The evidence tended to show that he could not have seen a train coming down from the station if he had stopped, by reason of the intervening line of freight cars.

Plaintiff recovered a verdict for \$500, and motion was made for a new trial, upon the ground that the accident was the result of his own negligence. The case was argued before the circuit and district judges.

Israel T. Cowles and Isaac Marston, for plaintiff.

Alfred Russell, for defendants.

BROWN, J., (*after stating the facts as above.*) The testimony leaves no doubt in my mind that plaintiff was guilty of negligence in not returning to Woodbridge street by way of Twelfth street as he had entered. It was not only the proper and safer route, but it was actually shorter than the one he took; and if, in driving along parallel with the railroad tracks, and before reaching the private way to the elevator, he had met with an injury, I should have regarded his taking this route as contributing to the accident; but as he met with the injury after he had reached and taken the private way from the elevator, I do not feel at liberty to inquire how he came there. In other words, his negligence had ceased

to operate before he crossed the track, and cannot therefore be considered as the proximate cause of the accident. Applying the rule laid down in *Railroad Co. v. Kellogg*, 94 U. S. 469, it does not appear to me that the injury was the natural and probable consequence of this negligence or wrongful act, or that it ought to have been foreseen in the light of the attending circumstances. From the moment he reached the private way and turned northward, he was as much entitled to be protected against the negligence of the company as if he had originally started from the elevator. The case of *Daniels v. Ballantine*, 23 Ohio St. 532, is an excellent illustration of this principle. In that case a tug which had taken a barge under an agreement to tow her from Saginaw to Buffalo, delayed unnecessarily in the St. Clair river. After resuming her voyage the barge was lost in Lake Erie. Although it was shown that if the tug had not delayed the loss would probably not have occurred, the court held that the deviation was not the proximate cause of loss, although it would have been otherwise, if the loss had occurred during the deviation. Other cases of a similar character are *Railroad Co. v. Reeves*, 10 Wall. 176; *Morrison v. Davis*, 20 Pa. St. 171; *Denny v. Railroad Co.*, 13 Gray, 481.

The main questions in this case are—*First*, whether there was negligence on the part of the engineer in proceeding too fast, and in failing to ring his bell; and, *second*, whether there was contributory negligence on the part of the plaintiff in crossing the track without using sufficient care to ascertain whether there was a train approaching. The road upon which the accident occurred, though within the yard of the defendants, was a well-recognized way from the elevator to Woodbridge street, laid out, cindered, and planked, and in constant use by teams going to and from the elevator. If not originally designated and laid out by the railroad company, it had been done with the consent of its officers, and they were accustomed to open their trains at the crossing of this road, so as to leave a free and unobstructed access to the elevator. At the time the accident occurred, the track next south of the one on which the plaintiff was injured was occupied by a line of freight cars, which had been opened at the crossing of the road just wide enough for teams to pass. The view towards the station from which the locomotive started was concealed, or at least obstructed, by this train of cars. Under these circumstances, I do not think that plaintiff can be considered as a trespasser in making use of this road. *Delaney v. Railway Co.*, 33 Wis. 67. And defendants were bound to the exercise of ordinary care and prudence to make their premises safe for the use of teams. *Cooley*, Torts, 607; *Bennett v. Railroad Co.*, 102 U. S. 577, 585; *Railroad Co. v. Stout*, 17 Wall. 657; *Elliott v. Pray*, 10 Allen, 378. Now, while there is no statutory obligation to ring a bell at a crossing within the company's yard, I consider it a question for the jury whether, in this case, there was due care exercised in running this locomotive at a speed of 10 to 12 miles an hour behind this line of freight cars, and crossing this road without giving any notice of its approach. I understand that where the view of the track from a highway is obstructed, or when, for any reason, there is difficulty

in seeing an approaching train, this is a circumstance which demands of the engineer the exercise of increased vigilance. Beach, Cont. Neg. 200. The existence of the road, and of its constant use, and the fact that a team might approach the track from the southward, where the view of the main track was obstructed, were well known. A locomotive moving at the rate of 10 miles an hour might not of itself make sufficient noise to attract attention, and I think it is not demanding too much of the company to require either that the engineer proceed at a very low rate of speed, or ring the bell while approaching this road; at least it was a question for the jury, and they have found this fact adversely to the defendants.

I also think the question of contributory negligence was one for the jury. Plaintiff says he listened for the train as he approached the track, but heard nothing. Had he been on foot, I should have held without hesitation that it was his duty to stop and look before crossing the track. *Pzolla v. Railroad Co.*, 54 Mich. 273, 20 N. W. Rep. 71. He was, however, driving a team of horses. If he had stopped before the horses reached the track, it is at least doubtful whether he could have seen anything, owing to the intervening line of freight cars, and while so standing still would have been exposed to injury from cars passing upon tracks to the southward of the main track. It would evidently have been of no avail to stop after the horses had begun to cross the track. It is difficult to see what more he could have done, unless it was to get out of his wagon, and go forward on foot for the purpose of looking; but this he was not obliged to do, particularly in view of the fact that he would have had to leave his team standing upon the track south of the line of freight cars. It is true, it was held in the case of *Railroad Co. v. Beale*, 73 Pa. St. 504, that if a traveler cannot see a track by looking out of the carriage he should get out and lead his horse, but I think this case is opposed to the great weight of authority, and particularly to the cases of *Mackay v. Railroad Co.*, 35 N. Y. 75, and *Davis v. Railroad Co.*, 47 N. Y. 400. The circumstances may be such as to require a driver to stop his team and listen,—as where a highway is approached through a deep cut obstructing the view,—but I do not think that applies to a case of this kind, where the plaintiff is crossing a large number of tracks laid close together, and where a train is liable to approach at any moment upon either one of them. Upon the whole, I think the question of the respective negligence of the two parties in this case was properly submitted to the jury, and that a new trial should be denied.

JACKSON, J., (*concurring*.) While this is a close case, I am of the opinion that the facts do not disclose such a clear case of negligence on the part of the plaintiff as to warrant the court in taking the question of negligence from the jury, or in holding as matter of law that the plaintiff could not or should not recover for the injury sustained. His injury was not an unavoidable accident. It was clearly the result of negligence; but, under the facts and circumstances of the case, the trial judge could not properly say, as matter of law, that the negligence which caused the

injury rested with plaintiff solely or chiefly, or to such an extent as to defeat his right of recovery. The roadway on which he was driving was known to and its use sanctioned by the defendants, and to cross that roadway at such a rate of speed as 10 or 12 miles an hour without giving any signal or warning of the approaching train, was not the exercise of reasonable and proper care on the part of defendant's employes in charge of such train. Whether this failure to exercise proper care in crossing this roadway, or the plaintiff's want of proper caution in crossing the track, caused the injury, was, under the facts of the case, a question of fact to be determined by the jury. I concur with the learned district judge in the opinion that the question of negligence was properly left to the jury, and in the conclusion reached by him that there should be no new trial in this case.

MAXWELL v. ATCHISON, T. & S. F. R. Co.

(Circuit Court, E. D. Michigan. March 19, 1888.)

1. CONTRACTS—ACTION FOR BREACH—JURISDICTION.

A cause of action upon a contract arises, not in the state where the contract is made, but where it is broken.

2. RAILROAD COMPANIES—ACTIONS—SERVICE OF PROCESS.

In an action against a railway corporation of another state, service of process cannot be made upon a passenger agent whose sole duty it is to solicit travel for the defendant road, notwithstanding he may have been employed to effect a compromise of plaintiff's claim.

3. COURTS—FEDERAL JURISDICTION—TORTS—AMOUNT IN CONTROVERSY—ACT OF 1875.

It seems that under the act of 1875, even in actions of tort, if it appears clearly from the plaintiff's own statement or the testimony of his witnesses that a verdict for \$2,000 would be so excessive as to require the court to set it aside, and grant a new trial, it is its duty to dismiss the case for the want of jurisdiction.

(Syllabus by the Court.)

At Law. On demurrer to replication.

This was an action of trespass upon the case to recover damages for the alleged expulsion of the plaintiff from one of defendant's passenger cars within the state of Kansas. Plaintiff, who is a resident and citizen of this county, bought from the Wabash Company, in Detroit, a ticket for Denver, Colo., and return. This ticket was composed of several coupons, one of which entitled him to be transported over the railroad of the defendant in the state of Kansas. His expulsion took place on his return from Denver. Defendant pleaded to the jurisdiction of the court: *First*. That defendant is a corporation organized under the laws of Kansas, and has no agent within this state upon whom process could be lawfully served; that George E. Gillman, upon whom such process was served, has desk-room, for which this defendant pays, in a coal office in this city, and has merely authority to solicit persons intending to travel in Kansas to patronize the defendant road; that he has no authority to

sell tickets, and is not clothed with any agency whatever from this defendant, except as such solicitor. *Second*. That the ejection of the plaintiff charged in the declaration took place in the state of Kansas; that Gillman did not solicit the plaintiff to travel upon the defendant road, and neither the purchase of the ticket nor the cause of action grew out of the agency of said Gillman as passenger agent. To this plea plaintiff replied—*First*, that Gillman was an agent of the defendant within this state, and was represented by the defendant upon one of its printed folders as a “passenger agent,” and that the defendant recognized Gillman as such agent by authorizing him to compromise this suit against it for a specified sum; and, *second*, that the cause of action did accrue to the plaintiff within the state of Michigan, because the contract was made with the defendant’s agent by the purchase of a ticket in Detroit to Denver and return, and was a continuing contract upon which a transitory action arises. Defendant demurred to this replication, and plaintiff joined in the demurrer.

Sylvester Larned and D. A. Straker, for plaintiff.

Alfred Russell, for defendant.

BROWN, J., (*after stating the facts as above*.) Two questions are presented by the pleadings in this case: *First*, whether Gillman was such a representative or agent of the defendant company that such company can be said to be “found” within this district, within the meaning of the act of congress; *second*, whether this court has jurisdiction of an action for a trespass committed upon the plaintiff in another state. The defendant is a corporation organized under the laws of Kansas, and its several lines of railway run westward from the Missouri river. It was represented in Detroit by one Gillman, who is described upon its folders as a “passenger agent.” His business is to solicit passengers for the defendant, but he has no authority to sell tickets. He also seems to have been employed by the defendant to effect a settlement of plaintiff’s claim, and, in pursuance of his instructions, made an offer of compromise. It does not appear to me that the law of this state with respect to suits against foreign corporations (How. St. § 8145) cuts any figure in the case, since it provides for service of process upon the agent of a foreign corporation only where the cause of action arises within this state. I am clearly of the opinion that the cause of action arises, not where the contract is made, but where it is broken; and that, as the expulsion of the plaintiff took place in the state of Kansas, the cause of action must be deemed to have arisen there. But, in addition to that, the statute provides that service may be made upon any officer or agent of the corporation; and the question who shall be deemed an “agent” within the meaning of the statute is left an open one, to be determined irrespective of the statute.

The general rule appears now to be well settled that a foreign corporation may be sued within any jurisdiction wherein it carries on an important part of its business. Where, under the laws of the state, it is required as a condition of doing business within the state that it shall appoint an officer or agent upon whom process may be served, such cor-

poration is always treated as "found" within the state within the meaning of the judiciary act; and suits in the federal courts may be instituted by service upon him. *Ex parte Schollenberger*, 96 U. S. 369; *Brownell v. Railroad Co.*, 3 Fed. Rep. 761; *Runkle v. Insurance Co.*, 2 Fed. Rep. 9; *Knott v. Insurance Co.*, 2 Woods, 479; *Fonda v. Assurance Co.*, 6 Cent. Law J. 305. On the other hand, when an officer of a foreign corporation is temporarily visiting or traveling within the state, it is equally well settled that service of process against the corporation cannot be made upon him if the corporation is not actually doing business within the state. *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. Rep. 354; *Newell v. Railway Co.*, 19 Mich. 336. What is the character or amount of business which the corporation must do to subject its agent to the service of process within the foreign state, is left in some doubt by the authorities. If it have an office for the general transaction of its business,—the sale of its goods, if it be a manufacturing corporation; or the making of contracts, and the receipt of freight and passengers for transportation, if it be a railroad,—it would appear to be sufficient. *Hayden v. Mills*, 1 Fed. Rep. 93; *Railroad Co. v. Harris*, 12 Wall. 65, *Railroad Co. v. Cram*, 102 Ill. 249; *Libbey v. Hodgdon*, 9 N. H. 394. So it was held that the circuit court of Illinois had jurisdiction of an action against a beef-canning corporation organized under the laws of Missouri, which owned a slaughter-house and stock-yard within the state of Illinois, where beef to be canned was slaughtered and dressed for and in the name of the company. *Packing Co. v. Hunter*, 7 Reporter, 455. So in *Williams v. Transportation Co.*, 14 O. G. 523, it was held that the station agent of a foreign transportation company was a representative upon whom process might be served, though he had nothing to do with the construction or operation of the cars, nor with the running of the same; his duty being merely to keep the books of the company, to collect the amount due for freights received and shipped, and to make returns of the same to the office of the company at Philadelphia. In that case the state law provided that actions might be brought against foreign corporations by service of process upon any officer, director, agent, clerk, or engineer. The same principle has been applied to foreign insurance companies having an agent within the jurisdiction of the court, with power to receive premiums and issue policies. *Moch v. Insurance Co.*, 10 Fed. Rep. 696; *Moulin v. Insurance Co.*, 25 N. J. Law, 57; *Michael v. Insurance Co.*, 10 La. Ann. 737. Upon the other hand, if the agent be a local one, with authority only to receive applications and give receipts for the same, it has been held that service upon such agent is insufficient to bind the corporation. *Weight v. Insurance Co.*, 30 La. Ann. 1186.

Much the strongest case in favor of the plaintiff is that of *Block v. Railroad Co.*, 21 Fed. Rep. 529. This was also an action for an injury received in Kansas through the negligence of this same defendant. The defendant's road did not run into the jurisdiction, but it had an office in Kansas City and St. Louis. Service was made upon the officer in charge of the company's office at St. Louis. Judge BREWER held that as the corporation had an established business office and agency within the dis-

strict, and an agent employed for the purpose of furthering the transportation business of the corporation, the corporation might be considered as found wherever such office and agency was established. By reference to the folders of the company, it will appear that these were general agents, with authority to make contracts and sell tickets for the company, and not mere solicitors of business, as in this case. In England the rule is that if the foreign corporation has a place of business, or a subordinate board of directors acting for the corporation in England, it may be sued there. *Newby v. Manufacturing Co.*, L. R. 7 Q. B. 293. The English courts, however, are less liberal in their application of this rule than our own. By statute, process against private corporations must be served upon the head officer, clerk, treasurer, or secretary; and in *Mackereth v. Railway Co.*, L. R. 8 Exch. 149, it was held that service upon a ticket agent of a Scotch railway at Carlisle was insufficient to charge the corporation, notwithstanding it ran its cars into the railway station at that place.

The general subject of the power of the federal courts to entertain suits against foreign corporations received a very exhaustive consideration by Judge JACKSON in *U. S. v. Telephone Co.*, 29 Fed. Rep. 17. This was a bill in equity against the Bell Telephone Company. The marshal returned service of process by delivering a copy of the subpoena to the vice-president of the Cleveland Telephone Company, such company being an agent and partner of the Bell Telephone Company within the Northern district of Ohio. The learned judge held the service to be insufficient, and in delivering the opinion observed—

“That, in the absence of a voluntary appearance, three conditions must concur or co-exist in order to give the federal courts jurisdiction *in personam* over a corporation created without the territorial limits of the state in which the court is held, viz.: *First*, it must appear as a matter of fact that the corporation is carrying on its business in such foreign state or district; *second*, that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such state; and, *third*, the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there as a condition, expressed or implied, of doing business in the state.”

It is evident that this ruling is fatal to the maintenance of the case under consideration, inasmuch as by the state law jurisdiction is given over foreign corporations only where the cause of action arises within this state. I have already held that the cause of action in this case arose within the state of Kansas. But even if it be conceded that jurisdiction might be maintained, irrespective of the state statute, wherever service could be made upon an authorized agent of the corporation, it does not seem to me that the business which the defendant carried on in this state was of such a character as to make it amenable to suits within this jurisdiction. Gillman was not an officer and managing agent, or even a ticket agent of the company. He had no independent office or place of business, but simply occupied a desk in a coal office. His authority was limited to soliciting business,—to turning, as far as he could, the tide of western travel over the defendant road. In fact, he was a mere runner.

From the folders of the company it appears that it has agents of this description in at least a dozen different states. If it can be sued in this state for a cause of action arising in Kansas, it is equally amenable to suit in any one of these states in which it may happen to have a passenger agent for soliciting business. It would, in my opinion, be an unwarranted extension of the law of constructive presence to hold the road liable to suit in all these different states as a corporation inhabitant or found therein. The same principle would make every manufacturing or trading corporation liable to suit in any state in which it sent a commercial agent or "drummer" to solicit patronage.

There is another point with respect to our cognizance of this case, which does not properly arise upon these pleadings, but may perhaps be alluded to here in view of the facts stated by counsel upon the argument. I have grave doubt whether the amount of damages is sufficient to give the court jurisdiction. While the general rule announced in *Gordon v. Longest*, 16 Pet. 97, is unquestioned, that in actions of tort the amount claimed in the declaration is the test of jurisdiction, this case must be construed in connection with the act of 1875, the fifth section of which makes it the duty of the court to dismiss the case when it shall appear to its satisfaction that the suit does not really and substantially involve a dispute or controversy properly within its jurisdiction. This duty was dwelt upon and enforced in the case of *Williams v. Nottawa*, 104 U. S. 209. I have had frequent occasion to apply this rule in actions upon contract, and also in actions of ejectment, where it clearly appeared that the value of the land in controversy was less than the minimum jurisdictional amount. I know of no reason why the same rule should not be applied in actions of tort, except that in such cases the damages are not susceptible of mathematical computation, and are more largely in the discretion of the jury than in actions upon contract. I apprehend, however, there is still some discretion in this class of cases. Suppose an action were brought for a manifestly trivial injury, such as a bruise or a sprained ankle, and the court can see that by no possibility could a verdict for \$2,000 be sustained,—I know of no reason why it should not refuse cognizance of the case, and remit the parties to their proper forum. Indeed, it seems to me that wherever it appears clear from the plaintiff's own statement, or the testimony of his witnesses, that a verdict of \$2,000 would be so grossly excessive as to require the court in the exercise of its judicial discretion to set it aside, and direct a new trial, it is equally its duty to dismiss the case for want of jurisdiction. In the case under consideration the plaintiff was not actually ejected from the cars. The conductor refused to receive his ticket, and threatened to eject him, but after some trouble and delay he succeeded in borrowing \$15 from a fellow-passenger, with which he paid his fare to Detroit, and was permitted to continue upon the same train. He was undoubtedly subjected to some inconvenience from his inability to procure food. He alleges, and I am bound to presume, that he suffered from the pangs of hunger; at the same time, upon his own statement, it appears to me exceedingly improbable that he could obtain a verdict for \$2,000, and equally improb-

able that such a verdict could be sustained, if it were rendered. It is not necessary, however, to pass upon this question. I make the suggestion, rather, as an intimation of what I propose to do in cases of this description. The time of the court is largely taken up in the trial of negligence cases in which the amount recovered is less than \$1,000; and the only penalty seems to be that a party shall not recover costs, if the amount of the verdict be less than \$500, unless there is power to apply the summary remedy which I have indicated. This power I propose to exercise where it clearly appears to me that the action should not have been brought here.

An order will be entered sustaining the demurrer to the replication, for the reason that the defendant was not found within this district.

ÆTNA LIFE INS. CO. v. AMERICAN SURETY CO.

(Circuit Court, D. Connecticut. March 21, 1888.)

1. BONDS—SURETY COMPANIES—MISREPRESENTATIONS—PREVIOUS DEFALCATIONS.

P., the general agent of a life insurance company, having, on his own motion, applied to plaintiff, a surety company, to go on his bond, that company forwarded to the secretary of the insurance company a certificate which, when filled out and signed by him, recited that the agent, "so far as the secretary's knowledge went," had always faithfully performed his duties, and that he was not then "in arrears or default." It also stated that his accounts "were last examined June 18, 1884, and found to be correct in every respect." This certificate bore date June 16, and the bond June 15, 1884. As a matter of fact P. was then in the company's debt \$150, on a draft which he had drawn on the company in March, 1884, and which it had paid, but had required an explanation, and demanded repayment. He had had correspondence with the secretary about renewal receipts, the natural inference from which was that the money which they called for, had been paid. The company did a very large business, its cash premium income for 1884 being about \$2,400,000; and P.'s agency was a comparatively small one. It was also its practice to leave accurate investigation of such agencies until the annual examination, which was had in December. *Held*, that the unpaid draft was not "arrears or default" within the meaning of the certificate, which referred to collection accounts, and that the secretary was not guilty of such laches as would discharge the surety company from liability on the bond for a subsequent defalcation.

2. SAME—EXISTING ACTS OF OMISSION.

The practice of an insurance company required its general agents to remit or account for all moneys during the next succeeding month. Renewal receipts, however, could be held for 60 days after premiums thereon were due, and were often retained by agents longer without objection. P., an agent appointed April 2, 1883, began making defalcations May 15th following, his system being to postpone his monthly accounts as long as he could, and to apply recent payments to old debts. This was kept up until December 4, 1884, when he was discovered, and found to be in arrears \$8,041.94, of which amount \$2,823.80 had been collected after June 15, 1884. On that day (June 15th) P., on his own motion, procured a bond from a surety company, one provision of which was that the insurance company should notify the surety of any act of omission or commission on the part of P. which "may involve a loss for which the surety is responsible hereunder." P. thereafter continued the same system; sending his June report August 4th, his July report August 24th, and his August report September 29th. He was written to October 1st,

his attention called to the matter, and an explanation demanded. He thereupon returned, about October 8th, a list of outstanding renewal receipts, and in his September report, which was sent October 29th, accounted for all the older collections. His October report came in November 14th, and contained nothing but September collections. The insurance company did a very large business, and P.'s agency was a small one, the accurate investigation of which it was the custom to leave until the annual examination, which took place in December. *Held* that, the company was not guilty of laches in not communicating P.'s delays to the surety company.

8. SAME—CONCURRENT BONDS.

A general agent of a life insurance company, who had, April 1, 1884, delivered to it a bond for the faithful performance of his duties so long as he should continue in that office, procured and handed over June 15, 1884, another bond of similar purport for one year, which the company accepted with the understanding that liability thereunder was limited to defalcations committed during that time. The old bond, however, was retained. One provision of the new bond was to the effect that if the company should hold, concurrently with it, any other bond, the loss, if any, should be apportioned. *Held*, that as to any loss resulting between June 15, 1884, and June 15, 1885, the two bonds were not concurrent, and that the last bond could be proceeded against for the whole.

4. SAME—DATE WHEN LIABILITY COMMENCES.

The bond of a general agent of an insurance company bore date June 15, 1884, but was not delivered to and accepted by the insurance company until July 29th following. The certificate as to character of the agent, which had previously been submitted to the secretary of the company, contained a blank which was to be filled in by him so as to state when the bond was to be dated, and in this blank he had written "June 15, or June 16, 1884." The bond itself declared that it was made June 15, 1884, and was in consideration of a premium for the term of 12 months ending June 15, 1885. *Held*, that the liability of the surety on the bond accrued, by relation, as of its date.

At Law. Trial by the court.

Charles J. Cole and Charles E. Perkins, for plaintiff.

Theodore M. Maltbie and Wm. Hamersley, for defendant.

SHIPMAN, J. This is an action at law, in which, by written stipulation signed by the parties, a trial by jury was waived, and the cause was tried by the court. Upon such trial, the following facts were found to have been proved and to be true: James N. Patrick was, on April 2, 1883, appointed by the plaintiff, a duly incorporated life insurance company, located in and having its principal office in Hartford, Conn., its general agent to procure applications for insurance for it in the state of Missouri, excepting one county; to receive premiums upon all policies issued upon such applications; to collect premiums upon renewals of the same, and to collect renewal premiums on existing policies issued by said company in said territory. He agreed to account to said company on or before the 10th day of each month, or at any other time when required, for all premiums received by him or his agents, and remit the amount of the same, less the charges to which he was entitled by the agreement, and to give a bond to the company for \$3,000, with good and satisfactory surety, for the faithful performance of his duties, and to renew and increase the same as might be desired. It was further agreed that the contract could be terminated after one year from its date, by either party, upon not less than 60 days' notice to the other of such proposed termination. By the rules of the plaintiff which existed at the

date of Patrick's appointment, and which continue to exist, all moneys which are received by an agent during each month are to be remitted; less charges, to the plaintiff, with his account, on or before the 10th of the succeeding month. By the practice of the plaintiff, the requirement that the account should be sent as early as the 10th of each month is not insisted upon; but the requirement that all moneys received during the preceding month should be remitted or accounted for in the next month, is imperative. The plaintiff always sends during each month to each general agent renewal receipts for the premiums becoming due during the succeeding month upon policies of insurance to persons within his territory, and such renewal receipts are charged to the respective agents to whom they are sent. This charge is a matter of book-keeping, and does not imply that the agent is indebted to the company for the amount of the receipts which are sent him. By the rules of the plaintiff, if a renewal premium was not paid when due, the policy lapsed, but, if satisfactory evidence was furnished that the person whose life was insured was in good health, and was acceptable, the agent might receive the premium, and deliver the receipt within 60 days from the time when the premium became due, and the insurance would be therefore revived, but the evidence must include a health certificate to be signed by the beneficiary, which should be sent to the plaintiff with the account in which the premiums were reported. Agents were therefore authorized to retain renewal receipts in their hands for 60 days after the premiums mentioned therein were due, and then, if unpaid, were directed to return them to the plaintiff. In practice, agents do sometimes retain such receipts for a longer period without prompt objection or criticism by the company. In each account the amount of each collected premium, the number and date of the policy upon which it was paid, and the name of the person whose life is insured thereby, are given, together with the charges against such premium, so that each account contains an appropriation of the receipts by the agent, and, when accepted, a corresponding acknowledgment of the payments by the plaintiff.

On February 26, 1883, said Patrick gave to the plaintiff a bond, with three persons as sureties in the sum of \$3,000, for the payment to the company of all moneys which he should receive belonging to it for one year from April 1, 1883; and on April 1, 1884, gave another bond in said sum of \$3,000, with three persons as sureties, for the faithful performance of his duties, so long as he should continue to be its general agent. Prior to June 15, 1884, said Patrick, at his own suggestion, made application to the defendant, an incorporation, duly incorporated for the purpose of executing contracts of indemnity for the conduct of employes, and located and having its principal office in the city of New York, for a bond to the plaintiff in the sum of \$3,500. This application was made by Patrick, without the solicitation of the plaintiff, probably because he feared that his bondsmen would become liable, and he preferred that the loss should fall upon a corporation rather than upon his personal friends. The defendant sent the application to the plaintiff, with a printed form of employe's certificate to be filled by an officer of

the company, and to be returned to the defendant. The secretary of the plaintiff thereupon filled the blanks in the certificate, signed the same, and returned the application and the certificate to the defendant. The certificate, when completed, was as follows:

"I have read the foregoing declarations and answers made by J. N. Patrick, and believe them to be true. He has been in the employ of this company during one year, and, to the best of my knowledge, has always performed his duties in a faithful and satisfactory manner. His accounts rendered to this company were last examined on the 13th day of June, 1884, and found to be correct in every respect. He is not, to my knowledge, at present in arrears or default. I know of nothing in his habits or antecedents affecting his title to general confidence, nor why the bond he applies for should not be granted to him.

"Amount required \$3,500. Bond to date from June 15, or June 16, 1884.

"*Dated at Hartford, the 16th of June, 1884.*

"J. L. ENGLISH, Secretary, on behalf of *Ætna Life Insurance Company.*"

The bond in suit was thereupon issued, the important portions of which are as follows:

"This bond was made the 15th day of June, 1884, between the American Surety Company, hereinafter called 'the company' of the first part, and J. N. Patrick of St. Louis, Missouri, hereinafter called the 'employee' of the second part, and *Ætna Life Insurance Company*, hereinafter called the 'employer' of the third part. Whereas, the employee has been appointed in the service of the employer, and has been assigned to the office or position of general agent by the said employer, and has applied to the American Surety Company for the grant by them of this bond: Now, therefore, in consideration of the sum of thirty-five dollars, lawful money of the United States of America, in hand paid to the said company as a premium for the term of twelve months ending on the 15th day of June, 1885, at twelve o'clock noon, it is hereby declared and agreed that, subject to the provisions herein contained, the company shall within three months next after notice accompanied by satisfactory proof of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer of money, securities, or other personal property in the possession of the employee, or for the possession of which he is responsible, by any act of fraud or dishonesty on the part of said employee, in connection with the duties hereinbefore referred to, or the duties to which, in the employer's service, he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during said continuance or within six months thereafter, or within six months from the death, or dismissal, or retirement of the employee from the service of said employer. * * * That if the employer shall at any time hold, concurrently with this bond, any other bond or guaranty of security from or on behalf of the employee, the employer shall be entitled, in the event of loss by default of the employee, to claim hereunder only such proportion of the loss as the amount covered by this bond bears to such other security; that the company shall be notified in writing, addressed to the president of the company, at its office in the city of New York, of any act of omission or of commission on the part of the employee which may involve a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer."

The premium was paid by Patrick, June 11, 1884. The bond was sent to him immediately after its date, and was delivered by him, when in Hartford, to the plaintiff, July 29, 1884, which accepted the same;

and thereafter the second bond of said Patrick was not regarded as concurrent for defalcations which might occur after June 15, 1884. In the month of December, 1884, the plaintiff, upon an examination of the books of said Patrick in St. Louis, ascertained that he was indebted to it in the sum of \$3,041.94 for premiums of insurance due to it before that time, collected by him and not paid over; that said default was occasioned by acts of fraud and dishonesty on the part of said Patrick, and that the pecuniary loss to the plaintiff resulting from said defalcations amounted to said sum of \$3,041.94. Of these facts thus ascertained, and which I find were true, the defendant was promptly notified. No part of said loss has ever been paid to the plaintiff. This amount of \$3,041.94 had all been collected since June 15, 1884, except J. F. Schwegman's premium, collected in January, 1884, the net amount due the plaintiff being \$80.10, and the following collected in May, 1884.

Two premiums upon policy of E. Dieckhaus,	-	\$ 95 96
" " " " " Mrs. " " " "	-	72 78
		<hr/>
		168 74
Less commissions and dividends,	-	30 20
		<hr/>
		138 54
Schwegmann's premium,	-	80 10
		<hr/>
		\$218 64

The money collected after June 15, 1884, and not remitted or accounted for, was, on January 1, 1885, \$2,823.30.

The defenses are as follows: (1 and 2) A concealment by the plaintiff, at the time of the execution and acceptance of the bond, of previous known defalcations of said Patrick, and misrepresentations by the plaintiff relative to the conduct of said Patrick, which were known to be untrue. These alleged concealments and misrepresentations at the time of the execution of said bond are all contained in said certificate. (3) A concealment in August, September, October, and November, 1884, of Patrick's known acts of omission and commission by which the defendant might be liable to sustain loss. (4) That the second bond of Patrick was concurrent with the bond in suit.

Patrick's first report of premium collections was sent to the plaintiff on May 15, 1883. It accounted for all the collections made in the month preceding, and was accompanied by a bank check for \$501.31, the balance due the company; but on May 15th he had collected of the May renewals nearly \$400, which had been deposited to his credit in the bank, and, after drawing the check for \$501.31, there remained in the bank to his credit \$50.52, showing that he had in fact used of the plaintiff's money from \$250 to \$300. This deficit gradually increased during the year 1883, but was partially made up by the discount of a note for \$1,200 in December, 1883, after which the same continually increasing use of the plaintiff's money went on, and resulted in the defalcation which has been stated. The habit and practice of Patrick was to postpone sending

his monthly account for as long a time as he safely could; to send his own check on the St. Louis bank in which he deposited, whereby he gained the time which intervened until the check was returned to St. Louis, and he was able to meet it in part by collections made meanwhile; to omit in his monthly accounts some of the collections which he had recently made, and to enter some of the older receipts which he had omitted in previous reports; so that, from recent collections, he was continually accounting for and paying previous defalcations. It was the habit of the plaintiff, after the examination of each monthly account of any agent, to send to him an "In-hand list" as it is termed, which is a list of the renewal receipts which had previously been sent to the agent, and which had not been returned or accounted for. This list in the case of Patrick, was an increasing list. In the spring of 1884, before the expiration of the first year of Patrick's agency, he commenced writing to Mr. Webster, the vice-president of the plaintiff, about a change in his contract and a new contract. Before March 19, 1884, the two met in Chicago, and the vice-president renewed the guaranty of \$1,800 for the next 12 months, which had agreed to be given for the first year. On April 10th the second bond was sent to the plaintiff, and Patrick commenced the second year of his agency on the terms of the previous year. The original contract was never terminated, and he never ceased to be agent under that original employment. He, however, continued his solicitations in regard to a new contract, and on July 29th came to Hartford; had an interview with the vice-president, which resulted in permitting the guaranty of \$150 per month to be charged monthly; the payment of clerk hire, of railroad and hotel expenses while on business; the employment for a year of canvassers, and a modification in regard to compensation upon his retirement from the agency. The bond in suit was delivered and accepted, and Patrick asked that the old bond should be surrendered, but the vice-president preferred to wait until previous business had been accounted for. At this time Patrick had not sent his report for June, but said that it was made out, and in his safe, and that he had forgotten to take it when he left St. Louis. Upon his return to St. Louis he sent his June report on August 4th, his July report on August 24th, and his August report on September 29th, which was received by the plaintiff on October 3d. On October 1st the vice-president wrote Patrick, saying that his in-hand list was very large; that over a third of the collections for a full year were due; and asking an explanation of the cause of this large list. Patrick returned, on or about October 8th, policies and renewal receipts amounting in all to \$573.16, whereupon, on October 30th, Mr. Webster wrote him that his list looked very much better, but that still a number were due in the early months of the year, which ought to be closed. The September report was sent October 29th, and contained only one September premium; the other items consisted of nearly all the previously unreported collections, to which his attention had been called by Mr. Webster. The October report was forwarded November 14th, and contained the September premiums, and no October premiums. It was dated at the head of the renewal column, October, instead of September,

as a sort of blind. Mr. Nason, the superintendent of agencies, visited St. Louis on December 4th, in the course of a business trip among some of the western agencies, and before the November report was forwarded, and speedily ascertained the fact of the defalcation, which became apparent upon a comparison of the in-hand list with Patrick's cash-book. The foregoing is a general outline of the history of Patrick's agency, and of the bond now in suit; other facts will be stated hereafter.

The question of fact which arises upon the first and second defenses is, did Mr. English know, or had he adequate reason to know, that any one of his statements was untrue? It will be observed that all the statements in the certificate, except one, were declarations of the belief or knowledge of Mr. English; and it will be further observed that Patrick was, on June 15th, and for a long time had been, a defaulter. I see no reason for the opinion that Mr. English, on June 15th, thought that Patrick collected money which he had not accounted for, or that he was not performing his duties in a faithful and satisfactory manner, or that he was in arrears or default as a collecting agent. The only knowledge that he had of Patrick's indebtedness to the company which has presented itself to me as of importance was the non-payment of a draft for \$150, which he drew upon the plaintiff in March, 1884, and which it paid; but required an explanation of the reason for making it, and demanded repayment, which had not been made when his May account was rendered,—or on June 15th. He drew the draft because he had a guaranty of \$1,800 for the year, and his commissions were apparently not about to yield that sum, and he was poor and needed the money. Mr. English supposed that the form in regard to "arrears or default" referred to the collection accounts of the agent. This was, in fact, its fair meaning, and it was not intended to relate to items of borrowed money, although if these unpaid items had amounted to a sum which was significant, and could reasonably be supposed to indicate that the safety of his collections was in danger, the fact should have been communicated in the certificate.

The remaining branch of the question is, did English have adequate reason to know of Patrick's defalcation and unfaithfulness? For, although he did not know the facts in regard to the agent's conduct, yet, if his ignorance arose from gross negligence in not ascertaining facts which were within his means or knowledge, or if he recklessly made untrue representations, he is chargeable with misrepresentation. Upon this branch of the question, the defendant occupies stronger ground than it does in regard to the knowledge of English. Patrick, on May 27, 1884, advised English that two annual premiums of Dieckhaus and wife had been paid in advance. These premiums were not accounted for in the monthly reports. On June 15th, Patrick had renewal receipts in his hands which were four or five months past due, of which \$621.15 were due in January, and \$336.21 were due in March. On May 27, 1884, by letter to English, Patrick asked for the renewal receipts of one Taylor, from which English justly inferred that the December, 1883, renewal had been paid, and wrote him June 9th that he hoped it would

be reported in his next report. I think that English thought that the omission to account for this premium was due to carelessness or negligence, and not to embezzlement. Subsequently, and after June 15th, Patrick replied that the omission was the fault of his clerk. The poverty of Patrick was shown by his permitting his own policy to lapse in December, 1883, and by his letters to the vice-president of December 29, and December 31, 1883, and January 4, 1884. The fact in regard to the apparent laches seems to me to be this: The plaintiff evidently does a large business. It was stated in the argument of the defendant's counsel that the returns made by it to the Connecticut Insurance Commissioner for 1884, showed that its cash premium income for that year was \$2,381,617.17. It did not look after a small agency with the promptness and sharpness which it would have done had its business been smaller, and had its needs of prompt payment been larger; letters written during the month in regard to individual payments were not probably compared with the current monthly account; the business of accurate investigation was left to the final report for the year, in December, which was required to be an exhaustive one, or to the examination of the superintendent for agencies during his tours among the agents. It is plain that the secretary cannot be expected to carry in his memory the details of the letters which he receives from agents, or to make himself the comparison of letters with monthly accounts. If that is done, it must be done by subordinates, or by a larger force of the book-keepers, whose business it is to examine agents' accounts. While therefore, in my opinion, a more thorough system of investigation, and a more constant watchfulness of Patrick's accounts, probably would have disclosed to some one in the home office, prior to June 15th, that Patrick's accounts were behindhand, and that, unless dishonest, he was very remiss, I cannot find that English ought to have known these facts, or that he was guilty of laches in not knowing them. A requirement which should compel an employer, who is merely stating his opinion, to use, for the benefit of a proposed surety, great vigilance in regard to the accounts of an employe, and greater vigilance than the successful employer uses himself in his own large business, and which has heretofore apparently proved to be adequate, is one which neither law nor good reason demands.

The next question of fact relates to the non-disclosure to the defendant of Patrick's remissness in August, September, October, and November, 1884. The obligation of the defendant was to pay to the plaintiff any pecuniary loss which it had sustained during the specified time by any act of fraud or dishonesty on the part of Patrick, in connection with his duties as agent. The plaintiff was obliged to promptly notify the defendant of any act of omission or of commission on the part of Patrick which "may involve a loss for which the company is responsible hereunder." It cannot be supposed that this provision calls upon the employer to notify the defendant of every act of laches or delay or inefficiency on the part of the agent, which ultimately may create a loss to the employer. It means that the defendant shall be notified of acts which may create a loss for which it is responsible,—that is, a loss arising from fraud or dis-

honesty. It is not necessary to undertake to define affirmatively what kind or class of acts must be communicated, and whether or not the obligation compels the employer to notify the defendant of that kind of conduct of the employe, outside of his business, which experience has shown may probably result in dishonesty. It is sufficient to say that mere laches or inefficiency of the employe in the business, which is consistent with integrity, was not required to be communicated. This defense involves the question whether the plaintiff knew, or had adequate reason to know, from August to November, that Patrick was a defaulter. It is obvious from the conduct of the officers that they did not know the facts in regard to Patrick. Their acts and their correspondence show this. Patrick was unavailingly requesting the vice-president to come to St. Louis, without disclosing a reason for the request. Webster neither went nor sent the superintendent, and showed that he did not think there was any necessity for a visit. I am by no means certain that the plaintiff is to be charged with the duty of communicating, during the life of the bond, facts which it did not know, but which by the exercise of due diligence it could have known. Assuming that such an obligation rested upon the employer, the question whether its officers ought to have known of Patrick's defalcation, depends in a great degree upon the same considerations which have heretofore been stated in regard to their knowledge on June 15th. Greater vigilance, or a larger clerical force, would have caused the criticisms which Webster made on October 1st, to have been made earlier, and would have earlier sent an examiner to St. Louis; but a demand of that grade of vigilance on the part of employers would speedily result in a cessation of business on the part of the defendant. The conduct of Patrick in not remitting was equally consistent with great remissness in collecting, or with a lack of integrity. The vice-president evidently did not adopt the theory of want of integrity. I do not find that the plaintiff had knowledge of such circumstances as to compel a knowledge of Patrick's default prior to December 4th, when the superintendent visited St. Louis.

The fourth defense is that the bonds given on and after April 1, 1884, were concurrent. The bond from the defendant was procured by Patrick in order to substitute it for the existing bond as to new transactions. It was accepted by the plaintiff, with the understanding that the old bond was not to exist against losses from unfaithfulness which occurred after June 15th. The two bonds were not concurrent.

The remaining questions are those of law. It is insisted by the defendant that there is no liability for any defalcation prior to July 29th, the date of the delivery of the bond to the plaintiff. It is true that "the delivery of a deed is presumed to have been made on the day of its date. But this presumption may be removed by evidence that it was delivered on some subsequent day; and, when a delivery on some subsequent day is shown, the deed speaks on that subsequent day, and not on the day of its date." *U. S. v. Le Baron*, 19 How. 73. In this case the delivery of the bond to Patrick, which was soon after its date, was not a delivery to the plaintiff. The latter had a right to accept or reject it, when

it for the first time was seen and examined. It was not delivered or accepted until July 29th, but when accepted it took effect in accordance with its express terms, and if, by its terms, it commenced on June 15th, and was to continue for 12 months thereafter, the bond, if delivered and if accepted during the 12 months, related back to June 15th. *Daves v. Edes*, 13 Mass. 177; *Hatch v. Attleborough*, 97 Mass. 533. The employer was required to fill a blank in his certificate, stating when the bond was to be dated. This has some significance when taken in connection with the terms of the bond, which declares that it was made on the 15th of June, 1884, and was in consideration of \$35 paid as a premium for the term of 12 months ending on June 15, 1885, at 12 o'clock noon. It also provides that the bond may be canceled upon one month's notice, and refunding the premium paid, less a *pro rata* part thereof for the term it has been in force, remaining liable for any default which may have been committed by the employee up to the date of such determination. These various provisions show clearly that the obligation was to commence on the prescribed day, and was to continue for one year, subject to cancellation, and that the day of delivery and acceptance was not the day from which the defendant's liability was to date.

The only remaining question is as to the amount of the defendant's liability. He received, after June 15th, \$2,823.30, which he either used himself, or wrongfully accounted for. That sum of money which he received after the date of the bond, instead of being honestly applied, was by fraud and dishonesty applied in payment of previous defalcations, and the new collections were, by like fraud, not accounted for. The amount due upon the defendant's obligation was on January 1, 1885, \$2,823.30, for which, with interest to the date of the payment, let judgment be entered in favor of the plaintiff.

BALLIETT v. SEELEY *et al.*¹

(*Circuit Court, N. D. New York. March 19, 1888.*)

BANKRUPTCY—FRAUDULENT TRANSACTION—PURCHASE BY WRONG-DOER FROM ASSIGNEE—EFFECT OF DISCHARGE.

B., as assignee in bankruptcy of D., obtained a judgment against D. and one S. for property fraudulently converted. S. was subsequently adjudged a bankrupt, and obtained a discharge from his debts. D. bought the judgment of the assignee in bankruptcy. *Held*: (1) That D. acquired the assignee's title to the judgment, and S. could not object that D. was a party to the fraud. (2) The judgment being for a debt created by fraud, the discharge of S. in bankruptcy did not affect it. (3) There being no contribution between wrong-doers, D. was entitled to collect the whole amount of S.

(*Syllabus by the Court.*)

Appeal from district court.

¹Reversing *Balliett v. Dearborn*, 27 Fed. Rep. 507.

In Bankruptcy. On motion for cancellation of judgment, or for perpetual stay of execution thereon. Reversing 27 Fed. Rep. 507, where the facts more fully appear.

Henry M. Davis, for appellant.

Daniel McIntosh, for respondent.

WALLACE, J. The order of the district court granting a perpetual stay of execution upon the judgment obtained against the defendants is, in effect, a final determination of the action, and is equivalent to a cancellation of the judgment. An appeal, therefore, properly lies in this court.

The judgment was for the value of property fraudulently transferred by Seeley and Davis with the purpose of defeating the title of the plaintiff as assignee in bankruptcy of Davis. Subsequently to the rendition of the judgment Seeley was adjudged a bankrupt, and in the course of the proceedings in bankruptcy obtained a discharge from his debts. Davis, the joint tort-feasor with Seeley, and his co-defendant in the action, purchased the judgment of Balliett, and caused the execution to be issued thereon against Seeley, which was stayed by the district court at the application of Seeley. It is entirely clear that, as the judgment debt was created by fraud in fact on the part of Seeley, as well as on the part of Davis, Seeley's discharge in bankruptcy did not affect the judgment. The decision of the learned district judge was placed upon the ground that Davis should not be permitted to collect a demand of Seeley which originated in the fraud of both, because he would thereby be enabled to profit by his own wrong. See *Balliett v. Dearborn*, 27 Fed. Rep. 507. This conclusion ignores the effect of the purchase by Davis of Balliett's title to the judgment. Balliett was entitled to enforce the judgment against Seeley and Davis, each or both; or, at his option, to sell it and realize upon it in that way. The vendee of personal property, including choses in action, acquires the title of the vendor, and any inquiry into his antecedent relations with the subject of the sale is wholly irrelevant in a case like the present. The judgment here being merely a chose in action, the purchaser took it subject to all equities existing at the time of the assignment in favor of the debtors or either of them against the assignor, but he acquired all the rights of the assignor. There are no exceptions to the rule that the purchaser acquires the title of the seller; on the other hand, he sometimes acquires a better title, as in the familiar instance of the purchase of commercial paper, or of chattels *bona fide* which the seller has acquired by deceit, and in the exceptional instances where as a *bona fide* purchaser he is not prejudiced by the notice of his assignor. *Bush v. Lathrop*, 22 N. Y. 535, 549; *Fort v. Burch*, 5 Denio, 187. In equity, as at law, the purchaser can stand upon the title of his vendor, and enforce his vendor's title against the equities of another, notwithstanding his knowledge of these equities at the time of his purchase; for otherwise the vendor might be deprived of selling his property for its full value. *Varick v. Briggs*, 6 Paige, 323, 329; *Jackson v. McChesney*, 7 Cow. 360; *Griffith v. Griffith*, 9 Paige, 315; *Boone v. Chiles*, 10

Pet. 177; 1 Story, Eq. Jur. § 409. If Seeley could insist that Davis is liable for contribution, the court would be justified in refusing to permit the latter to use its process for compelling Seeley to pay the whole judgment debt without offering to do equity. As there is no contribution between wrong-doers there is no foundation for such a claim. It must be held that Davis acquired what he bought, and succeeds to all the rights of Balliett to use the judgment against Seeley, including that of collecting it by an execution.

The order of the district court is therefore reversed.

UNITED STATES v. KING.

(Circuit Court, E. D. New York. February 24, 1888.)

1. HOMICIDE—MURDER—WITHIN MILITARY RESERVATION—DEFINITION.

Rev. St. U. S. § 5339, provides that "every person who commits murder within any fort * * * under the exclusive jurisdiction of the United States * * * shall suffer death." *Held*, the statute not defining the offense of murder, that the common law, as it was in England before the Revolution, and as it has since been interpreted in our courts, must be looked to for a definition, and as there defined, murder is where a person of sound memory and discretion unlawfully and feloniously kills any human being in the peace of the sovereign, with malice prepense or aforethought, express or implied.

2. SAME—BOUNDARIES OF RESERVATION.

On the trial of an indictment for murder alleged to have been committed at Fort Hamilton, in New York harbor, it was in evidence that the fatal shot was fired 100 feet inside a certain fence on the line of Hamilton avenue. The prosecution introduced a deed to the United States of a certain plot of ground, and also the act of the New York legislature covering the same plot. This was followed by testimony that the military authorities of the United States had for years past exercised acts of ownership and jurisdiction over the same ground, which was in the village of Fort Hamilton, adjacent to and inside of the said fence. Certain maps of the premises, sworn to by those who made them, were then put in evidence. *Held*, that if the jury believed the testimony of those who made the maps, and also believed that the natural and artificial monuments that they found on the soil when the maps were made coincided in location with the monuments, artificial and natural, that were placed there when the deed was given and the act of cession was passed, they were warranted in finding that the fence on the line of Hamilton avenue was substantially coincident with the property-line and the line of jurisdiction of the United States.

3. SAME—ARTICLES OF WAR.

Where the man killed is a civilian, and the killing is done in a government fort, by a private soldier when off duty, requests bearing upon the subject of the ground being a military post, and of the rules governing the service, the articles of war, etc., have no bearing upon the case, and are properly refused.

4. SAME—BREACH OF MILITARY REGULATION.

It appeared upon the trial of a private soldier charged with a murder committed by him upon a military reservation, that the soldiers stationed there were frequently allowed to go out and come in without a pass. It was also in evidence that there were many saloons in the neighborhood. *Held*, that this fact, though "to the prejudice of good order and military discipline," within the meaning of articles of war, (article 62,) should not work to the prejudice of the accused, who had availed himself of the privilege on the night of the murder.

5. SAME—JUSTIFIABLE HOMICIDE—WHAT CONSTITUTES.

W., the deceased, had attacked one M., a member of the regiment to which K. the accused, was attached as a private, and in the course of the affray had pursued him into the government reservation at Fort Hamilton, in New York harbor, where he got him down, and beat him so that M. cried out, "Murder!" and "Don't kill me!" K., who was a friend of M., and also upon good terms with W., saw the attack upon M., and heard his cries. He hastened to his quarters, got a rifle and two cartridges,—one ball and one blank,—and returning to the place of the encounter, which M. had left, he saw W., who was a powerful man, and aggressive when in liquor, as he then was, following M. up. He called to W. to leave the reservation, and did not load his piece until W., who continued to advance with a knife in his hand, and with threats that he was going "to do him [K.] up," was within eight feet of him. W. came on so rapidly that K. had no chance to raise his rifle, and he only discharged it when W. was against the muzzle, and at the moment of the discharge, the piece had not reached the horizontal, but was held just above the hip. The load was the ball cartridge, and W. was killed. The plea was justifiable homicide. *Held*, that to support the plea it was necessary that K. must have retreated as far as he could have done with safety to himself; that the danger of death or grievous bodily harm to himself or M. must have been apparently imminent, and that K.'s belief as to the character of the danger must have been honest, and founded upon grounds reasonable under the circumstances.¹

6. SAME—MANSLAUGHTER.

The difference between manslaughter and excusable homicide is this: "In excusable homicide the slayer could not escape if he would; in manslaughter he would not escape if he could."

7. SAME—INTOXICATION.

Where intoxication at the moment is set up as a defense to a charge of murder, it is for the jury to determine whether or not the accused was at that time capable of a specific intent to take life.²

8. SAME—EVIDENCE—RES GESTÆ.

Since the admission of the testimony of the accused in his own behalf, the rule of *res gestæ*, as applied to his own declarations, is not so rigidly enforced, the jury being properly charged as to its weight.³

9. SAME—DECLARATIONS OF ACCUSED.

No weight is to be given to a declaration by the accused, unless the jury are satisfied that it was made at a time when it was forced out as the utterance of truth by the particular event itself, and at a period of time so closely connected with the transaction that there has been no opportunity for subsequent reflection or determination as to what it might or might not be wise for the declarant to say.⁴

10. SAME—REASONABLE DOUBT.

A reasonable doubt is a doubt based on reason, and one which is reasonable in view of all the evidence.⁵

¹As to when a homicide is justifiable, see, also, *People v. Robertson*, (Cal.) 8 Pac. Rep. 600, and note; *State v. Donnelly*, (Iowa,) 27 N. W. Rep. 369, and note; *Darbey v. State*, (Ga.) 8 S. E. Rep. 663; *Lynch v. State*, (Tex.) 6 S. W. Rep. 190; *Stanley v. Com.*, (Ky.) Id. 155; *Duncan v. State*, (Ark.) Id. 164; *Fallin v. State*, (Ala.) 8 South. Rep. 525.

²Voluntary intoxication is no excuse for a crime; but evidence of drunkenness is admissible upon the question of the intent of the defendant, where intent is an element in the constitution of the offense charged. *State v. Lowe*, (Mo.) 5 S. W. Rep. 889; *State v. Mowry*, (Kan.) 15 Pac. Rep. 282; *Buckhannon v. Com.*, (Ky.) 5 S. W. Rep. 358, and note.

³As to when a declaration is admissible as part of the *res gestæ*, see *Dismukes v. State*, (Ala.) 8 South. Rep. 671.

⁴A reasonable doubt is one for which a sensible man can give a good reason, based on the evidence or want of evidence. It is such a doubt as a sensible man would act upon, or decline to act upon, in his own concerns. *U. S. v. Jones*, 31 Fed. Rep. 718. Respecting "reasonable doubt" in criminal cases, see *Knarr's Appeal*, (Pa.) 9 Atl. Rep. 873; *People v. Lee Sare Bo*, (Cal.) 14 Pac. Rep. 810; *McCullough v. State*, (Tex.) 5 S. W. Rep. 175; *White v. State*, (Tex.) 8 S. W. Rep. 710, and note; *U. S. v. Jackson*, 29 Fed. Rep. 508, and note; *People v. Kernaghan*, (Cal.) 14 Pac. Rep. 566; *Cowan v. State*, (Neb.) 26 N. W. Rep. 406; *State v. Robinson*, (S. C.) 4 S. E. Rep. 570; *Kidd v. State*, (Ala.) 8 South. Rep. 442; *State v. Maher*, (Iowa,) 27 N. W. Rep. 2.

Indictment for murder, under Rev. St. U. S. § 5339. That section provides that "every person who commits murder within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States, * * * shall suffer death."

Francis H. King, the accused, a private in the Fifth artillery, U. S. A., stationed at Fort Hamilton, New York harbor, was indicted for the murder of Ryan H. Willis, a civilian. The indictment was presented in the district court, and by order under Rev. St. U. S. § 1039, remitted to the circuit court for trial. The facts in evidence were briefly as follows: About 11:30 P. M. of November 26, 1887, Willis, while upon Hamilton avenue, a public thoroughfare adjoining the government reservation, assaulted one Marshall, an enlisted man attached to prisoner's regiment as a bandsman. He struck Marshall one or two heavy blows, whereupon the latter broke away, climbed over the fence, and had gotten about 20 feet beyond it upon the reservation when Willis, who had followed in pursuit, came up with him, knocked him down, and, holding him on the ground, continued to batter and pound him till three of Willis' friends pulled him off, and an acquaintance of Marshall led the latter off to his quarters, about 300 feet further on. While on the ground Marshall uttered loud cries of "Murder," "Don't kill me;" repeating them certainly twice, if not oftener. After Marshall was led away, Willis, boisterously anxious to continue his assault, pursued his way over the reservation grounds, surrounded by his friends,—who were endeavoring to induce him to desist,—until within a short distance of the barracks of Battery I, to which command the prisoner was attached. Willis was a powerful man, aggressive, quarrelsome, and violent when under the influence of liquor, as he manifestly was that night. The prisoner, who had always been on good terms with Willis, parted from him with friendly "good nights" at the door of a liquor saloon a few moments before the encounter with Marshall. King proceeded to the fence, and crossed it not far from the place where Marshall and Willis crossed. He saw the attack on Marshall, and heard his cries. According to his own story, he at once hastened to his quarters to get a rifle, hoping thus to terrify Willis and the others, and by this means save Marshall. King was in uniform. Upon reaching his quarters, and while taking a rifle from the rack in the dormitory, he woke up a fellow-soldier, who took the gun from him. There was a conflict of testimony between this soldier and the prisoner,—the one stating that King, with tears in his eyes, asked him for cartridges, saying: "You don't want to see me killed, do you;" the prisoner denying that he asked for cartridges, and saying that he spoke only of the risk of Marshall being killed. From the adjoining dormitory he finally secured a gun and two cartridges,—one ball and one blank,—and hurried again to the ground. Here, as he testified, he saw Willis and his three companions, Willis advancing towards him with loud threats and vile expressions, shouting that he "had a root to do [him] up;" that "he [Willis] could shoot as well as he [King];" and that he "would kill him deader than hell." King called to them to leave the government

land. He stood his ground as Willis advanced, with his piece pointing downward. He further testified that he did not load till Willis was within eight feet of him, and had raised his hand with a knife in it, and that the advance upon him was so quick that his piece had not reached the horizontal (held still just above the hip) after closing the breech-block before Willis was against the muzzle, and he fired. The evidence as to the events succeeding the departure of Marshall was very conflicting; some of it tending to support the prisoner's story, and some contradicting it. The prisoner swore that when he went out with the rifle he supposed Marshall was still lying helpless on the ground. It was bright moonlight, but a mist or fog was rising from the ground to the height of about 18 inches.

Mark D. Wilber, Dist. Atty., and *Mr. Devenny*, Asst. Dist. Atty., for the United States.

Isaac S. Catlin, for King.

LACOMBE, J., (charging jury.) Gentlemen of the jury, it is the duty of the court, as you know, to instruct or charge you as to the law of the case. In doing so courts frequently refer to the facts,—review them, and present them to the jury with their instructions as to the law. Such a course is not necessary, I think, in this case, because the facts are very few, and you certainly have them all within your recollection. I shall not weary you, therefore, with any general review of them; and inasmuch as it would be certainly unwise, if not improper, for the court to undertake to present to you any of the material facts without presenting them all, I shall merely instruct you as to the law applicable to cases such as this, with sufficient fullness, I hope, to enable you to handle the facts satisfactorily and conveniently when you reach your room. It is not unusual, in trials of this kind, to call the attention of the jury to the importance of the particular case they may have in charge. It is hardly necessary to do that here. You are intelligent men. You must fully understand how absolutely essential it is to the preservation of the social system in a civilized state that the laws should be enforced; especially so in the case of acts of violence. The laws must be obeyed; offenders must be punished; and that jurymen would be faithless to his trust who, in a case where the facts convicted, should bring in a verdict contrary to the facts. On the other hand, your responsibility in this case will be impressed upon you more forcibly by your experience than it would by any words of mine. For upward of a week you have sat within 25 feet of the prisoner at the bar, conscious of the fact that for him the issues of life and death are in your hands. If that solemn fact has not impressed you with a sense of the responsibility you owe to your consciences, and your oaths that the verdict you may render shall be honest, intelligent, and careful, nothing that I might say would do so, "though I spoke with the tongue of men and angels."

The prisoner at the bar, Francis H. King, is indicted for murder, and you are to answer the question as to his guilt or innocence. The fact of slaying being undisputed here, there are only three possible answers

which you can give to that question: You may find him guilty of murder as charged in the indictment, and in that case your verdict would be, "Guilty." You may find him not guilty of murder as charged in the indictment, but guilty of manslaughter; in that case your verdict would be, "Not guilty of murder, but guilty of manslaughter." You may find that he was not guilty of either offense, but that the homicide was excusable, and in that case your verdict would be, "Not guilty." You see, therefore, that at the outset of your deliberations there are certain technical words placed before you which must be defined, and before I go further I shall read to you the definitions of these words:

Murder. The Revised Statutes of the United States¹ prescribe a penalty for any person who commits murder within any fort or other place or district of country under the exclusive jurisdiction of the United States. But the statutes do not define the offense of murder. Therefore we must turn to the common law, as it was in England before the Revolution, and has been interpreted since by our courts, for a definition of that crime. It is this: Murder is where a person of sound memory and discretion unlawfully and feloniously kills any human being in the peace of the sovereign, with malice premeditated or aforethought, express or implied.

Manslaughter. Manslaughter is defined in the United States Revised Statutes, which in section 5341, prescribe that every person who, within any of the places or upon any of the waters described in the section that I first read, to-wit, any fort, arsenal, etc.,—every person who there unlawfully and willfully, but without malice, strikes, stabs, wounds, or shoots at, or otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury such other person dies, is guilty of the crime of manslaughter. That is the definition of "manslaughter."

You will observe that the distinction between the two, is that in the one malice is present, and in the other it is absent. It is therefore necessary to define that word.

Malice. Malice is defined as "an intent to do injury to another," or, "a design formed of doing mischief to another."

The other word or term which calls for definition at the outset is "excusable homicide." Homicide, of course, as you know, is the killing of one human being by another human being. Excusable homicide, so far as anything in this case requires its definition, is the killing of another in self-defense.

Now, perhaps, by this time you appreciate the fact that these definitions are hardly as satisfactory as they might be; nor is that surprising. A cane, a table, a chair,—any object that we look at in this room,—we can by the use of a few words define in a manner satisfactory to ourselves. When, however, we come to deal with crime, we deal largely with mental processes, and with the actions of the human heart; and eminent jurists, laboring for centuries, have been unable to prepare a definition of these crimes which, without further explanation, will enable a jury of 12 men to take it, and apply it to the facts of any case. Therefore, as we proceed with these instructions I shall again recur to

¹ Rev. St. U. S. § 5332.

these definitions, and give them such elaboration as may be necessary to enable you to see exactly what the offenses are. I shall probably best assist you if I trace over and point out to you the course which you may most conveniently pursue in your deliberations when considering the issues raised in this case.

The first thing to be determined is the death,—that Ryan Willis was killed,—and the way in which he was killed. Of course you are relieved of any trouble in that particular by the facts in the case, and the concessions and the statements of the prisoner himself. There is no dispute but that Ryan Willis came to his death by a ball discharged from a Springfield rifle held at the time in the hands of Francis H. King. The place where he was thus slain becomes material, because, as you will remember, the penalty was prescribed against one who commits murder within any fort, arsenal, place, or district of country under the exclusive jurisdiction of the United States. A deed has been put in evidence here to the United States, covering a certain plot of land. An act of the legislature of the state of New York has been read, covering also a plot of land. There is testimony that the military authorities of the United States have for years past exercised acts of ownership and of jurisdiction over a certain plot of land in the village of Fort Hamilton, lying adjacent to, and inside of—if I may use the expression—a certain fence on the line of Hamilton avenue. Now, certain maps, sworn to by those who made them, have been put in evidence; and without burdening you particularly with going over the details, I may charge you that if you believe the testimony of the surveyor and of the officers who made those maps, and further believe that the natural and artificial monuments that they found on the soil when the maps were made coincided in location with the monuments, artificial or natural, that were placed on the soil when the deed was given, and when the act of cession was passed, you are warranted in finding that the fence on the line of Hamilton avenue is substantially coincident with the property line and the line of jurisdiction of the United States there. And inasmuch as it is undisputed that the fatal blow was struck at a point certainly 100 feet inside of that fence, I charge you that if you believe the testimony of this surveyor and of the officers, you are warranted in finding that the fatal blow was struck on property within the exclusive jurisdiction of the United States.

Having got as far as that, the next question for you to take up and determine is this: Was this homicide excusable? Now, there are varieties of excusable homicide. For instance, homicide by misadventure,—that is by pure accident, without negligence,—is excusable. But the only kind of excusable homicide that there is any pretense of here, or that you need in any way concern yourselves with, is what is known as "homicide in self-defense." Under the law a person has the right to resist the application of force to himself with force proportioned to the attack. It used to be said that the offense threatened must be a felony in order to justify the taking of life in resisting. That is a very unsatisfactory rule for jurymen, because the distinction between felony and

misdeemeanor is frequently regulated by statute; it varies in the different states, and is not one within the general knowledge of most laymen. Therefore I instruct you that the rule to be followed is this, which you will find more convenient for your deliberation: If an assailant comes against me with a deadly weapon, apparently meaning to use it, or if without such weapon he assails me, breathing forth threatenings and slaughter, or by any other means indicating that it is his intention to inflict upon me a beating of such a character as to imperil life, or to maim me, or do me grievous bodily harm, then I may take life, when necessary to repel the assault. That is the general rule, and I have no doubt that it commends itself to your good sense. But, like all rules, it must be studied with its qualifications; and the first qualification to which I desire to call your attention is this: It is my duty when attacked to retreat as far as the fierceness of the assault would permit. It used to be said that it was the duty of the assailed to retreat to the ditch or to the wall. That picturesque expression was coined before the days of fire-arms, when every man who walked the-streets of London walked with his weapons by his side,—his rapier or his dagger, his quarter-staff or single-stick. It is not adapted for our use now; and even when it was coined it was ill-adapted to its purpose, for a man might be assailed at a place where there was neither ditch nor wall within three miles. The rule laid down by later authorities and sanctioned by text writers of ability is this: It is the duty of the assailed to abstain from the infliction of death until he has retreated as far as he can with safety to himself. Here let me call your attention to a very apt illustration which is used,—whether in a reported case or whether as the expression of a text writer I am not certain, but it is a convenient illustration to have before you. Manslaughter and excusable homicide, as you will see later on, approach each other very nearly, and the distinction between them is thus indicated: "In excusable homicide the slayer could not escape if he would; in manslaughter he would not escape if he could." That illustration very happily, in a few words, points out the distinction between the exercise of the right of excusable homicide and the crime of manslaughter, to which we will recur later on. There is another qualification, however, of the rule: The danger apprehended from the assailant need not be actually imminent, and irremediable,—it need only be apparently so. The learned district attorney called your attention to a case which very forcibly illustrates that qualification, where a person seeking to terrify pointed an unloaded gun at another, and that other person, deeming from the appearances that his life was in danger, replied by a discharge from his own pistol, and took the assailant's life. It is in 2 N. Y.¹ I think; and the court said he was entitled to rely upon the appearances. Now that same word "apparently" has given courts and text writers no end of trouble. Apparently to whom? Suppose one of you gentlemen was a man of a quick eye and powerful build, muscles of iron, and nerves of steel, feeling himself competent to meet and throw with his

¹ Shorter v. People, 2 N. Y. 193, 197.

naked hand any man that he has yet encountered who came against him with nothing but a knife,—is the test of apparently imminent peril to be applied as he in his individual case, if he were the assailed, would apply it? Or is it to be applied as perhaps another jury-man would apply it,—weak, under-sized, nervous from disease, inexperienced in personal combats? You see that it is a difficult question to deal with in the abstract. But in the concrete,—that is, in applying it to cases as they arise,—you will probably not experience as much difficulty as courts and text writers do in explaining it. These tests are to be applied: This belief—the belief that the assailed person has—must be an honest and sincere belief. That is one element. Secondly, it must not be negligently formed, or, as otherwise expressed, it must be founded upon reasonable grounds. And in determining whether it is founded on reasonable grounds, the jury are not to conceive of some ideally reasonable person, but they are to put themselves in the position of the assailed person, with his physical and mental equipment, surrounded with the circumstances and exposed to the influences with which he was surrounded, and to which he was exposed at the time. If, with these tests applied,—that the belief is honest and sincere; that it is not negligently formed, but is reasonably grounded,—if with those elements duly considered, the jury are satisfied that there was then an apparently imminent danger of death or grievous bodily harm to the person assailed, he is entitled to act upon the appearances. And the same rule as to appearances must be applied to the first qualification of the rule of self-defense,—that is, as to the time, if at all, when he should begin to retreat, and as to the limit to which his retreat should be conducted. In determining that question, also, you are to put yourselves in the place of the person assailed, surrounded by the circumstances, and exposed to the influences to which he was exposed. Thus much as to an attack upon one's self. Now as to an attack upon another. An attack made upon a friend, when it is of so fierce a character as has been described, may be resisted in a similar way; and there are similar qualifications of that rule. To state it in other words, there must be an apparently imminent fatal assault, or one calculated to work grievous harm, to justify the intervenor in taking the assailant's life. There must be a *bona fide* belief by the defendant,—with the qualifications as to appearances that I have called your attention to,—a *bona fide* belief by the defendant that an atrocious or felonious assault is in process of commission, which can only be resisted by the death of the felonious assailant, to make the killing excusable homicide; but if such belief though *bona fide* be negligently adopted by the defendant, it would be *manslaughter*.

Should you reach the conclusion that the homicide was not excusable, the next question for you to determine is: Was it manslaughter? Manslaughter, as you will remember, was defined by the statute, and was the unlawfully and willfully, but without malice, killing a person. It has also been thus defined at common law: "Manslaughter arises from the sudden heat of the passions; murder, from the wickedness of the heart." "Voluntary manslaughter is an intentional killing in hot blood,

and differs from murder in this: that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice aforethought, which is the essence of murder, is presumed to be wanting; and, the act being imputed to the infirmity of human nature, the punishment is proportionately lenient." "The provocation in the case of a killing in hot blood must be such as to account for the act by reason of the infirmity of human passions in men in general, and without attributing to the prisoner a cruel and relentless disposition." It includes the killing in hot blood; it also includes negligent killing. It will be more convenient for you, when you reach this stage of the case, to pass over for the moment the consideration of the question whether this crime—if crime it be—is manslaughter, and, if you reach the conclusion that it was not excusable homicide, determine at once whether or not it was murder; because, if not excusable homicide and not murder, then, the killing being admitted, it must be manslaughter. Manslaughter occupies the middle ground between excusable homicide on the one hand and murder on the other.

Murder, you will remember, is not defined by the statute, and, to paraphrase the common-law definition which I read, it is an unlawful killing, with malice. Malice, you will remember, I told you was the intention to do bodily harm; a formed design to do mischief. It has also been defined as a deliberate intent to kill. It does not necessarily import any especial malevolence towards the individual slain, but also includes the case of a generally depraved, wicked, and malicious spirit, a heart regardless of social duty, and deliberately bent on mischief. It imports premeditation. Therefore there must logically be a period of prior consideration; but as to the duration of that period no limit can be arbitrarily assigned. The time will vary as the minds and temperaments of men, and as do the circumstances in which they are placed. The human mind acts at times with marvelous rapidity. Men have sometimes seen the events of a life-time pass in a few minutes before their mental vision.¹ Thought is sometimes referred to as the very

¹Rear-Admiral Sir Francis Beaufort was once nearly drowned. During the brief period of apparent unconsciousness after he sank for the third time, his mind reviewed every event of his past life. His account of his experience, quoted in Miss Martineau's *Biographical Sketches*, is very interesting. "The course of those thoughts," he says, "I can even now in a great measure retrace. The event which had just taken place; the awkwardness which produced it; the bustle it must have occasioned; the effect it would have on a most affectionate father; the manner in which he would disclose it to the rest of the family; and a thousand other circumstances minutely associated with home,—were the first series of reflections that occurred. They took then a wider range: our last cruise; a former voyage and shipwreck; my school, the progress I had made there, and the time I had misspent; and even all my boyish pursuits and adventures. Thus traveling backward, every past incident of my life seemed to glance across my recollection in retrograde succession; not, however, in mere outline, as here stated, but the picture filled up with every minute and collateral feature. In short, the whole period of my existence seemed to be placed before me in a kind of panoramic review, and each act of it seemed to be accompanied by a consciousness of right or wrong, or by some reflection on its cause or its consequences. Indeed, many trifling events, which had been long forgotten, then crowded into my imagination, and with the character of recent familiarity." If this mental action continued until he was fully restored to consciousness, the time consumed was about 20 minutes. Admiral Beaufort, however, was always convinced that it lasted only during submersion; if so, all these events swept before his mental vision in the space of two minutes.

symbol of swiftness.¹ There is no time so short but that within it the human mind can form a deliberate purpose to do an act; and if the intent to do mischief to another is thus formed as a deliberate intent, though after no matter how short a period of reflection, it none the less is malice. Malice, in the old definitions, is spoken of as express or implied. That again is a distinction which is a delusion and a snare. Practically, jurymen never deal with express malice. There is no express evidence of malice given to them. Malice, as I have told you, is an intent of the mind and heart. There is never presented to a jury direct evidence of what was the intent of the man's heart at the time. He is the only possible direct witness to that; and if he meant so to testify, he would plead guilty. The existence or non-existence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart, the processes of the mind, are to us, or to any one outside of the individual, exhibited by the acts which the individual performs; and we are entitled to infer what his intent was,—what were the processes of his mind, and the feelings of his heart,—by a careful study of the acts which he performed, and of the other external indications which he may have given of what his state of mind and heart was. As an eminent text writer has put it, there is no case of malicious homicide in which malice is not inferred from attendant circumstances; no case in which it is demonstrated as express. We have no power to ascertain the certain condition of a man's heart; the best we can do is to infer his intent more or less satisfactorily, from his acts. Now, a person is presumed to intend what he does. A man who performs an act which he knows will produce a particular result is, from our common experience, presumed to have anticipated that result, and to have intended it. Therefore we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed at any definite period before the fatal blow. From the very fact of a blow being struck we have the right to infer as a presumption of fact, but not of law, (a distinction I will call your attention to in a moment,) that the blow was intended prior to the striking, although at a period of time inappreciably distant. And thus we frequently find the statement laid down in reported cases and by text writers, that malice is to be inferred from the use of a deadly weapon. Put thus baldly, the statement of the proposition is hardly fair to the defendant. It is true, if that is all the evidence in the case. Proven the death, proven the slaying with a deadly weapon, and stopping there, we are warranted in inferring malice, and therefore finding the crime to be murder. But it is very, very rarely that that is all the evidence in the case. Your own experience, from what you have heard and what you have read, certainly must have instructed you that there is hardly ever, if, indeed, ever,—I never heard of one,—a case where the only fact

¹Haste me to know 't, that I, with wings as swift
As meditation, or the thoughts of love,
May sweep to my revenge.

Hamlet: Act I., Scene 5.

proved against the defendant, or the only fact proved in his favor, was the killing the deceased with a deadly weapon. And the moment a single other fact is admitted into the case, this statement of a presumption becomes misleading, unless the jury bear in mind the caution which I will now give. Malice is to be inferred from *all* the facts in the case. If malice is found, it must be drawn as an inference from everything that is proved taken together and considered as a whole. Every fact, no matter how small; every circumstance, no matter how trivial, which bears upon the question of malice, must be considered by the jury at the same time that they consider the use of the deadly weapon; and it is only as a conclusion from all those facts and circumstances that malice, if inferred at all, is to be inferred. To murder, the existence of malice is absolutely essential. If there is no malice, and if the homicide is not excusable, then it must be manslaughter.

There have been many requests submitted by the prisoner's counsel bearing on the subject of this being a military post, and of the rules governing the service, the articles of war, etc. Now, that need not concern you a particle. This is not a slaying in the discharge of any military duty; it is not the case of the shooting down a prisoner escaping from the guard-house; it is not the case of shooting down an intruder seeking to elude a sentry, or attempting to run his guard. There is no element of the discharge of a military duty about this case at all. Waiving entirely any evidence as to a direct or implied permission for citizens to cross that parade ground, waiving that altogether, and considering that Willis stood there a naked trespasser, intruding wholly without right in a place where he had no business to be, that fact did not warrant a private soldier without any orders from his superior officer in shooting him down in his tracks. Nay, if Willis stood there a red-handed murderer, striding triumphant over the plain, with his victim behind him, but with his crime accomplished, that fact did not justify the killing of him on sight. It might be an excuse for hot blood in the man who thus saw the corpse of his soldier friend on the ground; but it was no excuse for shooting down the slayer. On the other hand, if slaying in self-defense were warranted in this case, it would stand the prisoner in just as good stead if he had slain Willis on Hamilton avenue as within the precincts of the reservation. There is no element whatever of military duty that enters into the determination of this case, and you need not concern yourselves with it.

There are other minor branches of the case to which it is proper that I should call your attention. The first is intoxication. There is no direct evidence of intoxication on the part of the prisoner in this case. There is, however, evidence of his having drunk several times; and I know not, of course, to what your deliberations may or may not lead you in that regard; and it is therefore proper that I should give you instructions as to the bearing of intoxication, if found to exist in the case of the defendant. Intoxication is no excuse for crime. A man cannot commit a crime and then say, "I was intoxicated," and claim to go unwhipped of his offense. It is no excuse whatever for the commission of crime. But when shown,

it may do one of two things: it may sometimes bring murder down to the grade of manslaughter, and it may sometimes bring apparent self-defense up to the grade of manslaughter. The court of appeals in this state has thus laid down the rule:

"It has never yet been held that the crime of murder can be reduced to manslaughter by showing that the perpetrator was drunk, when the same offense, if committed by a sober man would be murder. But if by reason of intoxication the defendant was so far deprived of his senses as to be incapable of entertaining a purpose, or of acting from design, then he might not be guilty of murder, but be guilty of manslaughter."

And the same rule is thus stated by a very eminent text writer:

"Where the question of a specific intent is essential to the commission of a crime [and I have already charged you that malice, which is intent, is necessary to the crime of murder] the fact that an offender was drunk when he did the act which, being coupled with that intention, would constitute the crime, should be taken into account by the jury in deciding whether he had that intention."

But it is needless for me to call your attention to the fact that courts have repeatedly held that this excuse is to be received with great caution. The question on that branch of the case which is always left for the jury to determine is whether the defendant's mental condition was such that he was capable of a specific intent to take life.

I also told you that intoxication would sometimes bring self-defense up to the grade of manslaughter. You remember what I told you about appearances being looked at from the standpoint of the person assailed, your putting yourself in his place, and looking at it with his surroundings,—the circumstances as they surrounded him. Now, if the danger seemed apparently imminent to him as he was, but seemed so apparent to him only because his mind was confused with liquor,—wouldn't have been thus apparent to him, or wouldn't have seemed to be so imminent if his mind had been clear,—in other words, if he made an error of fact in determining whether or not his peril was imminent, and that error of fact was due to the circumstance that he was under the influence of liquor, then, as drunkenness is negligence, he was negligent in forming his belief. He would then be guilty of negligent homicide; and negligent homicide is manslaughter.

The presumption of innocence. Upon that I surely need say nothing to you. It is the A, B, C, of common life, as it is of law. The law presumes a man to be innocent, until he is proved guilty. That presumption stands by him through the trial to its close, until it is overcome by affirmative proof. And if the evidence of guilt or innocence be so evenly balanced as to cause the jury to entertain a reasonable doubt as to his guilt or innocence, the accused should be acquitted. That leads me to the definition of reasonable doubt. What is reasonable doubt? Reasonable doubt is a question of common sense and reason, and cannot be ascertained by artificial rule or definition. Moral evidence cannot be weighed with the nicety and certainty with which coin and bullion are weighed at the mint. I can do no better on this branch of the case than

to read you from a decision of the supreme court of the United States, where the following charge was approved as being sound law:

"The court charges you that the law presumes the defendant innocent, until proven guilty beyond a reasonable doubt; that if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence you should do so, and in that case find him not guilty. You are further instructed that you cannot find the defendant guilty, unless from all the evidence you believe him guilty beyond a reasonable doubt. The court further charges you that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence; and if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt. But if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt."

There are two other minor matters that I will now refer to. I admitted evidence (and probably strained the law somewhat in admitting it) as to the statements made by the prisoner on his way to the guard-house, or after arriving. There is a principle in the law of evidence which is known as "*res gestæ*;" that is, that the declarations of an individual made at the moment of a particular occurrence, when the circumstances are such that we may assume that his mind is controlled by the event, may be received in evidence, because they are supposed to be expressions involuntarily forced out of him by the particular event, and thus have an element of truthfulness which they might otherwise not have. That rule is very carefully guarded by the courts. And I only admitted the testimony here because, now that the defendant himself can take the stand, there does not seem to be the necessity of enforcing the rule so strictly, if the jury are properly charged upon it. Now, any statement or declaration that is put in evidence of course must be taken in its entirety; you must consider it as a whole. But you are not to give any more weight to a declaration thus made, or any weight at all, unless you are satisfied that it was made at a time when it was forced out as the utterance of a truth; forced out against his will, or without his will, by the particular event itself, and at a period of time so closely connected with the transaction that there has been no opportunity for subsequent reflection or determination as to what it might or might not be wise for him to say. With that qualification, I think the testimony can be left safely with you, and that there has been no error in admitting it.

There is one other point—a minor point—to which I would also call your attention. I am particularly anxious to do so because it is a piece of evidence of the defendant himself. And inasmuch as it came out in response to a question by the court, I should be loath to think that you might perhaps attach more importance to it than it deserves, and also extremely loath to think that any evidence called out by my question might work improperly to the disadvantage of the prisoner. You remember I asked him whether he had a pass that night, and he said he had not; and it was in evidence that the soldiers frequently left here and

came back without the formality of having a pass. Any evidence in that regard you remember. Now, you and I may have our own opinion as laymen, as civilians, upon the question whether it was or not, in the comprehensive language of the sixty-second article of war, "to the prejudice of good order and military discipline," to maintain a company of enlisted men in barracks, located only a few hundred feet from a row of rum-shops, without a guard or sentry to overlook their outgoings and incomings, so that they might leave their barracks at any hour of the night, and come back at any hour of the night, and possibly at any stage of intoxication that pleased them, without encountering any guard, or sentry, or superior officer. But whatever our opinions may be as to the wisdom of such a course, the prisoner is in no way responsible for that condition of affairs; and any feeling which we may have in consequence of its existence is in no way to be visited upon him. He was entitled to avail himself of and to enjoy just as much laxity of discipline as his superior officers at that post winked at; and whether he was out on pass, or without pass, must not weigh with you one feather's weight in handling this case, and in considering the facts. He is in no way responsible for anything of the kind, and no prejudice arises from the circumstances which are in evidence, as to the situation of this post and garrison, and the way in which it was conducted; they are not to influence you one particle.

After ruling upon the written requests to charge as presented by counsel, the court said:

Briefly to recapitulate: To murder, malice is essential. Malice is an intent to kill,—a formed design to kill. It imports premeditation; but the mental processes are so swift that premeditation may be found to exist within the very shortest time. Manslaughter is an unlawful killing without malice. It includes a killing in hot blood, after provocation. It includes a killing when a party, judging from appearances, makes an error of fact, and is mistaken because he is negligent. And it includes a killing which would otherwise be murder, unless you find that the mind is so obscured by intoxication as to be incapable of forming any purpose at all.

Excusable homicide is homicide in self-defense, against an attack such as I have explained to you, qualified with the duty of abstention from slaying until necessity compels the fatal act, and with the duty of retreating as far as safety to the assailed person will admit; and with the further qualification that appearances are enough, provided you find that the belief in them was sincere and honest,—that it was not formed negligently, but upon reasonable grounds, viewing the circumstances, and the facts and phenomena, by putting yourself for the moment in the place of the assailed; and finally forming your opinion upon the whole case from a consideration of all the facts.

Your verdict will be, and can only be, one of three. If you find the defendant guilty of murder, your verdict will be simply "Guilty;" if you

find him not guilty of murder, but guilty of manslaughter, your verdict will be, as stated, "Not guilty of murder, but guilty of manslaughter;" if you find that the homicide was excusable, as being in self-defense, which is the only excuse proffered here, then your verdict will be, of course, "Not guilty."

The verdict was "Not guilty."

UNITED STATES v. ATKINSON.

(District Court, E. D. Michigan. March 19, 1888.)

1. POST-OFFICE—LARCENY FROM THE MAILS—INDICTMENT.

In indictments against employes of the post-office department for embezzling and secreting valuable letters, it is not necessary to allege that the same was done with a fraudulent intent. The offense is a mere misdemeanor, and it is sufficient to set it forth in the language of the statute.

2. SAME—REV. ST. U. S. § 5467.

Section 5467, Rev. St., covers the offenses of secreting and embezzling valuable letters, as well as stealing their contents, and the omission of the words, "every such person shall on conviction thereof, for every such offense," used in section 279 of the act of June 8, 1872, is immaterial.¹

(Syllabus by the Court.)

On Motion in Arrest of Judgment.

The prisoner was convicted upon the first and third counts of an indictment charging him with the embezzlement of letters containing money. The first count charged that the defendant, "a person employed as letter carrier in the postal service of the United States, did embezzle a certain letter which came into his possession as such letter carrier, * * * which letter contained four pecuniary obligations of the government of the United States, to-wit: four notes, commonly called treasury notes, each of the denomination and value of one dollar, * * * contrary to the form," etc. The third count charged him in substantially the same language with "secreting" a certain letter. The case was argued before the circuit and district judges.

J. W. Finney, for defendant.

Charles T. Wilkins, Asst. U. S. Dist. Atty., for the United States.

BROWN, J. It is insisted upon this motion that both the first and third counts, one of which charges the defendant with embezzling, and the other with secreting, a letter containing an article of value, are defective in failing to allege that the act charged was done with a criminal intent. Exactly what words are necessary to be used to set forth with sufficient clearness the fraudulent intent are not stated, but presuming

¹In the case of U. S. v. Harry, arising in the Western district, **SEVERENS, J.**, also held, after a careful examination of section 5467, that the penalty attached to both clauses of the section, but filed no opinion.

them to be "feloniously" or "fraudulently," it is pertinent to inquire whether in the case of statutory offenses like this it is necessary to make use of them. Mr. Bishop states that where a new felony is created by statute, but the statute does not use the word "feloniously," there is a difference of judicial opinion whether the words should be put in the indictment. 1 Bish. Crim. Proc. § 290. But many cases under this or similar statutes have held that offenses under the post-office laws are not felonies, but misdemeanors, and that, if described in the words of the statute, the indictment is sufficient. In *U. S. v. Lancaster*, 2 McLean, 481, the indictment was similar to the one under consideration, using only the words, "secrete" and "embezzle." The indictment was held sufficient, and it was expressly stated that it was not necessary to charge that the taking was felonious. In *U. S. v. Mills*, 7 Pet. 138, it was held that an indictment setting forth that the defendant "did procure, advise, and assist one to secrete, embezzle, and destroy a letter," was a misdemeanor, and that, in such cases, it is sufficient to charge the offense in the words of the statute. The indictment was held sufficient. Later cases in the supreme court are supposed to have laid down a more stringent rule, but upon a careful examination, we think they only go to the extent of holding that all of the essential ingredients of the offense must be charged. Thus, in *U. S. v. Cook*, 17 Wall. 168, it is said that every ingredient of which the offense is composed must be accurately and clearly alleged; and where a statute defining an offense contains an exception in the enacting clause, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception be omitted, it was held that an indictment founded upon the statute must allege enough to show that the accused is not within the exception; otherwise, if the language of the section defining the offense is entirely separable from the exception. The case particularly relied upon is that of *U. S. v. Carll*, 105 U. S. 611, in which it was held that an indictment for passing a counterfeited obligation of the United States must allege that defendant knew it to be counterfeited; but here was a distinct fact, which it was conceded was necessary to be proven upon the trial, and the court very properly held that it should be averred in the indictment. I take it, however, the rule is different where the fraudulent intent is to be presumed from the act done. 1 Bish. Crim. Proc. §§ 278-290. So, in *U. S. v. Britton*, 107 U. S. 655, 2 Sup. Ct. Rep. 512, it was held that a count which charged the president of a national bank with having "willfully misapplied" the funds of the association, should aver that he did so for the benefit of himself, or some other person, and with an intent to injure or defraud; but the court in delivering the opinion said these words "have no settled technical meaning like the word 'embezzle,' as used in the statutes, or the words, 'steal, take, and carry away,' as used at common law. They do not therefore of themselves clearly and fully set forth every element of the offense charged." The word "embezzlement," of itself, implies a fraudulent and unlawful intent on the part of the person charged. No one can lawfully or honestly embezzle money or other

property. Certainly an official of the post-office department cannot lawfully embezzle a letter intrusted to him in his official capacity. In *U. S. v. Laws*, 2 Low. Dec. 115, the words used in the indictment were simply "secrete" and "embezzle," and, although the case was vigorously contested, the point was not even made that any further description of the intent was necessary. So, in *U. S. v. Sander*, 6 McLean, 598, it was held that a count charging that the prisoner secreted and embezzled a certain letter was good. Indeed, the first count of this indictment seems to have been taken directly from Wharton's Precedents, 1110, and is one which has been in common use in this district ever since the court was organized.

In support of the second ground of the motion it is urged that the action of the revisors of the statutes in omitting the words contained in section 279 of the act of June 8, 1872, "every such person shall on conviction thereof for every such offense," unhitches the penalty in section 5467 from every offense described therein, except the last one, of stealing and taking articles of value out of any letter, etc. In support of this objection we are cited to the case of *U. S. v. Long*, 10 Fed. Rep. 879, wherein it was held that the omission of the words "every such person shall upon conviction thereof for every such offense" before the words "shall be punishable by imprisonment," was fatal to the punishment of every offense mentioned in the statute, except the last. Upon a careful reading of the section, we find ourselves unable to concur in the opinion of the learned judge in this case. Omitting all immaterial clauses, the section, as revised, now reads as follows:

"Any person employed in any department of the postal service, who shall secrete, embezzle, or destroy any letter * * * which was intended to be conveyed by mail, * * * and which shall contain any * * * article of value, or writing representing the same; any such person who shall steal or take any of the things aforesaid out of any letter * * * shall be punishable by imprisonment," etc.

We are unable to see why the punishment is not as applicable to the first offense of secreting, embezzling, or destroying, as to the second, for stealing and taking from the letters; and it seems to us that the omission of the words, "every such person shall, upon conviction thereof, for every such offense" is entirely immaterial. Unless we adopt this construction, we must impute to congress the recital and definition of a grave offense in very elaborate language, for no apparent purpose whatever. The use of the word "and" to connect the two clauses would have removed every doubt, but we think it may be implied.

The motion in arrest of judgment is therefore overruled.

STATE OF CONNECTICUT v. GOULD *et al.**(Circuit Court, N. D. New York. March 19, 1888.)*

COPYRIGHT—STATE REPORTS—CONNECTICUT DECISIONS.

The act of March 22, 1882, (Acts Gen. Assem. Conn.,) directing the reporter to publish the decisions of the supreme court of errors, and copyright the volumes, does not prohibit any one else from publishing the opinions separately or collectively, but restricts the exclusive right of publication to the Reports compiled and edited by the reporter.

In Equity. On bill for injunction.

E. Ellery Anderson, for complainant.

N. C. Moak, for defendants.

WALLACE, J. The act of the general assembly of the state of Connecticut (approved March 22, 1882) creating the office of reporter of the judicial decisions of the supreme court of errors, fixing his salary, and directing those decisions to be published in volumes under the supervision of the comptroller, and the several volumes copyrighted for the benefit of the people of the state, does not forbid expressly or by implication the publication of the opinions of the court, separately or collectively, by any person who chooses to use them, but by reasonable construction restricts the exclusive right of publication to the Reports compiled and edited by the officer who is to receive a salary for the work. The statute undoubtedly contemplates that the Reports which are to be published will be prepared for publication in the usual and convenient form of law reports, containing an index and appropriate *syllabi* accompanying the opinions, which, as the work of the reporter, would be the unquestioned and familiar subject of copyright. If it had been the object of the statute to prevent the publication of the judicial decisions of the court, or to regulate the mode of promulgating them, so that they should have no publicity except in the designated form of official Reports, that intention could have been easily manifested by apt language so as to remove all doubt; and in view of the serious question often debated, but never authoritatively decided by the courts of this country, whether such opinions can be copyrighted by the state, it would seem that the statute would have been so framed as to leave no doubt of the legislative will, if such an intention had been entertained. The opinion has been expressed in several adjudications, by judges whose opinions are entitled to the highest respect, that the judicial decisions of the courts are not the subject of copyright, but should be regarded as public property, to be freely published by any one who may choose to publish them. This view has been taken upon considerations of public policy which, it is said, demand, in a country where every person is presumed and required to know the law, that the fullest and earliest opportunity of access to the expositions of the judicial tribunals should be afforded to all. No statute should be interpreted, unless the language used admits of no other interpretation, to press beyond the certain confines of legislative power,

(*U. S. v. Combs*, 12 Pet. 72,) and in obedience to this rule the courts have almost uniformly interpreted statutes closely resembling the present so as to restrict the copyright to the completed volume. *Davidson v. Wheelock*, 27 Fed. Rep. 61; *Banks v. Publishing Co.*, Id. 50; *Banks v. Manchester*, 23 Fed. Rep. 143; *Nash v. Lathrop*, 142 Mass. 29, 6 N. E. Rep. 559. The case of *Gould v. Banks*, 53 Conn. 415, 2 Atl. Rep. 386, is relied upon by the complainant. The opinion in that case undoubtedly asserts the right of the state to copyright the opinions, and interprets the statute as designed to effectuate that right. The observations upon this point, however, were unnecessary to the decision of the case before the court, which was whether a *mandamus* should be granted to compel the reporter to furnish copies of the opinions which he was preparing for publication, when the writ would operate to deprive the authorized publishers for the state of the benefit of their contract with the state. This sufficiently appears from the following language of the opinion: "If, therefore, we should now direct the reporter to furnish copies of the opinions to the petitioners that they may sell them to the public in advance for their own profit, we should, in effect, advise the state to a breach of contract."

As the defendants have not pirated any of the matter originally prepared by the reporter, the motion for an injunction is denied.

VULCANITE CO. v. AMERICAN CO.¹

(*Circuit Court, E. D. Pennsylvania*, October 10, 1887.)

PATENTS FOR INVENTIONS—INFRINGEMENT—COMPOSITE PAVEMENTS.

Letters patent 269,480 were granted for an improvement in composite pavements formed with circular, square, or analogous depressions, equal or nearly equal in diameter in each direction, and with even or level margin on the pavement surface, adapted to afford an additional hold to the feet, and prevent slipping. *Held*, to possess patentable novelty, and to be infringed by a pavement made of slag, cement, and a concrete of gravel and cement with a top dressing of slag and cement, and finished with a roller which made impressions upon the surface.

In Equity. Bill for infringement of letters patent.

This is a suit brought against the American Artificial Stone Pavement Company for infringing letters patent No. 269,480, granted December 19, 1882, to Peter Stuart, of Edinburgh, Scotland, for an improvement in composite pavements. The improvement is especially, though not exclusively, intended for application to sidewalks; and it consists in the formation in the surface of pavements of depressions of such a character that in stepping thereon the pressure of the feet will expel the air, causing a partial vacuum, which, supplementing the mechanical effect of the roughened surface, will operate to afford an additional hold to the feet

¹ Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

and prevent slipping. This beneficial effect is greater when the pavement is wet, at which time pavements as ordinarily constructed with smooth or grooved surfaces are more than usually slippery. The claim in the patent is for a composite pavement formed with circular, square, or analogous depressions of equal or nearly equal diameter in each direction, and with even or level margin on the pavement surface, to adapt them to operate in the manner described. By an agreement entered into between Peter Stuart, the patentee, and Matthew Taylor, of New York, the latter became the owner of the right to use the patent in suit in the United States and Canada. The said Taylor subsequently assigned the right to use said patent in the city and county of Philadelphia, in the state of Pennsylvania, to the complainant corporation. The prayers of the bill were for an injunction and an account.

George J. Harding, William Henry Smith, and George Harding, for complainant.

Hector T. Fenton, for respondent.

PER CURIAM. The evidence does not satisfy us that the complainant's contrivance to avoid the danger of slipping on smooth surfaced composite pavements was anticipated, nor that it lacked patentable novelty. In this respect the case is doubtless near the line, and calculated to inspire doubt. To create doubt, however, is not sufficient to overthrow the presumption arising from the patent; the evidence should be satisfactorily convincing. Nor is it clear that this contrivance is shown by the record of complainant's former patent for composite pavements. That patent was exclusively for other elements than the face. It is very doubtful whether the ideas embraced in this contrivance could have been gathered from the drawing of the former patent, and it is not suggested that any hint of them is to be found elsewhere in the record. If this were otherwise, however, the result would be the same, as appears from *McMillan v. Reese*, 1 Fed. Rep. 722, and other cases to the same effect, preceding and following it.

A decree must therefore be entered for an account, and an injunction, with costs.

NEW JERSEY MANUF'G CO. v. COOPER *et al.*

(Circuit Court, D New Jersey. January 10, 1888.)

1. PATENTS FOR INVENTIONS—PATENTABILITY—NOVELTY—METALLIC BUTTONS.

The first claim of letters patents, No. 216,978, of July 1, 1879, to Charles Radcliff, for "improvement in metallic buttons" is as follows: "A metallic button consisting of two disks, a crown and bottom piece, in combination with a wire placed between them, so formed as to fit and strengthen the periphery of said disks, and to act as the bar for the thread, substantially as and for the purpose described." *Held*, void for want of novelty; buttons formed of an upper and lower disk, with an intermediate wire thread-bar, viz., the glove button, the Woodbury button, the Hornish button, the Fernald button, and the Thalheimer button, having been old at the date of the patent.

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2. SAME—WANT OF INVENTION.

In view of the prior state of the art, as evidenced by the glove button and the Woodbury, Hornish, Fernald, and Thalheimer buttons, letters patent No. 216,978, of July 1, 1879, to Charles Radcliff, for "improvement in metallic buttons," are void for want of invention; Radcliff having simply straightened the bar of the old glove button, and possibly exercised greater care in making its length correspond with the diameter of the disks, or straightened the bar of the Woodbury button and added a covering as suggested by the patent.

In Equity.

Betts, Atterbury, Hyde & Betts, for complainant.

Whitehead, Gallagher & Richards, for respondents.

BUTLER, J. The suit is for infringement of letters patent No. 216,978, granted July 1, 1879, to Charles Radcliff, for "improvement in metallic buttons."

The defense is—*First*, want of patentable novelty; *second*, non-infringement. The specifications and claims of the patent, are as follows:

Be it known that I, Charles Radcliff, of the city of Newark, county of Essex, and state of New Jersey, have invented a new and useful improvement in metallic buttons, of which the following is a specification: The invention relates to buttons which are stamped out of metal sheets with dies. Heretofore metallic buttons have been made either of one piece of metal, or of two hollow metallic disks joined together by bending the edge of one disk over the other. The disadvantage of the former method was the weight of the button, and of the latter method its weakness. When such buttons were perforated, two semicircular eyes were usually made in the center of the button, leaving a part of the metal between them to form a bar for the thread. The edges of this bar had a tendency to cut the thread. My invention consists in inserting between the disks of a perforated metallic button a strengthening piece made of wire so formed or bent as to accurately fit the inside edge of the smaller disk, and forming a transverse bar across its diameter, said bar passing across the perforations in the center of the disks, and forming the bar for the thread; and the ends of the wire, which fit the inner edge of the disk, give strength to the periphery of the button. By this means I form a very strong and light button, and the transverse bar, being round and smooth, will not cut the thread. In the accompanying drawings, A. and B., Figs. 1, 2, and 3 are the metallic disks, perforated with one large round hole in each disk, instead of two semicircular ones, or several small round ones, as is usually the case. C, E, F, are different forms of the transverse thread-bar. I do not confine myself to any particular form of this transverse bar. The ends of the bar may be made of any suitable form from a bar perfectly straight through the shapes shown at E and C up to that shown at F, or it may be combined with a circular ring, which fits the inner edge of the disk. All these are obvious modifications of the same idea. I myself prefer the form shown at C, which furnishes all the requisite strength, combined with cheapness of manufacture. In Figs. 1 and 2 the disks are shown before the edges are bent over to clasp the disks together. D, Fig. 2, is a side view of the completed button, and Fig. 3, gives a top and bottom view of the completed button. What I claim is: (1) A metallic button consisting of two disks, a crown and bottom piece, in combination with a wire placed between them, so formed as to fit and strengthen the periphery of said disks, and to act as the bar for the thread, substantially as and for the purpose described. (2) In a metallic button consisting of two disks joined together, a transverse bar of round wire,

substantially in the shape shown at C, substantially as and for the purpose described.

The infringement charged is of the first claim only. Does the button there described embrace patentable novelty? It is "a metallic button, consisting of two disks, a crown and bottom piece, in combination with a wire placed between them, so formed as to fit and strengthen the periphery of said disks, and to act as the bar for the thread." The important element of this combination is the wire bar, whose office is to strengthen the periphery, and afford a thread-hold; nothing more is claimed for it. The former state of the art is illustrated by the glove button, the Woodbury button, the Hornish button, and the Fernald button. We say nothing at present of Thalheimer's. Buttons formed of an upper and lower disk, with an intermediate wire thread-bar, were old at the date of the patent. The bar was bent so that its center projected through the perforation in the lower disk, and formed a shank. In some instances it was held in place by the pressure of the disks alone, and in others was attached to thick, stiff paper, which received the pressure. In some instances, the ends of the bar extended to the periphery of the disks, and in others, especially where attached to paper, it was shorter; the paper, when used being cut to fit the disks. The complainant endeavors to distinguish his button from these, by pointing to the fact that in them the bar was bent at the center, while in his it is straight, and to the difference in its effect upon the periphery of the disks. We do not think the dissimilarity in the bar at the center, is important. It was formerly bent to afford greater convenience in applying the thread. Whether bent or straight, the button is essentially the same. Furthermore, the claim does not call for a straight bar at the center, and certainly covers a crooked one. If such had not previously been employed, the complainant would undoubtedly regard its use as an infringement. To say that such buttons belong to a different class, that they are shank buttons, and the others bar buttons, signifies nothing material to the inquiry. Nor do we see anything important in the alleged difference in effect upon the periphery. In the glove button before us the ends fit the disks as closely as in that of the complainant, and strengthen the periphery sufficiently for practical purposes. It might not bear as much pressure as the complainant's at the ends of the wire; but the difference is only in degree, and is therefore immaterial. (It is indeed difficult to see how the complainant's straight bar—shown in Fig. E of his draught—is of any essential value in strengthening the periphery. Of course it adds strength at the point of contact, but as this leaves probably nine-tenths of the entire extent unsupported, it can be of little importance.) The Hornish and Fernald buttons, with their intermediate paper disks and attached wire bars, also have the disk support. It may not bear great pressure, but it extends to the entire circumference. The support here, it is true, is not derived from the wire alone. The plaintiff, cannot, however, rely upon this to distinguish the button from his, for the same difference exists in the respondents' button, the alleged infringement. The Woodbury button (as shown by the draught, and the exhibit "Wood-

bury Button") has quite as good a periphery support as the complainant's. Indeed, when the wire constituting the thread-bar and periphery of this button is inclosed within the disks, it is difficult, if not impossible, to distinguish it from the complainant's, even in form, except that the bar is bent at the center, which, as we have seen, is immaterial. Woodbury's patent contemplates and suggests a covering for the wire, and this of course may be of the metallic disks then in use, or other material. The Thalheimer button is identical with the complainant's even in form, its thread-bar is straight, and the ends fitted to the periphery. While Mr. Thalheimer testifies very positively to its manufacture prior to the date of complainant's patent, a question is raised respecting his accuracy. The view we entertain renders a decision of this question unnecessary. If the complainant was not actually anticipated, it is very clear, we think, that what he did does not embrace invention. He simply straightened the bar of the old glove button, and possibly exercised greater care to make its length correspond with the diameter of the disks, or straightened the bar of the Woodbury button, and added a covering, as suggested by that patent. The testimony and argument directed to the points of cheapness, lightness, and strength (elsewhere than at the periphery) are aside of the question involved.

As we hold the claim to be invalid, the question of infringement need not be considered. The bill must be dismissed with costs.

CELLULOID MANUF'G CO. v. ARLINGTON MANUF'G CO.

(*Oronsit Court, D. New Jersey.* January 10, 1888.)

PATENTS FOR INVENTIONS—ACTIONS FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Defendant corporation did not deny infringement, but claimed that it had ceased to infringe before bill filed, and did not intend to renew the use of the infringing machine which still remained in its possession. *Held*, the patent having been adjudicated to be valid, that a preliminary injunction should be granted.

In Equity. Bill for infringement of letters patent No. 199,908, of February 5, 1878, to John W. Hyatt, assignor to the Celluloid Manufacturing Company, for the manufacture of celluloid and other plastic compositions. On motion for preliminary injunction.

Rowland Cox, for the motion.

John R. Bennett, contra.

WALES, J. The patent has been held to be valid.¹ The defendant admits, or at least does not deny, infringement, but claims that it had ceased to infringe before the bill was filed, and does not intend to renew

¹21 Fed. Rep. 904.

the use of the infringing machine. It still continues in possession of all the contrivances and appliances to enable it to violate the patent, but promises not to use them for that purpose. This is a naked and unsupported promise. The practice of the courts in such cases is well settled. In *Woodworth v. Stone*, 3 Story, 752, it was decided that "a bill for an injunction will lie, if the patent-right is admitted or has been established, without any established breach, upon well-grounded proof of an apprehended intention on the part of the defendant to violate the plaintiff's right." *A fortiori* should an injunction issue where, as in the present case, the defendant has already infringed, and nothing but a mere promise stands in the way of its doing so again. The general rule is stated in Walk. Pat. § 676, and concludes as follows: "Indeed, no injunction can be averted by affirmative evidence that the defendant has ceased to infringe, even though coupled with a promise that he will infringe no more." See, also, Curt. Pat. § 422, which gives the same rule, only in different language. Further authority on the same point may be found in *Chemical Works v. Vice*, 14 Blatchf. 179, and in *Losh v. Hague*, 1 Webst. Pat. Cas. 200. If the defendant intends in good faith to keep its promise, the injunction will not harm it; otherwise, it will be a security for the plaintiff that its rights will not again be invaded. The plaintiff is entitled to a decree.

MICHAELIS *et al.* v. ROESSLER *et al.*

(Circuit Court, D. New Jersey. January 18, 1888.)

1. PATENTS FOR INVENTIONS—EXTENT OF CLAIM—PROCESS FOR MANUFACTURING CHLOROFORM.

The second claim of letters patent No. 822,194, of July 14, 1885, to Gustavus Michaelis, for "the manufacture of chloroform and purified acetates," is as follows: "The production of chloroform from the liquid products resulting from the decomposition of crude acetates at high temperatures by subjecting said liquid products to the action of a hypochlorite, and removing the chloroform therefrom by distillation, substantially as described." The patent contained no reference to the color or degree of crudeness of the acetates, and stated that the brown acetates were preferable for the purpose. *Held*, the gray acetates being distinguishable, as respects crudeness, from the brown only in a slight degree, that they were embraced in the term "crude acetates."

2. SAME—INFRINGEMENT.

Gray acetates being embraced in the term "crude acetates," as used in the second claim of letters patent No. 822,194, of July 14, 1885, to Gustavus Michaelis for "the manufacture of chloroform and purified acetates," their use in the production of chloroform in combination with a method of distillation substantially the same as that described in the Michaelis patent is an infringement thereof.

3. SAME—VALIDITY—INACCURACIES IN SPECIFICATIONS.

There being no room for doubt that Gustavus Michaelis (letters patent No. 822,194, of July 14, 1885) was the first to discover that chloroform could be advantageously obtained from the liquid products resulting from the decomposition of crude acetates of lime by the method of distillation described in the patent, and it being very clear that the production of chloroform was greatly cheapened by that discovery, the patent is not invalidated by the facts that

he was mistaken respecting the quantity of chloroform obtainable from acetones, (which were previously used for its production,) that he was probably in error as to the quantity that could be got from the higher boiling properties of ingredients of crude acetates, and that other statements contained in his specifications are inaccurate.

In Equity. Bill for infringement of letters patent No. 322,194, of July 14, 1888, to Gustavus Michaelis, assignor of one-half to William T. Mayer, for "the manufacture of chloroform, and purified acetates."

Arnoux, Ritch & Woodford, for complainants.

Gifford & Brown, for respondents.

Before McKENNAN and BUTLER, JJ.

PER CURIAM. This suit is for infringement of the second claim of complainants' patent, No. 322,194, dated July 14, 1885, for "the manufacture of chloroform, and purified acetates." The claim reads as follows:

"(2) The production of chloroform from the liquid products resulting from the decomposition of crude acetates at high temperatures, by subjecting said liquid products to the action of a hypochlorite, and removing the chloroform therefrom by distillation, substantially as described."

There is no room to doubt that the complainant was the first to discover that chloroform could be advantageously obtained from the liquid products resulting from the decomposition of crude acetate of lime, by the method of distillation described in the patent; and it is very clear that the production of chloroform was greatly cheapened by this discovery. Subsequent experiments have shown that the patentee was mistaken respecting the quantity of chloroform obtainable from acetones, (which were previously used for its production,) and that he was probably mistaken respecting the quantity obtainable from the higher boiling properties of ingredients of crude acetates, and that other statements contained in his specifications are inaccurate. These mistakes do not, however, affect the validity of the patent. Conceding them, the fact remains that he was the first to discover the process described of manufacturing chloroform from crude acetates of lime, and that this was a highly valuable discovery.

Does the respondent infringe? He uses the gray acetate, while the complainant uses the brown. The patent designates "crude" acetates, without reference to color or degree of crudeness, and states the brown to be preferable. This designation clearly includes the gray, which, as respects crudeness, is distinguishable from the brown only in a slight degree. Both are "crude" in the sense contemplated by the term, as employed in the patent. That the method of distillation used by the respondent is substantially the same as that described and used by the complainant seems clear.

A decree must be entered against the respondent for an injunction and an account.

EMERSON *et al.* v. HUBBARD *et al.*

(Circuit Court, W. D. Pennsylvania. March 2, 1883.)

PATENTS FOR INVENTIONS—ASSIGNMENT—RIGHTS OF ASSIGNEE—PRIOR INFRINGEMENTS.

Mere intention, not signified in an assignment of letters patent to include therein claims for infringements previously committed, will not suffice to invest the assignee with any equitable title to those claims; and such assignee, after bill filed, in a suit for infringement brought by him, having procured an assignment of said claims, will not be permitted in that suit to set up by a supplemental bill this post assignment.

In Equity.

Sur motion for leave to file a supplemental bill, which was exhibited to the court.

Wm. L. Pierce, for complainants.

W. Bakewell, for respondents.

ACHESON, J. It seems to be quite plain that the assignments set up in the original bill transferred the title to the letters patent only, and did not carry the claims for previous infringements. *Moore v. Marsh*, 7 Wall. 515. Now, giving to the allegations contained in the proposed supplemental bill the fullest effect, the plaintiffs' alleged equitable title to those claims rests upon the mere intention of the parties to those assignments thereby to transfer them. But no such intention appears on the face of the instruments. At best it is a case of naked intention verbally expressed, but not carried out. No particulars are stated, or facts disclosed, from which the plaintiff might deduce any equitable title. The assignments of the patents to the plaintiff was for the nominal consideration of five dollars. In fine, it is not shown to the court that the plaintiff had the shadow of right in or to the claims in question until nearly five months after this suit was brought, when assignments thereof were executed. These post assignments the plaintiff seeks, by means of a supplemental bill, to have "considered as included in the cause of action as set forth in the original bill, and more particularly as a part of complainant's title, as set forth in paragraph 12 thereof." But a plaintiff cannot support a bad title by acquiring another after the filing of the original bill, and bringing it in by supplemental bill. 2 Daniell, Ch. Pr. 1594, note 2; *Tonkin v. Lethbridge*, Coop. Ch. 43; *Pilkington v. Wignall*, 2 Madd. 240; Story, Eq. Pl. § 339. Being of opinion that this motion should be disallowed for the reasons above indicated, I do not think it necessary to consider the defendants' further objections to the motion. The motion is denied.

LIGOWSKI CLAY-PIGEON CO. v. AMERICAN CLAY-BIRD CO.

(Circuit Court, S. D. Ohio. March 6, 1888.)

1. PATENTS FOR INVENTIONS—CLAY-BIRD TRAPS—INFRINGEMENT.

The only object of the invention, as stated in the specification, covered by letters patent No. 252,230, of January 10, 1882, to the Ligowski Clay-Pigeon Company, as assignee of George Ligowski, for "target traps," is to furnish a trap especially adapted for throwing the saucer or cup shaped flying target formed as a thin shell of clay or similar material, suitably hardened, and slotted at or near its periphery, and provided with a detachable tongue, embraced by letters patent No. 231,919, of September 7, 1880, to said Ligowski. In the trap used by the American Clay-Bird Company, the clamp of the trap-lever is in form and construction so unlike that of the Ligowski patent that, while it can be used for throwing a saucer or cup shaped target, it cannot be made to throw the targets described in the Ligowski specification in the manner set out in his patents; nor, on the other hand, can the Ligowski clamp be made to throw the targets thrown by the American Clay-Bird Company's trap, unless they are provided with tongues, or their equivalents. *Held*, that the clamp of the American Clay-Bird Company's trap-lever was the equivalent of that of Ligowski, and being so, the fact that it might be an improvement did not render its use any the less an infringement.

2. SAME—LETTERS NO. 252,230—INVENTION.

The first claim of letters patent No. 252,230, of January 10, 1882, to the Ligowski Clay-Pigeon Company, as assignee of George Ligowski, for target traps, is as follows. "The combination, in a target trap, of a spring-lever, a rack, and an adjustable tension-arm carrying the trigger, with which latter is engaged said lever, as herein described." The holding clamp for grasping the target is omitted from the claim. The target referred to is that covered by letters patent No. 231,919, of September 7, 1880, to said Ligowski. *Held*, that the omission of the holding clamp did not invalidate the claim, that being susceptible of ready application in any desired form by a skilled mechanic, and that the limited combination in the claim was not anticipated by the patents to Bogardus, Call, and others in evidence; the saucer shape of the Ligowski target giving it, when projected horizontally or at an angle by the trap, a rapid rotation upon a vertical or inclined axis, and the concavity, which imprisoned the air, causing the target to rise in a curve with a downward convexity, like that followed by a bird rising from its cover; a result the exact reverse of that secured by previously known projectiles, and insuring, in addition, a gradual descent.

3. SAME—INFRINGEMENT.

The second claim of the same patent is for "the combination of spring-lever, head, segmental rack, adjustable tension-arm and trigger, as herein described." The third claim is for "the combination in the target trap of the head, having the spring portion of the lever coiled about it, the jointed standards, the notched knuckles, and the bolts and nuts connecting the same." The various styles of traps pictured in the circulars and advertisements of the American Clay-Bird Company, offered in evidence, showed a segmental rack in the same combination, and serving the same purpose, as that described in Ligowski's second claim. *Held*, that the second and third claims were valid, and infringed by said traps; every element of the third claim appearing in said traps, save for the substitution of the old and equivalent ball and socket joint for the knuckle joints.

4. SAME.

The fourth claim is for "the combination, in a target trap, of a clamp consisting of the bar, pivoted lever, spring, seven-threaded rod, and adjustable nut, as described." *Held* valid.

5. SAME—WANT OF NOVELTY.

The fifth claim of letters patent No. 252,230, of January 10, 1882, to the Ligowski Clay-Pigeon Company, as assignee of George Ligowski, for target traps, covers nothing more than a spring-latch. *Held* invalid, as not displaying invention, and the device being so old and well known that the court would take judicial cognizance of it without notice or proof.

6. SAME—OMISSION OF ELEMENT FROM SPECIFICATIONS.

In letters patent No. 252,230, of January 10, 1882, to the Ligowski Clay-Pigeon Company, as assignee of George Ligowski, for target traps, there is no mention of the pin, which is introduced in the clamp as a guide and fulcrum for the setting and discharge of the target. In a suit for infringement by that company, the preponderance of the evidence was that the pin was added simply to serve inexperienced trappers as a guide in inserting the clay pigeon, that it originated long after the application for the patent; and that the trap could be successfully operated without it. *Held*, that the omission did not invalidate the patent.

7. SAME—LETTERS NO. 313,804—COMBINATION—NOVELTY.

The invention in letters patent No. 313,804, of March 10, 1885, to the Ligowski Clay-Pigeon Company, as assignee of Jacob Bloom, for an improvement upon the Ligowski "target trap," covered by letters patent No. 252,230, has for its object to provide that trap with a second and weaker spring, coiled, reversely to the throwing spring, about the head of the trap, within the drum, and concentric with the actuating spring, and so adjusted as to intercept the throwing lever in the radial movement when at about its maximum speed, and then, gradually checking the throwing-arm, to return it to its position of rest. The violent recoil of the Ligowski arm is thus obviated, and the target is discharged with greater certainty, and with less liability to breakage. *Held*, that the patent was valid, Bloom being the first to demonstrate, by reduction to practical use, the utility and value of the combination of the two concentric springs, not only in the head of the trap, but also to apply such a combination of the concentric springs, acting on different *radii* in opposite directions, for any purpose whatever.

8. SAME—ABANDONMENT—WHAT CONSTITUTES.

The inventor in letters patent No. 313,804, to the Ligowski Clay-Pigeon Company, as assignee of Jacob Bloom, for an improvement upon the Ligowski "target trap," filed his application March 22, 1882. Notice of allowance was forwarded to him, and he, being compelled to go to Europe on business, left instructions with his clerk to pay the final fee within the statutory six months. He was absent more than a year, and some 10 months longer than he expected he would be gone. Upon his return he found that the fee had not been paid, and on August 6, 1883, he renewed his application, which was allowed September 20, 1883. In January, 1884, a new specification was filed, and the two original claims expanded to eight. The patent was allowed February 19, 1885. *Held*, that the date of the original application was the one to which reference should be made in determining whether or not there had been two years' public use and sale of the invention before application, there being nothing in the evidence to warrant the conclusion that Bloom had at any time abandoned either his invention or his application.

In Equity.

Parkinson & Parkinson, for complainant.

L. M. Hosea and *W. Merrill*, for respondent.

SAGE, J. This is a suit for an injunction and account for infringement of letters patent No. 252,230, for target traps, granted complainant, January 10, 1882, as the assignee of George Ligowski, and No. 313,804, granted complainant as assignee of Jacob Bloom, March 10, 1885, upon an application filed March 22, 1882, and renewed August 6, 1883, for an improvement upon the Ligowski invention described and claimed in No. 252,230. The object of the Ligowski invention, as stated in his patent, is to furnish a trap especially adapted for throwing flying targets, so constructed as to cause them to imitate the flight of a bird, and in the peculiar form shown in letters patent No. 231,919,¹ granted to Ligowski

¹See 31 Fed. Rep. 466.

September 7, 1880. The Ligowski patent shows a trap consisting of a standard normally vertical, but so mounted that it may be adjusted to varying inclinations; a spring coiled about the standard, and having a tangential prolongation to serve as a throwing-arm; a trigger or trip-latch to hold the spring-arm or throwing-arm in its set position, and to be disengaged when a target is to be thrown; a clamp at the free end of the throwing-arm adapted to grasp the target at or near its periphery, and to hold it in a substantially horizontal position during the radial sweep of the throwing-arm until the latter attains its maximum velocity, when, as the specification states, the target is "automatically disengaged," and "skims off with a spinning action that closely imitates the flight of a quail." The trap is also provided with means for adjusting the operative force of the spring-arm, and for rotating the standard, about which the throwing-arm is coiled, and securing it in any desired position relatively to its base or tripod, which, in use, is generally staked to the ground. The Bloom patent is for improvements upon the Ligowski invention. The throwing-arm, instead of being a tangential extension of the coiled spring, as shown in the Ligowski patent, is a lever pivoted to the vertical standard. The spring is coiled about a drum upon the head of the standard, and its free end engages with, and is adapted to propel, the throwing-arm. The drum is flanged or grooved at its upper edge, to hold the upper coil of the spring against displacement when the trap is set. This arrangement, it is claimed, secures a more regular sweep of the throwing-arm. In the Ligowski trap, the sweep of the throwing-arm is arrested by the reversed strain of the coiled actuating spring, after the propelling strain is exhausted. Bloom provided the trap with a second and weaker spring, coiled reversely to the throwing spring, and so adjusted as to intercept the throwing lever in the radial movement, when at about its maximum speed, then gradually checking the throwing-arm, and returning it to its position of rest; whereas in the Ligowski trap the arm was suddenly checked, and flew back with a violent recoil. The result of Bloom's improvement is to discharge the target with greater certainty, and with less liability to breakage. The second spring is coiled about the head of the trap, within the drum, and concentric with the actuating spring. A wooden thimble is placed between the standard and the inner spring, to prevent the wear and friction of direct contact between the spring and the metallic standard. This thimble is also provided with a circumferential groove at its upper edge, to restrain the top coil of the inner spring. Both these traps were designed and are specially adapted for throwing a saucer or cup shaped flying target formed as a thin shell of clay, or similar material suitably hardened, and slotted at or near its periphery, and provided with a detachable tongue. For this target a patent was granted Ligowski, September 7, 1880.

The defenses are the invalidity of the patent sued upon, and non-infringement.

The first proposition is that Ligowski in his specification describes his invention as an improvement in target traps, whereby they are rendered

capable of throwing the "peculiar form of target seen in letters patent 231,919, granted September 7, 1880," and that this is set forth as the sole and exclusive purpose of the improvement. This statement is perhaps a trifle too strong, but it is true that the only object of the invention stated in the specification is to furnish a trap especially adapted for throwing the peculiar form of flying targets above referred to, and that was doubtless the only object the inventor had in view. It is urged that the tongue upon the target was its essential feature, and that the peculiar clamp at the end of the trap-lever was likewise the essential feature of the trap; that the patentability of either or both of the devices resides in the "unitary result" produced by the tongue attached to the target, and the clamp attached to the trap-arm; and that infringement can be predicated only upon the proposition that Ligowski's invention was broader than this, and included a concave target generally, and a trap of any description capable of throwing a concave target; for the clamp of the defendant's trap-lever is in form and construction so unlike that of the complainant that, while it can be used for throwing a saucer or cup shaped target, it cannot be made to throw the targets described in the Ligowski specification in the manner described in his patent, nor, on the other hand, can his clamp be made to throw the targets thrown by the defendant's trap, unless they be provided with tongues or their equivalents. In a word, the contention for the defendant is that the construction claimed for the patent on behalf of the complainant obviously requires an enlargement of the patentee's claims beyond the expressed limitations of the patent. The answer to this objection is twofold: (1) The clamp of the defendant's trap-lever is the equivalent of the complainant's. It may also be—for the use for which it was intended, and to which it is applied—an improvement. It is so varied in form and construction as to be adapted to grasp the target itself, and not to grasp the tongue of a similar target having a tongue attached; but the change did not make it any less an infringement. That *bona fide* inventors of a combination are as much entitled to equivalents as the inventors of other patentable improvements has been so often affirmed that no citation of authorities is necessary. (2) It is quite as well settled that the inventor is entitled to all the uses to which his invention can be applied; whether he or another conceived them, or whether he has specified them in his patent or not. To disregard these propositions would be almost to nullify the patent laws.

The defendant's attack is next upon the claims *seriatim*. The first claim is as follows: "The combination in a target trap of a spring-lever, a rack, and an adjustable tension arm carrying the trigger, with which latter is engaged said lever, as herein described." The holding clamp for grasping the tongue of the target is omitted from this claim, but it is insisted that, in order to sustain the claim, it must be understood as embodied in it, for the reason that without it the elements named do not constitute a target trap, and could not co-operate to produce any definite result; and also because such limited combination is anticipated by the patents to Bogardus, Call, and others in evidence. Prior to the intro-

duction by Ligowski of the saucer-shaped targets, artificial targets—generally of fragile balls—were used. These were projected by traps which were mere catapults, (as were the traps of Bogardus, Call, and others, referred to,) flying them into the air in a line always following a parabolic curve, having an upward convexity; while a bird rises in a curve having its convexity downward, until, attaining its altitude, it flies in a path substantially parallel to the ground. The new target was saucer-shaped, and to be projected horizontally or at an angle, by a force which would give it a rapid rotation upon a vertical or inclined axis, the concavity serving to imprison the air, whereby the target could be made to rise in a curve with a downward convexity, like that followed by a bird in rising from its cover, but the exact reverse of that followed by previously known projectiles; and further, insuring a gradual descent. The complainant's combination accomplished this result. He was the pioneer in this line of invention, and although each part of the combination was old, there was something more than an aggregation of old elements. A new and beneficial result—that of imparting to a projectile, by mechanical means, a rotation upon an axis at right angles to its movement, in a new line of flight—was produced, and this is evidence of invention, as was held in *Loom Co. v. Higgins*, 105 U. S. 580. *Forbush v. Cook*, 2 Fish. Pat. Cas. 668, is authority for the validity of the claim, notwithstanding it does not include, in terms, the holding clamp, which could be readily applied in any desired form by a skilled mechanic.

The second claim is for "the combination of spring lever, P, p, head, M, segmental rack, O, adjustable tension arm, U, and trigger, V, W, as herein described." It simply introduces the additional element, the "head, M."

The third claim is for the combination in the target trap of the head having the spring portion of the lever coiled about it; the jointed standards, the notched knuckles, and the bolts and nuts connecting the same. Exhibit "Clay-Bird Co. Circular," offered in evidence by complainant, shows a segmental rack in the same combination in traps manufactured and sold by defendant, and serving the same purpose as that described in the second claim. Every element of the third claim appears in each style of defendant's traps, excepting for the substitution of the old and equivalent ball and socket joint for the knuckle joints. What has been said as to the validity of the first claim applies with equal force to the second and third claims.

The fourth claim is for "the combination in a target trap of a clamp consisting of the bar R, r', pivoted lever S, s', spring, T', seven-threaded rod, t', and adjustable nut, t', as described." This claim is also held to be valid.

The fifth claim is, in the opinion of the court, invalid, for the reason that it does not display invention. It covers nothing more than a spring-latch, a device so old and well known that the court may take judicial cognizance of it without notice or proof. *Brown v. Piper*, 91 U. S. 44; *Terhune v. Phillips*, 99 U. S. 592; *Dunbar v. Myers*, 94 U. S. 187; *Slawson v. Railroad Co.*, 107 U. S. 652, 2 Sup. Ct. Rep. 663; *Wollensak v.*

Reher, 115 U. S. 96, 5 Sup. Ct. Rep. 1137; *Drummond v. Venable*, 26 Fed. Rep. 243; *West v. Rae*, 33 Fed. Rep. 45.

A further objection to the validity of the patent is that the pin which is introduced in the clamp as a guide and fulcrum for the setting and discharge of the target is not mentioned in the patent, although defendant claims that it is proven to have been discovered before the patent was issued. Defendant urges that this pin is a most important element in assisting the target to release itself at the proper moment, and in economizing its acquired momentum. It is in evidence for the defendant that all the traps ever marketed were provided with this pin. One witness for the defendant testifies that from actual tests he found that without the pin the action of the trap was wholly unreliable, and three witnesses testify that the pin is important, and contributes vitality to the successful operation of the trap. On the other hand, six witnesses for the complainant testify to the successful operation of the trap without the pin, upon tests made by them or in their presence, and two,—Ligowski and Bloom,—that it originated long after the application for the patent. The application for the patent was filed May 16, 1881. Bloom testifies that the pin was placed upon the traps late in the summer of 1881. Ligowski testifies that the first traps manufactured and sold had no pins in the clamps, and were successful in operation, and the pin was added to the clamp to serve inexperienced trappers as a guide in inserting the pigeon. The preponderance of the evidence is decidedly in favor of the complainant, and the opinion of the court is that the objection is not well taken.

To the Bloom patent it is objected that in substance it covers only the addition of a "recoil," or buffer spring, to the Ligowski trap; that this did not involve invention, as buffer springs to receive the impact of the arm in traps were old; and springs coiled in similar relations were old in door springs, rocking-chair springs, etc. The court does not sustain this objection. Bloom was not only the first to demonstrate, by reducing to practical use, the utility and value of the combination of the two concentric springs in the head of the trap, with the throwing-arm, but he was also the first to apply such a combination of the concentric springs acting on different *radii* in opposite directions for any purpose whatever, and the court considers that he was entitled to a patent, unless the further objection now to be considered is fatal to its validity. Bloom filed his application for a patent, March 22, 1882. Notice of allowance was forwarded to him at Cincinnati. Leaving instruction with his chief clerk and book-keeper to pay the final fee within the six months required by law, he took his departure for Europe in the interest of the Ligowski Company, about the 1st day of May, 1882, expecting to be absent three or four months, but did not return until early in the summer of 1883. Shortly after his return he ascertained that his clerk had failed to forward the final fee, and the patent had not been issued. On the 6th of August, 1883, he renewed his application. It was allowed September 20, 1883; and in January, 1884, a new specification was filed, and the two original claims expanded to eight. The patent was allowed Febru-

ary 19, 1885. Witnesses for the defendant testify to sales by the Ligowski Company, of which Bloom was manager, of traps embodying the Bloom improvement, on June 28, 1881, when three sales were made, and in July, 1881, when two sales were made. With Bloom's amended specification, filed in January, 1884, was filed an affidavit that the invention had not been in public use or on sale for more than two years prior to August 6, 1883, and witnesses for the complainant testify that all sales prior to that date were of the single-spring or Ligowski trap. The testimony in reference to this feature of the case is irreconcilable, and so conflicting, and so supported by circumstances on each side, that if the determination of the fact were necessary to the proper decision of the cause, it would involve a very close and critical examination, and a somewhat detailed statement of the depositions of the witnesses. But upon the authority of *Godfrey v. Eames*, 1 Wall. 317; *Smith v. Vulcanite Co.*, 93 U. S. 486; and *Graham v. McCormick*, 10 Biss. 39, 11 Fed. Rep. 859,—it is clear that the date of Bloom's original application is that to which the court must refer in deciding whether there had been two years' public use and sale of his invention before his application for a patent. There is nothing in the evidence to warrant the conclusion that Bloom at any time abandoned either his invention or his application for a patent.

The question of infringement remains to be considered. The trap first manufactured and sold by the defendant has a spring lever, a rack, and an adjustable tension arm carrying a trigger with which the lever engages, all combined and operating as does the same combination in the Ligowski patent. This form of trap is shown in complainant's exhibits, "American Field," and "American Clay-Bird Co. Circular." They also show a segmental rack having the same number of notches and projections shown in the drawings of the Ligowski patent. Complainant's exhibits—"Portion of Defendant's New Trap," and "American Clay-Bird Co. Trap, No. 4"—show, in place of the open notched rack, a rack having a series of perforations, with any of which the trigger-carrying arm may engage, but the perforated rack serves the exact purpose of the notched rack, and must be regarded as its equivalent. All these traps are therefore infringements of claims 1 and 2 of the Ligowski patent.

The trap which is in evidence and marked "Exhibit Defendant's Trap" shows a trigger-holding mechanism consisting of a single notch. It may be possible, but it is not practicable, to increase the tension by removing the trigger arm from the notch, and causing it to engage against the projection which forms the further side of the notch. That evidently was not intended, and an attempt at such adjustment would hardly occur to one using the trap. There is in this trap no infringement of the first or second claim of the Ligowski patent. Each of the four styles of defendant's traps infringes the third claim of the Ligowski patent. They substitute for the knuckle joints of the Ligowski trap the old and equivalent ball and socket joints, and they embody every other element of the claim, all combined and operating as described in the patent.

From what has already been said in reference to the target-holding or clamping mechanism of the complainant's traps and that of the defend-

ant's traps, it follows that defendant's infringe the fourth claim of the Ligowski patent. The fifth claim, having been found invalid, requires no further consideration. The defendant's also infringe the Bloom patent. The traps constructed as shown by exhibits, "American Field," and "Portion of Defendant's New Trap," have every element of every claim of the Bloom trap, combined and operated substantially as specified in the Bloom patent. The trap designated "Exhibit Defendant's Trap," has not "a trip-latch to which the lever may be connected at varying distances from its position of rest," and it is not, therefore, an infringement of the fourth claim, but it does infringe all the remaining claims. The trap constructed as shown by "Exhibit American Clay-Bird Co. Trap, No. 4," omits the recoil spring described and claimed by Bloom, but it embodies every other element of his patent, and is an infringement of the fourth and seventh claims.

A decree against the defendant for an injunction and account will be entered, but without costs as to the Ligowski patent, by reason of the invalidity of the fifth claim thereof.

CONSOLIDATED ELECTRIC LIGHT CO. v. M'KEESPORT LIGHT CO.

(Circuit Court, W. D. Pennsylvania. March 17, 1888.)

PATENTS FOR INVENTIONS—SEVERAL ASSIGNMENTS BEFORE ISSUE.

Letters patent issued to the assignee of the inventor are not void because prior to the issuance thereof such assignee had made an assignment of the invention to a third person, who had assigned the same to still another person, all the assignments being recorded in the patent-office; but by operation of law the legal title to the patent, upon the issuance thereof, *eo instanti* vested in the ultimate assignee. Following *Light Co. v. Light Co.*, 25 Fed. Rep. 719.

In Equity.

Sur demurrer to bill of complaint.

W. Bakewell, for complainant.

John C. Tomlinson, for respondent.

ACHESON, J. The precise question here presented was raised in the case of *Light Co. v. Light Co.*, 25 Fed. Rep. 719, and was decided favorably to the plaintiff. I have carefully read the opinion of Judge WALLACE, and perceive no reason for doubting the correctness of his conclusion. How can it be said that the patent was issued without authority of law, and therefore is void, when in fact it was issued to the very person designated by section 4895, Rev. St., viz., "the assignee of the inventor"? There was, indeed, a literal compliance with the provisions of the statute. But as by operation of law the legal title to the patent, upon the issuance thereof, *eo instanti* vested in the plaintiff as the ultimate assignee, the substantial result was the same as if it had formally issued to the plaintiff. *Gayler v. Wilder*, 10 How. 477. While this

view saves the patent, and subserves the justice of this case, it neither runs counter to sound public policy, nor tends to any evil consequences, so far as I can see. And now, March 17, 1888, the demurrer is overruled, with leave to the defendant to answer the bill within 30 days.

PALMER v. JOHNSTON.

(Circuit Court, N. D. New York. March 19, 1888.)

1. PATENTS FOR INVENTIONS—SASH BALANCES—PATENTABILITY—INVENTION.

The invention covered by letters patent No. 126,081, of April 23, 1872, to John J. Cowell, for an "improvement in sash balances," relates to a cast metal pulley-box, and consists, in the second claim, in forming the box with two or more semi-tubular swellings, one at each end of the box, adapted to fit auger-holes bored in the frame for inserting the box. *Held*, that the improvement, though a very simple one, involved something more than ordinary mechanical skill, and that it showed inventive novelty in the saving of time and attention to details called for in the use of prior devices.

2. SAME—EVIDENCE OF INVENTIVE NOVELTY.

The fact that as soon as a patented improvement was made and introduced, its advantages over devices which had preceded it became manifest at once, and it commended itself to the public as a practical and desirable improvement, affords a safer criterion of inventive novelty than any subsequent opinion of an expert or intuition of a judge.

3. SAME—ANTICIPATION—BY PRIOR PATENTS.

In letters patent No. 64,957, of May 21, 1867, to Simon Drum, the method of inserting pulley-boxes in the window frame by making an auger-hole at each end of the proposed recess, and cutting away the intermediate wood, is described, and the specifications set out an oblong pulley-box with rounded ends, the arch of which would correspond with the arch of the auger-holes. *Held* not an anticipation of letters patent No. 126,081, of April 23, 1872, to John J. Cowell, for an "improvement in sash balances," the essential feature of the Cowell device, viz., the semi-tubular swellings, being wanting.

4. SAME—INFRINGEMENT.

The invention covered by the second claim of letters patent No. 126,081, of April 23, 1872, to John J. Cowell, for an "improvement in sash balances," relates to a cast metal pulley-box, and consists in forming the box with two or more semi-tubular swellings, one at each end of the box, adapted to fit auger-holes bored in the frame for inserting the box. The device covered by letters patent No. 185,869, of December 12, 1876, to John Vetterlein, is provided with semi-tubular swellings, not only at each end, like the Cowell box, but also with intermediate semi-tubular swellings which practically connect with each other. *Held* an infringement.

In Equity.

Nelson Davenport, for complainant.

Ezek Cowen, for respondent.

WALLACE, J. The second claim of letters patent¹ granted to John J. Cowell, April 23, 1872, for an "improvement in sash balances," is in controversy in this suit. The invention in question relates to a cast metal pulley-box, and consists in forming the box with two or more

¹No. 126,081.

semi-tubular swellings, one at each end of the box, adapted to fit auger-holes bored in the frame for inserting the box. The specification points out the advantages of such a pulley-box as follows:

"In inserting this casing in the window frame it is only necessary to bore auger-holes corresponding with the swellings, and chip out between the holes. The swellings fit snugly in the auger-holes, and it is not necessary to cut away wood neatly between the two auger-holes, as the sides of the box are less in diameter than the diameter of the swellings. The boxes can, by reason of this construction, be more easily and cheaply inserted in window frames, and will be held just as securely and snugly in place as if the sides were more neatly fitted to the wood."

The defendant is manufacturing pulley-boxes made conformably to a patent¹ granted to John Vetterlein, December 12, 1876. That patent describes the alleged infringing device as follows:

"My improvement relates to the case, B, made with an external surface composed of segments of cylinders, C, at opposite sides, so placed that they are adapted to enter mortises formed by holes bored in wood, such holes intersecting so that the interior of the opening made in the wood will be corrugations corresponding with the corrugations upon the surface of the case."

In other words, the defendant's device is provided with semi-tubular swellings, not only at each end, like that of Cowell's pulley-box, but with the intermediate semi-tubular swellings which practically connect with each other. When Cowell made his improvements in pulley-boxes it was customary to insert pulley-boxes in the frame by making an auger-hole at each end of the proposed recess, and cutting away the intermediate wood; and a patent² had been granted to Simon Drum, of the date of May 21, 1867, which described this method of inserting pulley-boxes, and described an oblong pulley-box with rounded ends, the arch of which would correspond with the arch of the auger-holes. The pulley-box of this patent did not, however, have the semi-tubular swellings of Cowell's device. This was the nearest approach in the prior state of the art to the pulley-box of Cowell; and Cowell was the first to recognize the advantage in the saving of time and attention to details in inserting pulley-boxes which would result from employing the peculiar form of pulley-box which his patent describes and claims. Cowell's improvement was a very simple one, and it is easy to assert now that any competent mechanic in that department of industry could have made it by the exercise of ordinary mechanical skill. Indeed, it seems surprising now that no one had made it; but no one had, although many kinds of pulley-boxes had been made, and some had been patented; and as soon as this one was made and introduced its advantages were manifest, and it commended itself to the public as a practical and desirable device, and a better one than those which had preceded it. These circumstances afford a safer criterion of inventive novelty than any subsequent opinion of an expert or intuition of a judge.

The defendant has appropriated the invention of the Cowell patent, and a decree is therefore ordered for an injunction and an accounting.

¹No. 185,869.

²No. 64,952.

BABCOCK & WILCOX CO. v. PIONEER IRON-WORKS *et al.*

(Circuit Court, S. D. New York. March 22, 1888.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—STEAM GENERATORS—LETTERS PATENT No. 90,506.

In a steam generator of that class in which the water is contained in a series of tubes inclined upward from the fire front, active circulation of the water is necessary to success in making steam. The steam, therefore, is carried to a chamber above, but in its passage some water goes with it. If this water is allowed to fall back towards the high end of the tubes from which the steam comes, the circulation is impeded. Crawford (letters patent No. 90,506, of May 25, 1869, to Benjamin Crawford) made the ends of the tubes to open into chambers, called "boxes," which communicate with each other, and the chambers at the high end to communicate with the steam-chamber above. He placed the reservoir of supply above, and communicating downward into the chambers at the lower end, and connected the lower part of the steam-chamber with this reservoir. This arrangement takes the water from the steam-chamber to the supply and into the circulation forward, and effectually prevents the obstruction which it would cause by being left to take the other course. *Held* not anticipated by English letters patent No. 652, of 1868, to one Inglis; the water carried with the steam into the steam-chamber, or accumulated there by condensation, being liable in that improvement to find its way into the chamber at the lower end of the tubes, and to be drawn into the upward circulation through the tubes again, and to fall back the other way.

2. SAME.

The first two claims of letters patent No. 90,506 of May 25, 1869, to Benjamin Crawford, for an "improvement in steam generators" relate principally to the intercommunicating chambers or boxes at the ends of the series of tubes inclined upward from the fire front. *Held* invalid, such communicating devices being old.

3. SAME—CONSTRUCTION OF CLAIM.

The third claim is for the water reservoir connected with the steam-drum, "or other part," in combination with the inclined tubes, substantially as described. *Held* valid, the phrase "or other part" creating no uncertainty in view of the fact that the connection would not be substantially as described unless the connection should be between the water reservoir and the steam-drum, or some other part similar to the steam-drum.

4. SAME.

The fifth claim brings other parts into a combination with the same arrangement. *Held* valid, so far as it included the third.

5. SAME—INFRINGEMENT.

The steam generator of defendants had the inclined tubes, the communicating chambers, and the steam-drum connected at the lower part with the water reservoir. The location of the parts, however, was somewhat different from that in the third claim of letters patent No. 90,506, of May 25, 1869, to Benjamin Crawford, for an "improvement in steam generators," but they accomplished the same thing by the same means and in the same way. *Held* an infringement.

6. SAME—LETTERS PATENT No. 175,548—PATENTABILITY.

The first claim of letters patent No. 175,548, of April 4, 1876, to Babcock & Wilcox, for an "improvement in sectional steam generators," is for a tube connecting the steam-drum with other parts, and united to them by expanded, instead of screw, joints. *Held*, the joints and their advantages being old, that the invention was not patentable; the only new thing that was done being to use the joints in the places indicated, and that amounting merely to a good selection from among known joints and involving only good workmanship.

7. SAME—ACTIONS FOR INFRINGEMENT—JOINT INFRINGERS—COMPROMISE—STIPULATION.

The bill charged a joint infringement by P. and S., which "said defendants are jointly concerned in and connected with," by the manufacture by P. for

sale by S. of the patented article. Pending suit the patent expired, and P. settled by written stipulation under seal; the money paid "to cover the costs of complainant in this suit against P., and all damages for the infringement by said P. of the letters patent sued on." It was also provided that the settlement should not release S., "all such claims and demands being expressly reserved." *He'd*, both P. and S. being liable for all the infringement by either as maker, seller, or user, that the stipulation discharged S. both as to costs and as to damages.

8. SAME—PLEADINGS—AMENDMENTS TO CORRESPOND TO PROOF.

Where witnesses have been examined as to prior patents which are material upon the question of anticipation, and which were not set up in the answer, nor formally put in evidence, but which have been treated as regularly in the case for that purpose, on the argument and in the consideration of the cause, a motion made and submitted with the case for the amendment of the answer, and for the allowance of the patents, as being formally in evidence, will be granted in order to make the case complete.

In Equity. Bill for infringement against the Pioneer Iron-Works and the Safety Steam Generator Company.

Samuel R. Betts and *Benjamin F. Thurston*, for complainants.

Edward N. Dickerson, Sr., and *Edward N. Dickerson, Jr.*, for respondent, Safety Steam Generator Company.

WHEELER, J. This suit is brought upon three patents: No. 90,506, dated May 25, 1869, and granted to Benjamin Crawford, for an improvement in steam generators; No. 98,490, dated January 4, 1870, and granted to Griffith, Wundram, and Muller, for an improvement in sectional steam generators; and No. 175,548, dated April 4, 1876, and granted to Babcock and Wilcox, for an improvement in sectional steam generators. On the argument infringement of the first, second, third, and fifth claims of the first and the first claim of the last is relied upon. The first claim of the last patent is for a tube connecting the steam-drum with other parts, and united to them by expanded, instead of screw, joints. The expanded joint appears to a slight extent to be like a ball and socket joint, and to admit of small movements of the parts without causing a leak. Such a joint seems to be peculiarly useful in those connections on account of necessary changes in the relative position of the parts caused by expansion and contraction and otherwise. But such joints and their advantages are conceded to have been old and well known before, so that the only new thing done was to use one in this place. This was merely a good selection from among known joints, and involved good workmanship, and apparently nothing more. It does not seem to come up to a patentable invention. *Railroad Co. v. Truck Co.*, 110 U. S. 490, 4 Sup. Ct. Rep. 220; *Miller v. Foree*, 116 U. S. 22, 6 Sup. Ct. Rep. 204. These generators are of that class in which the water is contained in a series of tubes inclined upward from the fire front. Active circulation of the water through the heated parts of the tubes is necessary to success in making steam; and as there is no room for steam in the tubes it must be carried to a chamber above, and some water will go with it. If this water is left to fall back towards the high ends of the tubes from which the steam comes it impedes the circulation. Prior to Crawford's invention there was no arrangement, so far as has been made to appear, to compel it to go to the lower end of the tubes and take its place with

water from the supply in the circulation upward through the tubes again. He made the ends of the tubes to open into chambers, called boxes, which communicated with one another, and the chambers at the high end to communicate with the steam chamber above; and he placed the reservoir of supply above, and communicating downward into the chambers at the lower end, and connected the lower part of the steam chamber with this reservoir. This arrangement takes the water from the steam chamber to the supply, and into the circulation forward, and effectually prevents the obstruction which it would cause by being left to take the other course. The invention described in English letters patent No. 652, granted to one Inglis, in 1863, comes nearest to this arrangement of anything shown, as an anticipation. In that, as understood, the water carried with the steam into the steam chamber, or accumulated there by condensation, might find its way into the chamber at the lower end of the tubes, and be drawn into the upward circulation through the tubes again, and might fall back the other way and obstruct the circulation. The first two claims relate principally to the boxes forming the communicating chambers at the ends of the tubes. Such communicating devices are shown to have been known before. The third claim is for the water reservoir connected with the steam-drum, or other part, in combination with the inclined tubes, substantially as described. Some question is made about the exactness of this claim on account of the expression, "or other part." The connection would not be substantially as described unless the connection should be between the water reservoir and the steam-drum, or some other part similar to the steam-drum. Therefore that is what is understood by that expression, which, with that understanding, creates no uncertainty. That claim appears to cover this new arrangement, and to be valid. The fifth claim brings other parts into a combination with the same arrangement, and would appear to be valid so far as it is included in the third. The steam generator of the defendants has the inclined tubes, the communicating chambers, the steam-drum connected at the lower part with the water reservoir; and their description of its operation in their circular put in evidence is the same as that mentioned of the invention of Crawford. The location of the parts is somewhat different, but they appear to accomplish the same thing by the same means in substantially the same way, and to have thereby infringed the third claim of this patent. Whether they infringe the fifth or not is not material, for an infringement of that would be an infringement of this, and the consequences of an infringement are not varied, so far as known by the number of claims infringed.

This patent has expired, and no occasion for an injunction against further infringement of it is made to appear. No question of liability or relief is left, except as to profits and damages. With reference to those the defendant Pioneer Iron-Works appears by written stipulation with the orator under seal to have settled with the orator since the suit was brought, and while it was in readiness for final hearing, and to have paid to the orator \$6,500 "in cash, to cover the costs of the complainant in this suit against said Pioneer Iron-Works, and all damages for the in-

fringement by the said Pioneer Iron-Works of the letters patent sued on," but "not to discharge or license any parties who may have used or may hereafter use any infringing apparatus heretofore or hereafter made by the Pioneer Iron-Works, except as herein expressly stated, nor shall it release the Safety Steam Generator Company; all such claims and demands being expressly reserved." The defendant the Steam Generator Company insists that this settlement is a full answer to any further claim by the orator against that company on account of this infringement. The bill charges a joint infringement, which "said defendants are jointly concerned in and connected to" by the manufacture by the Pioneer Iron-Works, for sale made by the Safety Steam Generator Company, of steam generators containing each and all of the inventions contained in each and all of these letters patent. The answer denies all infringement. The evidence meagerly shows that the generators of the defendants contain the invention of this third claim. The infringement of a patent is in the nature of a trespass upon the exclusive rights of the owner of the patent secured by it, for which an action would lie at common law. Bull. N. P. 75. The action would be an action on the case, as for a tort, in which all who participate are principals, and for which they are jointly and severally liable for the whole. 1 Chit. Pl. 141; 2 Greenl. Ev. § 487. This is the form of action mentioned in the statutes. Rev. St. U. S. § 4919; *Moore v. Marsh*, 7 Wall. 515; *Mowry v. Whitney*, 14 Wall. 620; Co. Litt. § 376, laid down this:

"Also if two men doe a trespassed to another, who releases to one of them by his deed all actions personalls, and notwithstanding sueth an action of trespassed against the other, the defendant may wel shew that the trespassed was done by him, and by another, his fellow, and that the plaintife by his deed (which he sheweth forth) released to his fellow all actions personalls, and demand the judgment, &c., and yet such deed belongeth to his fellow, and not to him."

This seems to be good law to this day. 2 Greenl. Ev. § 80; *Eastman v. Grant*, 34 Vt. 387. A plaintiff is entitled to but one satisfaction of his cause of action, whether but one or many may be liable, or whatever the form of action may be. *Fowell v. Forrest*, 2 Saund. 48a; *Lovejoy v. Murray*, 3 Wall. 1. If the damages are actually paid by one, that is a sufficient satisfaction for all. If such payment is acknowledged by deed, the actual consideration cannot be inquired into. If the plaintiff had brought suit against the Pioneer Iron-Works alone, on the proofs in this case, as here understood and considered, judgment would have been recovered for all the infringement involved. After the satisfaction of such judgment no action could be maintained against the Safety Steam Generator Company for the same infringement, because the plaintiff would be fully satisfied for that. The infringement by one is the same as that by the other; and when satisfaction is made for that, the whole is satisfied. The payment and acknowledgment of it cover all damages for the infringement by the Pioneer Iron-Works, and that includes all the infringement involved in this case, and covers all damages for it. The agreement expressly provides that the Safety Steam Generator Company shall not be released, but, whether released or not, the orator has no unsatis-

fied claim to recover upon against that company. This case differs in this respect from *Chamberlin v. Murphy*, 41 Vt. 110, where part satisfaction was received from some of the defendants, and they were discharged without affecting the liability of the others for the residue. There the payment was received for but a part, and the rest of the cause of action was expressly reserved. Here the payment is received for all the damages, and only the liability of the other defendant, so far as this case is concerned, is reserved. That liability was reduced to nothing when all the damages were paid.

The orator urges that the recovery of damages from a manufacturer for infringement does not relieve a seller or user, afterwards, from liability, and that even the recovery of damages from a seller would not relieve a subsequent user; and argues from these premises that the Safety Steam Generator Company is or may be liable beyond the Pioneer Iron-Works. *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. Rep. 244. But as this case now stands, both of the defendants were liable for all the infringement by either as maker, seller, or user, and all the damages for all of this have been paid. Nothing is left in that or any other view which has been presented or suggested itself. This result may not have been, and probably was not, intended by the orator and the Pioneer Iron-Works, in doing what they did; still the conclusion that such is the legal effect of it seems to be unavoidable. As there is no relief to which the orator appears to be entitled against the Safety Steam Generator Company, the bill must be dismissed as to that company.

This conclusion would have rendered any inquiry into the original liability of that company unnecessary but for the question of costs. There are no costs for which one defendant was liable that the other was not, that are made to appear. All the costs for which one defendant was liable are paid. There are none for which the other was liable remaining to be recovered or paid. But both were liable for costs, and neither was entitled to any, as the case has turned, when the costs were incurred. For that reason neither has ever become entitled to costs. The stipulation provides for an injunction against the Pioneer Iron-Works.

Witnesses appear to have been examined as to some prior patents which are material as to questions of anticipation, and which were not set up in the answer, nor formally put in evidence, but have been treated as regularly in the case for that purpose on the argument and in the consideration of the case. Motion was made, and submitted with the case, for the amendment of the answer, and the allowance of these patents as being formally in evidence. That motion is granted to make the case complete.

Let an order be entered for the amendment of the answer, and the allowance of these patents in evidence; and let a decree be entered for an injunction against the Pioneer Iron-Works, according to stipulation, and dismissing the bill as to the Safety Steam Generator Company, without costs, and without prejudice to the validity of the third claim of the Crawford patent.

THE DORA.

MOORE *et al.* v. THE DORA. HOPE INS. CO. v. SAME. COSULICH
v. SAME.

(District Court, E. D. Louisiana. May 25, 1887.)

1. SHIPPING—BOTTOMRY AND RESPONDENTIA—WHAT CONSTITUTES.

The master of a ship, having need of money in a foreign port, executed two instruments to secure loans, the tenor of which was that the master, for necessary disbursements of the vessel, pledged the vessel and freight for the payment of the amount expressed, to be made 10 days after the arrival of the vessel at the port of destination, any other draft or obligation to be secondary. Except by implication there was no renunciation of the claim for repayment of the loan, unless the ship arrived at her port of destination. *Held*, that these instruments had the force and validity of bottomry bonds.

2. SAME—RANK—AS BETWEEN BONDS ON SAME VESSEL.

In a question as to the rank of two bottomry bonds upon the same ship, the fact appeared to be that the obligations, though dated one one day, and the other the next day, were for moneys expended during the same period and to relieve the same necessity. *Held*, that since the priority must be determined according to the necessity at the time of the advances, and these advances were contemporaneous, and furnished relief from the same wants, the obligations must rank as of the same date.

3. SAME—ADVANCES BY SHIP'S AGENT FOR GENERAL AVERAGE.

A ship made jettison of part of her cargo, and upon her arrival in a foreign port was libeled and sold. *Held*, that the claims of the agents of the ship for money advanced in payment of her part of the general average should be paid out of the proceeds of the sale, before the bottomry bonds.

4. SAME—NATURE OF AGENTS' LIEN.

The lien of a ship's agents in a foreign port for money advanced in payment of her part of a general average arising out of a jettison of part of the cargo is a lien enforceable by a proceeding *in rem* in admiralty.

5. SAME—EXPENSES IN PREPARING SHIP FOR SALE.

A ship deviated from her course, and, after making jettison of part of her cargo, reached a foreign port. *Held* that, upon a libel and sale of the vessel, a claim of the ship's agents for money advanced for the preservation of the ship after she reached the harbor, and after she was condemned, to place her in a condition where she could be sold as a condemned vessel, should be first paid, before the bottomry bonds.

In Admiralty.

E. W. Huntington, for J. & C. Moore & Co.

H. Denis, for Hope Ins. Co. and claimants.

T. J. Semmes, for S. A. Cosulich.

BILLINGS, J. These three causes, consolidated and tried as one, present the following state of facts: On the 10th and 11th days of March, 1886, the Austrian ship Dora was at Pensacola, Fla., laden for a voyage to Genoa, Italy, with a cargo of lumber. Having need of money for disbursements, and being without funds, the master, made and delivered two instruments,—the one, for 6,000 francs, on March 10th; and the other, for 617 pounds sterling, upon March 11th. The tenor of these instruments was that the master, for necessary disbursements of the vessel, pledged the vessel and freight for the payment of the amount, ex-

pressed to be made 10 days after the arrival of the vessel at the port of destination, any other draft or obligation to be secondary. On March 14th the vessel set sail on her voyage, and proceeded to sea. She encountered rough weather, and sprung aleak. The master, after consultation with the other officers, to save the vessel and the residue of the cargo, caused a jettison to be made of a portion of the lumber, and, for safety of life, vessel, and cargo, determined to and did turn aside from his voyage, and seek New Orleans as a port of refuge, at which port she arrived on March 24th. On same day the Austrian consul appointed surveyors, who on 29th made an examination, and ordered cargo to be unladen, to allow of further survey. The cargo was unloaded between March 31st and April 22d. On April 29th the surveyors recommended that the vessel be condemned and sold. The master was about to have the vessel sold, when, on May 18th, the libel in the first of the causes was filed. Upon her arrival the vessel had been placed in the hands of J. A. Cosulich & Co., who had made the disbursements, and afterwards libeled her in the third suit. These libelants knew the owner of the vessel, and that he was a man of wealth. There is no other evidence that the disbursements were not made upon their reliance upon the vessel and the cargo for the amounts respectively required for them. Messrs. Cosulich & Co. advanced in all the sum of \$3,206.88. A general average was adjusted of the loss arising by the jettison, and the expenditures at this the port of refuge; and for the part of this loss and these expenditures, put by the adjustment upon the ship, claim is made by Cosulich & Co. upon the vessel and its proceeds. The vessel was sold, and brought \$2,400, which is in the registry of the court. The questions are as to the validity and priority of these alleged claims upon the ship.

First. What is the character of those two hypothecations made at Pensacola? The proctors for those who hold them contend that they are bottomry instruments. Bottomry is defined to be a maritime contract by which a ship (or bottom) is hypothecated in security for money borrowed for the purposes of her voyage, under the condition that, if the ship arrive at the port of her destination, the borrower, personally, as well as the ship, shall be liable for the repayment of the loan, together with such premium thereon as may have been agreed on; but that, if the ship be lost, the lender shall have no claim against the borrower, either for the sum advanced or the premium, (which is often termed "maritime interest," since it may be fixed without necessary limit from the legal rate of interest in the country where the loan is made, or where it is to be paid.) The earlier bottomry contracts were executed under seal, and contained a special clause renouncing all claim for repayment of the loan, unless the ship arrived at her port of destination. The later usage has dispensed with the seal.

As to the absence of the old clause of renunciation of claim of repayment unless the ship arrived: In *Simonds v. Hodgson*, 3 Barn. & Adol. 50, the court of king's bench, presided over by Lord TENTERDEN, C. J., reversing the judgment of the common pleas, (6 Bing. 114,) held that where from the whole instrument it was manifest that the lender takes

upon himself the peril of the voyage, the instrument is one of bottomry. In *The Nelson*, 1 Hagg. Adm. 169, Lord STOWELL held that when the instrument simply provided that "the money was to be paid at a certain time after the arrival of the ship at her port," that that was a sufficient description of a sea risk, and made the instrument one of bottomry. I consider it to be settled by authority that these instruments have the validity and force of bottomry bonds.

Second. As to their rank with reference to each other. The fact appears to be that those obligations, though dated one one day, and the other the next day, were for moneys expended during the same period, and to relieve the same necessity of the ship. In *The Virgin*, 8 Pet. 551, the court say, it is the practice to execute the bond after the money has been furnished on an agreement for a bottomry, as the precise amount cannot sooner be ascertained. It is settled law that the holder of a bottomry bond must show that there was a necessity for the hypothecation, and that a bottomry bond may be good for a portion of the loan, and bad for another portion. It would follow that the priority must be determined according to the necessity at the time of the advances, and, as the advances were contemporaneous, and for a single necessity, the obligations must rank as of the same date.

Third. There remains the question as to the rank of these bonds considered as one obligation, and the claims of Cosulich & Co. for their advances at this port. A study of the elements and grounds of the apportionment made by the adjusters shows this: That before the case came into the hands of the proctors for the ship's agents at this port, they had caused a general average to be made, to which the owners of the cargo had submitted, and their proportion of which they had paid. There is a further question as to expenditures in this port by the ship's agents, not included in the general average, amounting to \$346.31. I shall first consider the question as if the lien upon the proceeds of the ship arose from a general average. The elements which make up the total which is apportioned are: \$128.40, value of the cargo jettisoned; \$193.34, the value of the yawl and tackle of the ship thrown overboard and destroyed to save cargo; and upwards of \$6,000, expended by the ship's agents here. This total is apportioned upon cargo valued at \$8,686.40, and one-half value of vessel, making \$1,884.17. So that the chief question strictly is as to the right to enforce a lien against the bottomry obligations arising from expenditures made by the ship through its agents in a foreign port, a large portion of which has been satisfied by the owners of the cargo. As to the amount of the cargo jettisoned, the question is as to the validity and effect of a general average as against the bottomry holders. The general doctrine as laid down by the text writers, and as concurred in by the judges, is that money loaned upon bottomry is not affected by average or salvage. This language has led to some perplexity. In *Ologaardt v. The Anna*, in the United States district court in Rhode Island, reported in 9 Amer. Law Reg. (N. S.) 475, the court, after stating four reasons in favor of the claim of the libelants, which was for the enforcement of a claim for bottomry money against a general av-

erage, maintains libellant's claim. But I think it fair to infer that the court held that no general average could operate against bottomry. But this case stands alone as an express adjudication of that conclusion. In *Cargo ex Galam*, Brown & L. (1863-65) p. 184, the court interpreted this often-quoted maxim as to bottomry obligations not being liable to average, and held it was true only as between the owner of the thing hypothecated and the owner of the bottomry bond; but that, as between the holder of the bottomry bond and those whose lien arises in respect of services by which the thing hypothecated had been benefited, this maxim did not hold. This case maintained the lien arising from a general average for rescuing a portion of the cargo against the ship and rest of the cargo, as having a priority over a former *respondentia*. There can be no doubt but that this last decision is based upon a correct appreciation of the subject of maritime liens, and is correct. In *Cope v. Dock Co.*, 10 Fed. Rep. 142, 144, is given the reason for maritime liens upon ships, as follows:

"The ship and all things pertaining to it are, in the law of admiralty, so far as moneyed responsibility is concerned, clothed with personality. Those who repair her, or loan money upon her, or equip or man her, or who work for her, those who are injured by her, and those who save her, may look to her for judgment as the debtor. The reason for this is that ships are often distant far from home and their owners, and commerce was vastly facilitated, and the interest of all concerned therein vastly promoted, by their being endowed by law with the attributes or faculties of a personal debtor. This reason is the origin of the whole doctrine of maritime liens; and by this reason maritime liens are to be ascertained and measured and ranked."

Whoever lends money upon a bottomry obligation for the ordinary transactions of her voyage, has a lien upon the vessel which outranks all lienholders, save the mariners for their wages. But where maritime services or sacrifices or expenditures are rendered necessary which carry with them maritime liens, the holder of the bottomry bond, like any other mortgagee or pledgee, has his conditional interest burdened precisely as if he were to that extent an owner. Indeed, the bottomry holder can be no more than absolute owner, so far as third persons are concerned. To hold any more restricted doctrine would prejudice the interests of the bottomry holder himself. It is for his interest as well as for that of all other absolute or conditional owners that the whole should be saved by a sacrifice of a part, and that the whole thus saved should contribute to make good the sacrifice, and that salvors and all others who render benefits which save or render available the bottom pledged to him, should have a lien upon that bottom, even against him. See *Williams & B. Adm. Jur.* 64, 65; and *Macl. Shipp.* 702-705. I think that, upon reason and authority, the general average should be paid before the bottomry bonds. The transactions out of which the general average arose were subsequent to these bonds, and aided in providing and making available the bottom which these bonds contingently represented.

But it is urged by the learned proctors for the bottomry that the general average does not carry with it any maritime lien which can subject the ship to admiralty jurisdiction. It will be conceded that all jurists

have held that the general average carried with it a lien, either at common law or in admiralty. Those who, under certain circumstances, have denied that it constituted a privilege enforceable in the courts of admiralty have admitted that it gave a lien which was good in the common-law courts. This would be sufficient to dispose of this point in favor of the claimants as to the jettison and later disbursements. The three consolidated cases may be treated as one case initiated by the bottomry holders, and, the *res* being in the possession of the court, the lienholders other than those of an admiralty character might be decreed to be satisfied out of the *res* or its proceeds. This is the point decided in *The Lottawanna*, 21 Wall. 558, 581, 582. But the weight of authority is in favor of the general average in this case carrying with it such a lien as would of itself give and maintain admiralty jurisdiction. It would be idle to review all the cases in which the question has been passed upon. It may be said that in England this lien is treated as purely of a common-law character; while the weight of American authorities is decidedly in favor of its carrying an admiralty lien capable of being enforced in a proceeding *in rem* in a court of admiralty. Nor is it necessary to examine the earlier decisions in the United States supreme court bearing upon this subject, because this precise question was presented to that court in *Nemours v. Vance*, 19 How. 162, 171. It was there held that the owner of a cargo jettisoned has a maritime lien on the vessel for the contributory share due from the vessel on an adjustment of a general average, which lien may be enforced by a proceeding *in rem* in the admiralty.

Lastly, as to the claim of Cosulich & Co. for the \$362 expended by them as the ship's agents, after she was brought into this port, and which was not included in the general average. For the most part, or to the extent of a great part, these expenditures were made for the preservation of the ship, and, after she was condemned, to place her in a condition where she could be sold as a condemned vessel. They were therefore expenditures made in a foreign port, which tended directly to enable the bottomry-men to realize out of the vessel in a port where she had to be sold. Those which are valid against the ship rank before the bottomry holders, precisely as would the expenses of an auctioneer in making the sale; they were a necessity or there could have been no realizing out of the vessel for the bondholder. There is a series of cases in which the supreme court of the United States have defined the liens of those who expend moneys upon ships in foreign parts, which, in their own language, have "had the effect to place these liens upon a more substantial footing." Those decisions maintain the general doctrine that expenditure which benefits the *res* creates a lien. These cases are *The Grape-Shot*, 9 Wall. 129; *The Luku*, 10 Wall. 192; *The Patapasco*, 13 Wall. 329; *The Emily Souder*, 17 Wall. 666. Those cases also dispose of the point taken that, because the parties making the expenditures know the owners, and know them to be persons of wealth, that therefore they gave the credit to the owners, and not to the ship; for they hold, among other propositions, (*Patapasco*, 13 Wall. 334,) that the burden of displacing the lien

from the vessel, where expenditures were necessary, was upon the claimants. In that case the charge upon the books of the libelants was against the owner personally, and still the court held the credit was given to the vessel. The conclusion is that Cosulich & Co. must first be paid the amount adjusted by the general average as the contributory share of the vessel's loss and expense, viz., \$1,808.40, and for such portion of the expenditures of \$346 as were necessary in order to preserve the vessel, (and to ascertain these items there may be a reference.) The balance of the proceeds must go to the holders of the two bottomry obligations *pro rata*.

THE DORA.

MOORE *et. al.* v. THE DORA. HOPE INS. CO. v. SAME. COSULICH v. SAME.

(Circuit Court, E. D. Louisiana. February 25, 1888.)

MARITIME LIENS—PRIORITIES—ADVANCES TO PAY SEAMEN'S WAGES—BOTTOMRY BONDS.

An Austrian ship bound from Pensacola, Fla., to Genoa, Italy, deviated from her course, and, arriving at New Orleans, was libeled and seized. Two of the libels were for bottomry bonds, and a third for money advanced for the payment of mariners' wages. *Held*, that the money advanced by third libellant for such payment having been so used, he acquired a lien of equal rank with that extinguished, and his claim ranked above the bottomry bonds.

In Admiralty. On appeal from district court.

See *The Dora*, *ante*, 343.

E. W. Huntington, for J. & C. Moore & Co.

H. Denis, for Hope Ins. Co. and claimants.

T. J. Semmes, for S. A. Cosulich. *

PARDEE, J. The elaborate opinion given in these cases by Judge BILLINGS satisfactorily settles all the questions considered. There remains, however, to be disposed of a claim of S. Cosulich & Co., of \$1,208.30, alleged to have been paid to the captain of the *Dora* to pay seamen's wages. In the account attached to the libel made up May 21, 1886, and indorsed, "Approved, M. Premuda, Master," the said item is charged as follows: "P'd cash to captain to pay off the ship's crew for provisions, etc., \$1,208.30." The claim is supported by the evidence of Cosulich that he paid all the sums of money specified in his bill, and by the evidence of Capt. Premuda, who says: "*Question*. I find an item in Mr. Cosulich's bill for \$1,208, for paying provisions and expenses? *Answer*. Yes, sir. That is right. *Q*. Did you expend that money for that purpose? *A*. Yes, sir." On the first submission of the case, this was all the evidence in relation to the said item. Subsequently the evidence of Capt. Premuda was taken under commission, and he then testifies that

of the item \$1,208.30 nothing was for provisions; \$1,150 was for wages and \$58.30 was for expenses; of the sum for wages \$990 accrued before the Dora left Pensacola, and \$160 accrued after the ship was condemned, and before the sale. On cross-examination, the captain further says: "The wages were due the crew for about five months' services—from November 2, 1885, to March 17, 1886, which is the date on which the ship deviated from her course; also from April 29, 1886, the day when the ship was condemned at New Orleans, to the 29th day of May, 1886, when she was sold. At different times during the month of May, part of the crew was paid and discharged; the aggregate of the wages paid to these men were \$160, explained this: Mate, \$30 per month; boatswain, \$25 per month; cook, \$22 per month; 14 sailors, together, \$206 per month; petty expenses, \$58.30." Answered from private memorandum book, which cannot be annexed to answer. "The names of such persons paid out of the said \$1,208.30, so far as I can furnish, are as follows: *Mate*, Giovanni Amandick, Lussinpleolo; *boatswain*, Carcich, of Chimehi; *cook*, Dargonis, Dalmatia. I do not know the names and places of residence of the fourteen sailors. According to custom I took no receipt." There is no conflicting evidence. The showing thus made, while indefinite as to many particulars, establishes without contradiction that, when the Dora was in the port of New Orleans, there was owing to her crew for wages the sum of \$1,150; \$990 of which accrued before the date of the bottomry bonds sued on, and \$160 of which accrued just before and just after the seizure was made in this case. These wages were paid by the moneys advanced for the purpose by Cosulich & Co.

By the maritime law seamen's wages constitute a lien on the ship of the highest rank. This lien is preferred to, and ranks, liens arising under bottomry bonds. See Fland. Mar. Law, § 282; *The Charles Carter*, 4 Cranch, 328; *The Virgin*, 8 Pet. 553. Where funds are advanced to the master of and on the credit of a ship, for the purpose of paying off maritime liens, and the funds are so applied, the lender acquires a lien of equal rank and standing to those extinguished with the funds so advanced. See *The Emily Souder*, 17 Wall. 666; *The Lulu*, 10 Wall. 192; *Insurance Co. v. Baring*, 20 Wall. 159; *The Guiding Star*, 9 Fed. Rep. 521. As it is established in this case that Cosulich & Co. advanced these moneys in a foreign port, on the credit of the ship, and they were applied to the extinguishment of mariners' wages, which are proved to have been due, and which, as has been seen, constituted a lien prior to the lien of the bottomry bonds, it seems clear, under the authorities aforesaid, and many others that could be cited, that Cosulich & Co.'s claim should be declared a lien prior in rank to the bottomry bonds; in fact prior to any and all the claims made in this case.

The only answer is that the specific amount of wages due each seaman, and his time of service and discharge, do not appear in the evidence, and the absence of such specific evidence throws suspicion and doubt on the claim. I have considered this, and to that end have quoted herein the entire evidence on the subject, and the result, to my mind, is that too much is proved for the court to ignore on suspicions unsup-

ported by any evidence. It is apparent that the wages of the seamen, as claimed, were due and owing, unless they were paid from the moneys advanced on bottomry at Pensacola; and, if they were paid from those moneys, then it was a fact which the libellant could and should have shown by evidence. It is proper to notice that the advance of moneys on bottomry bonds, and the application of the same to the necessities of the ship, is only established by the evidence of the captain, and that only in a general way, and without naming a single creditor, or giving a single voucher. There is no reason that the master's undisputed evidence should be taken in the one case, and wholly rejected in the other.

The decree to be entered will conform to the opinion of Judge BILLINGS on all the questions discussed by him, and with this opinion on the claim of Cosulich & Co. for moneys advanced to pay wages.

THE THOMAS MELVILLE.¹

WINDMULLER *et al.* v. THE THOMAS MELVILLE.

LEVY *et al.* v. SAME.

(Circuit Court, S. D. New York. March 16, 1888.)

1. ADMIRALTY—APPEAL—REVIEW.

The action of the district court in refusing to consider damage to a cargo of prunes from coal-dust, because not properly pleaded, is subject to review on appeal to the circuit court.

2. SAME—AMENDMENT ON APPEAL.

The libel to recover for damage to a shipment of prunes charged an unsafe and unseaworthy condition of the vessel, so that her decks leaked, and also want of proper care, insufficient dunnage, and improper stowage. The main damage was caused by sea water, but some of the cases had been penetrated by coal-dust. This last element of damage was not referred to in the libel. It came up, however, in dealing with insurers, and some few questions were asked about it in libellant's depositions, but it was not insisted upon until the trial, more than three years after the arrival of the ship, and long after respondent's depositions had been concluded, and the goods had been sold and taken away beyond the reach of examination. *Held*, that libellant was not entitled to file a new or amended libel in the circuit court on appeal, under rules of the circuit court, Southern district of New York, No. 181, providing for the exhibition, without leave, of "new allegations," etc.

3. SAME—STRIKING NEW ALLEGATIONS FROM THE FILES.

Rules of the circuit court, Southern district of New York, No. 180, provides that if the appellee shall have any cause to show why new allegations (filed without leave, under rule No. 181) or proofs should not be offered, or new relief prayed on the appeal, he shall give four days' notice thereof, * * * and such cause shall be shown within the first two days of the term; otherwise the appeal shall be allowed according to its terms." *Held*, that the circuit court had power under the rule to strike the "new allegations" from the files on motion.

Appeal from district court.

¹ Affirming 81 Fed. Rep. 486.

In Admiralty. On motion to strike amended libels.

Libels to recover damages to a cargo of prunes shipped by the libelants on board the Thomas Melville, at Trieste. The main damage was caused by sea water, but a portion of the packages had coal-dust on the outside, which seems to have penetrated some of the cases. This latter element of damage was not referred to in either libel as a separate cause of action. Some reference was made to it in dealing with the insurers, and a few questions asked about it in libelant's depositions taken in 1883, but it was not set up as a distinct claim until the trial, more than three years after the arrival of the ship, long after respondent's depositions had been completed, and the goods had been sold and taken away beyond the reach of examination. The district court refused to allow the libels to be amended so as to include this cause of action. There was a decree dismissing both libels with costs, and libelants took this appeal. See 31 Fed. Rep. 486.

John Berry and Wilcox, Adams & Macklin, for appellants.

E. B. Convers, for appellee.

LACOMBE, J. If the district court erred in not considering the coal-dust damage as not properly pleaded, such error may be reviewed in this court upon appeal. If the appellant wishes to put himself in a better position by amending his pleading, the same reasons which induced the district court to refuse him such leave seem, upon examination of the affidavits and papers, sufficient to induce this court to deny him that relief. He has filed an amended, or, as he calls it, a "new" libel, without leave, under rule 131, which provides that "if new allegations are to be made * * * in this court, then the libelant * * * shall exhibit in this court a libel, on oath, within ten days, to which the adverse party shall, in twenty days, answer on oath, subject in each case to extension; * * * and on default the court will make" a proper order for the final disposition of the case. Appellee moves to strike this libel from the files. In support of his motion he refers to rule 130, which provides that if the appellee "shall have any cause to show why new allegations or proofs should not be offered, or new relief prayed on the appeal, he shall give four days' notice thereof, * * * and such cause shall be shown within the first two days of the term; otherwise the appeal shall be allowed according to its terms." Upon the merits this court is satisfied that good cause is shown against there being now presented any new allegations as to the damage from coal-dust. It is true that no leave is asked to present new allegations, and that rule 130 does not expressly provide for striking the new libel from the files, but it would be a senseless practice which would incumber the case on appeal with allegations which the court would not consider upon the argument. In the absence, therefore, of any authority,—and none is cited,—holding that this court may not strike the amended or new libel from the files, the motion is granted.

THE BROTHERS APAP.¹

ZACCARO v. THE BROTHERS APAP.

(District Court, E. D. New York. February 17, 1898.)

MARITIME LIENS—ENFORCEMENT—UNSATISFIED JUDGMENT IN STATE COURT.

A judgment recovered in a state court against a master for the value of supplies furnished a vessel, and which remains unsatisfied, is no bar to the enforcement in admiralty of the lien upon the vessel for such supplies.

In Admiralty.

John A. Anderson, for libellant.

Ullo, Ruebeamen & Hubbe, for claimants.

BENEDICT, J. This is an action *in rem* to enforce against a foreign vessel a lien for certain supplies furnished to the vessel in the port of New York. The furnishing of the supplies is proved, and there is no sufficient proof to warrant the finding that they were furnished on a personal credit alone. The only question in the case arises out of the fact that prior to instituting this proceeding the libellant brought suit against the master of the vessel in a state court for these same supplies, in which action he recovered a judgment against the master, but of which judgment he has been unable to obtain any satisfaction. The contention on the part of the claimant is that the libellant lost his lien upon the ship by suing the master as he did. I cannot agree with the claimant in this contention. Upon principle, it seems to me that in cases where a lien upon the ship arises, and also a personal liability on the part of the master and the owner as well, the creditor must be allowed to pursue each of these remedies in succession, until he obtains satisfaction of his debt. That he should be able to do this seems to me to be the reason why these several remedies are given by law. Surely the value of the rule will be largely diminished if it be held that a futile attempt to enforce the master's personal liability deprives the creditor of the benefit of the ship's liability. The case of *The Bengal*, 1 Swab. 468, and *The John and Mary*, Id. 471, are directly in point, and adverse to the contention of the claimant. Judge STORY has somewhere remarked to the same effect, but I cannot now find the case. No adjudged case in this country has been called to my attention, except the case of *The Swallow*, 1 Bond, 189, which seemshard ly in point. There the creditor had elected to enforce a lien given by the state law.

Let the libellant have a decree for the amount of the bill, with interest and costs.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

BAKER v. UNITED STATES.

(Circuit Court, D. California. March 5, 1888.)

COURTS—JURISDICTION—CLAIMS AGAINST UNITED STATES—SURVEYING CONTRACTS.

The act of Congress March 3, 1887, (24 St. 505,) provides that where the amount in controversy is between \$1,000 and \$10,000 the circuit courts shall have concurrent jurisdiction with the court of claims of "all claims * * * founded upon * * * any law of congress, * * * or upon any contract, express or implied, with the government of the United States," etc.; "claims which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same" being excepted. The complaint upon a surveying contract set out that the surveyor general of California had approved the field-notes, and certified them, as well as the performance of the work, but that before he forwarded his report to Washington, D. C., he was instructed by the commissioner of the general land-office to proceed no further in the matter. Under the terms of the agreement, this report should have gone to the said commissioner, and, if approved by him, been then referred to the auditor for final allowance and payment. *Held*, on demurrer to complaint, that the claim had not been "heretofore rejected or reported on adversely," within the meaning of the act, and that the circuit court, sitting in California, had jurisdiction, the amount sued for being between \$1,000 and \$10,000.

At Law. On demurrer to complaint.

A. P. Van Duzer, for plaintiff.

J. C. Carey, U. S. Atty., for defendant.

SAWYER, J., (*orally*.) This is a suit on one of these surveying contracts,—a civil suit to recover the amount due on one of these contracts,—the persons connected with which are under indictment in this court for conspiring to defraud the government. The point is made and urged, that the court has no jurisdiction, for the reason that this particular claim has already been passed upon by the land department at Washington, and rejected; and that it so appears upon the face of the complaint. I do not so read it. The contract is set out in full, and in connection with the other allegations in the complaint, I think, a good cause of action is stated. The objection made to the jurisdiction is, that the case stated is not within the terms of the act, as it appears to have been considered and rejected by the proper department.

The act of March 3, 1887, conferred jurisdiction on the court of claims to hear and determine "all claims * * * founded upon * * * any law of congress, * * * or upon any contract, express or implied, with the government of the United States," etc., provided nothing in the act shall be construed to give jurisdiction to hear and determine "claims which have heretofore been rejected, or reported on adversely by any court, department, or commission authorized to hear and determine the same." 24 St. 505. Section 3 gives concurrent jurisdiction to the circuit courts over all such claims wherein the amount claimed exceeds \$1,000, and is less than \$10,000. I am not fully satisfied what the exception as to a determination or reporting against by a department is in-

tended to embrace. But giving the provision its broadest signification, it only extends to claims "heretofore" acted upon and rejected by the department, that is to say, before the passage of the act; and that does not include the contract set out in the complaint in this action. The complaint does not say that the claim has been passed upon by the department at Washington, and rejected. The surveyor general was, according to the contract, to approve and certify to the field-notes, and certify to the amount due, and then his approval and certificate were to be sent to Washington, where it was to be considered by the commissioner of the general land-office for his approval, and then referred to the auditor for final allowance and payment, so that the auditor was the man to finally pass upon the claim. The averments are that the surveyor general approved and certified to the field-notes in the proper mode,—had approved the field-notes; certified that the work was performed in accordance with the contract, and that the plaintiff is entitled to his money; but that before he forwarded his report to Washington, he received orders from the commissioner of the general land-office not to take any further action in it, or to report it to Washington. That in consequence of these positive and distinct orders, it had never been forwarded to Washington, consequently the department at Washington whose duty it was to pass upon the claim never did consider and pass upon it, and it never was determined or rejected. On the contrary, by the action of the commissioner, consideration was prevented, and it was not determined or rejected by the proper department before the passage of the act or at any time. I do not think it comes within the proviso, that excluded from jurisdiction claims "heretofore" determined or rejected by the department, giving the statute the broadest signification. I do not think it comes within the purview of that prohibitory clause, and the complaint states a good cause of action over which the court has jurisdiction.

The demurrer must therefore be overruled, and it is so ordered.

PERRIN v. UNITED STATES.

(*Orcutt Court, D. California. March 5, 1888.*)

At Law. On demurrer to complaint.

SAWYER, J., (*orally.*) The plaintiff in this case is one of the parties, also, embraced in the indictments. He sets out two contracts similar to that set out in *Baker's Case*, *ante*, 353, and they do not appear to have been passed upon by the department. One of them is stated to have been approved by Surveyor General Brown, and the other by Surveyor General Hammond, but it does not appear that the department ever determined or passed upon either or reported against them. The allegation is such as to make out a good cause of action, and the same order will be made in this case as in the other.

The demurrer will be overruled, with leave to answer in 30 days.

PRICE *et ux.* v. HUNTER *et al.*¹

(Circuit Court, E. D. Pennsylvania. February 8, 1888.)

1. TAXATION—TAXABLE PROPERTY—TRUSTS—STATUTES—REPEAL.

The Pennsylvania statute of April 22, 1846, (P. L. 486,) which imposes a tax of three mills "upon all property, real or personal, (not taxed under existing laws,) held, owned, used, or invested by any person, company, or corporation, in trust for the use, benefit, or advantage of any other person, company, or corporation," was not repealed by the act of 1879 and its supplements, passed in 1881 and 1885, in so far as it relates to property in Pennsylvania, held by a Pennsylvania corporation in trust for non-residents of the state. The assessment of such a tax upon property so held is within the literal scope of the act 22d April, 1846.

2. SAME—NON-RESIDENT BENEFICIARIES.

A state has the power to tax property within its boundaries held by a resident trustee for a non-resident *cestui que trust*.

In Equity.

Richard L. Ashhurst, Angelo T. Fredey, Rowland Evans, William Henry Rawle, and R. C. McMurtrie, for complainants.

Rufus E. Shapley and Wm. S. Kirkpatrick, Atty. Gen., for respondents.

McKENNAN, J. The prayer of this bill is for an injunction to restrain the payment or collection, by John Hunter, receiver of taxes, and the other defendants, of a tax ostensibly imposed by the laws of Pennsylvania upon mortgages for about \$200,000, held by the Philadelphia Trust & Safe Deposit & Insurance Company, a Pennsylvania corporation, for the benefit of Mrs. Price, one of the complainants, and a non-resident of the state of Pennsylvania. Two questions are involved in the case, upon the decision of which its result depends: *First*. Is the tax complained of authorized by the laws of the state? *Second*. If it is, has the state the power to impose it?

1. It is conceded by the counsel of the defendants that the tax is imposed by the Pennsylvania statute of April 22, 1846, (P. L. 486,) and unless that act is in force and covers it, it has no warrant elsewhere. That act subjects to a tax of three mills "all property, real or personal, (not taxed under existing laws,) held, owned, used, or invested by any person, company, or corporation," in trust for the use, benefit, or advantage of any other person, company, or corporation." Argument or comment cannot make the import of this act any clearer than is expressed in its own unambiguous and comprehensive phraseology. It incontestably enacts that all property held by a trustee in the state, for the benefit of another, shall be subject to the tax imposed, irrespective of the domicile of the beneficiary. But it is urged that this act is repealed by the act of 1879 and its supplements, passed in 1881 and 1885. This, however, is not so. Those acts repeal former acts in so far only as their provisions are inconsistent with those of previous acts. While some of the provisions of the act of 1846 are changed by these subsequent acts, the tax here involved is

¹ Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

not referred to, and hence is undisturbed. We are therefore of opinion that the act of 1846 is still in force so far as it relates to the tax complained of, and that the assessment of this tax is within its literal scope.

2. Has the state the power to impose this tax? In several of the state supreme courts this question has been the subject of consideration, and it has uniformly held that property is taxable by the states as against the trustee at his place of residence, where the *cestuis que trustent* are non-residents. *People v. Assessors*, 40 N. Y. 154; *Latrobe v. Baltimore*, 19 Md. 13; *Cutlin v. Hall*, 21 Vt. 152; *Dorr v. Boston*, 6 Gray, 131. In Pennsylvania, since the act of 1846, the decisions of the supreme court are of similar effect. Thus, in *Borough of Carlisle v. Marshall*, 36 Pa. St. 401, where the *cestuis que trustent* were non-residents, and the trustee a resident of the state, the court declares that the fund in the hands of the trustee was taxable for state purposes at his place of residence under the act of 1846. See, also, *West Chester v. Darlington*, 38 Pa. St. 157. In the supreme court of the United States no case has been decided involving the question presented here. Correlative questions have arisen, and have been adjudicated, but they do not furnish any authoritative guide to the determination of this case. *State Tax on Foreign-Held Bonds Cases*, 15 Wall. 300, is the leading case of its class. By a law of the state of Pennsylvania, a tax was imposed upon bonds issued by a Pennsylvania railroad corporation, and held and owned by non-residents. It is to be noticed that the legal and beneficial ownership of the subject of taxation were both in another state than Pennsylvania, determinable by the residence of each owner, and hence was beyond the jurisdiction of the latter. The court held that the law was invalid, as impairing the obligation of the contract, between the corporation and its creditors, and that as the *situs* of the property taxed was outside the state, it was beyond her jurisdiction. Speaking of the power of taxation, the court say: "It may touch property in every shape,—in its natural condition, in its manufactured form, and in its various transmutations. It may touch business in the almost infinite forms in which it is conducted,—in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal constitution, the power of the mode, form, and extent of taxation is unlimited, when the subjects to which it applies are within her jurisdiction." In the present case, the trust property in question was transferred to the trustee, a Pennsylvania corporation, by two deeds of trust, and by the will of Samuel Harlan, to be held for the benefit of his daughter, Mrs. Price, during life, and then to be paid to her appointees or to her children. The legal title and ownership of the property was thus vested in the trust company, and is under its control, subject only to the terms of the trust. The trustee is domiciled in Pennsylvania, as a creature of its law, and hence the *situs* of the property is in that state, where the trustee resides. It is thus in their own jurisdiction, and within the reach of her taxing power.

The bill is dismissed, at the costs of the complainants.

PULLMAN PALACE CAR CO. v. CENTRAL TRANSP. CO.¹

(Circuit Court, E. D. Pennsylvania, March 2, 1888.)

1. INJUNCTION—AGAINST PROCEEDINGS AT LAW.

Equity will not interfere by injunction to restrain proceedings at law when all the matters of defense are as available at law as in equity, although complicated and more difficult of presentation.

2. ACCOUNTING—BETWEEN PARTIES NOT HOLDING FIDUCIARY RELATIONS TO EACH OTHER—EVIDENCE.

In an action between parties not holding a fiduciary relation towards each other, based upon a right to an account of receipts and expenditures, the defendant cannot be called upon to produce vouchers or furnish a detailed statement.

In Equity.

The complainant's bill was for an injunction to restrain the defendant from prosecuting at law a suit begun by it against the complainant to recover rent reserved in a lease executed by them in 1870. Upon a motion for an injunction the court dismissed the bill.

Edward S. Isham, George F. Edmunds, Samuel Dickson, and Richard C. Dols, for complainants.

John G. Johnson, for defendant.

BRADLEY, Justice. Upon the renewed application for an injunction in this case we do not think that any new facts are presented which should induce us to change the conclusion formerly reached, to-wit, that the injunction should be denied as regards the action brought for rent accruing prior to the 1st day of July, 1886, when the complainants gave notice of their election to determine the lease and contract of 1870. The ground of relief set up in the bill is that when, at the expiration of the contract with the Pennsylvania Railroad Company, in January, 1885, the complainants contemplated giving notice of their election to terminate the lease, in view of the reduction of net revenues below the amount of the rent reserved, the defendants, through their agents, induced and persuaded the complainants to adopt the other alternative of paying them an equitable sum or share of the net revenues that might be realized, and as should be agreed upon; and that the complainants consented to this, and acted upon that understanding in concluding a new contract with the Pennsylvania Railroad Company. The complainants contend that, after this arrangement had been gone into, it was inequitable and unjust for the defendants to claim and sue for the original rent. This ground was insisted upon on the former motion, but it is contended that since then the facts have been more fully elicited by the proofs, and that it has been shown that the complainants actually gave notice to terminate the lease, but were induced to withdraw it, and to proceed upon the other alternative. Though this is not the way in which the case is presented in the bill, we do not see that it makes any

¹ Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

material difference in the case as far as the application for an injunction is concerned. If the facts contended for are a good ground for relief at all, they are as available as a defense at law as in equity. They are set up for the purpose of showing that the condition subsequent created by the eighth article of the lease, the purpose of which was to cause the covenant to pay \$264,000 per annum to cease, has been accomplished. Proof that that condition has been accomplished would be a legal defense to the action. Whether the pleadings in the action are adapted to the introduction of this kind of proof, we do not know. That makes no difference in reference to this application. If the pleadings are defective, and the time for amendment has not expired, the proper amendments can be supplied. The difficulty of proving the fact that the net revenues are less than \$264,000 a year on account of the complication of the matters involved, we do not regard as, by any means, such as to draw the case into equity. It is not a question of account arising upon a fiduciary relation, and does not involve the principles of such an account. It is necessary, it is true, for the complainants to show by their receipts and expenses that their net revenues are less than \$264,000, but that may be done by a mode of proof very far short of that required from a trustee or agent in rendering an account to his beneficiary or principal. We do not suppose that the defendants would be entitled to call for vouchers, or to be furnished with a detailed statement.

The motion must be denied.

PASCAULT v. COCHRAN.

(Circuit Court, D. Delaware. March 2, 1883.)

1. MORTGAGES—RECITALS—CONCLUSIVENESS.

A mortgage on land in Delaware, given as additional security for the purchase price of land in Maryland, was dated July 28, 1871, and recited that the deed from the vendor and the purchase-money mortgage bore date both, and were delivered both, on that day. *Held*, on bill to foreclose the Delaware mortgage, that the recital as to dates was not conclusive, and, it being shown that both mortgages and the deed were delivered, all three simultaneously, August 5, 1871, parol evidence was admissible to show that the three instruments formed one transaction.

2. DEED—OF BARGAIN AND SALE—OMISSION OF BARGAINEE—CONSTRUCTION.

In Delaware, where the common mode of assurance is a deed of bargain and sale operating under the statute of uses, the words in a deed, "bargains and sells unto the sole and separate use of the said P.," will be construed, in equity, when the intention of the parties is clear, to mean "bargains and sells unto P., and to the only proper use and behoof of the said P.;" and such a deed will be reformed to carry that intention into effect.

3. VENDOR AND VENDEE—SURETY FOR VENDEE—RELEASE BY NEW CONTRACT.

A deed, which contained the usual covenant for "further assurances," recited that grantors' title was under a certain will and proceedings in partition in orphans' court. As security for the purchase money a mortgage was taken on the land; and, as security for that mortgage, the purchaser's father gave a mortgage on other land of his own. After the deed and mortgages were delivered, it was discovered that the orphans' court had no jurisdiction to

make the allotment under the will. The vendors, who had a right to the fee-simple in the land, and who had made no intentional misrepresentations, thereupon, of their own motion, secured quitclaims from all interested, and made the purchaser a good title. *Held*, on bill to foreclose the mortgage from the father, that the father's obligation as surety was not discharged, it not being made to appear that he had suffered any loss or injury, and the execution of the "further assurance" not constituting a new contract.

4. SAME—FORECLOSURE OF PURCHASE-MONEY MORTGAGE—APPOINTMENT OF RECEIVER.

The maker of a mortgage given as additional security for the payment of a purchase-money mortgage is not discharged by the fact that a receiver has been appointed in the suit to foreclose the purchase-money mortgage at the instance of the mortgagee, and with the consent of the purchaser; such an appointment not changing the title to or creating any lien upon the land, or giving any advantage or priority to the mortgagee.

5. SAME—DEPRECIATION IN VALUE OF LAND.

A serious depreciation in the value of land after the time of its purchase, the vendor and vendee having bargained on equal terms, in the absence of proof of fraud, misrepresentation, or concealment of any material fact on the part of the vendor, by which the purchaser was betrayed into an unfortunate speculation, will not discharge the surety of the latter.

In Equity. Bill to foreclose a mortgage.

Philip F. Thomas and Wm. C. Spruance, for complainant.

Alexander B. Cooper and George Gray, for respondent.

WALES, J. This is a suit to foreclose a mortgage given by William A. Cochran, the defendant, to Catharine H. Pascault, the complainant, as additional security for the payment of \$40,000, that sum being the purchase money of a farm in Cecil county, Md., called "Greenfield," containing about 288 acres of land, which the complainant and her husband (now deceased) had sold and conveyed to Henry S. Cochran, the son of the defendant. The history of the case, as gathered from the bill, answer, and proofs, is as follows: In the early summer of 1871, the complainant, being the owner in her own right of 272 acres of "Greenfield," and her husband owning the remaining portion, they entered into negotiations with Henry S. Cochran and William A. Cochran for the sale of the farm, and it was finally agreed that Henry S. Cochran would become the purchaser for \$40,000. As the sale was entirely on credit, no cash payments being required or offered, it was further agreed that, in addition to Henry S. Cochran's mortgage of "Greenfield" for the whole amount of the purchase money, the defendant should also give a mortgage of his farm on which he was then residing, in New Castle county, Del. In pursuance of this agreement, the complainant and her husband, by deed dated August 5, 1871, conveyed "Greenfield" to Henry S. Cochran, and the latter at the same time gave his mortgage of like date, to the complainant. On the same day, and at the same place, to-wit, on the 5th of August, at the town of Elkton, where and when the transaction just mentioned took place, the mortgage of William A. Cochran, the defendant, and his wife, dated the 28th of July, 1871, was delivered to the complainant. The deed and the two mortgages were all intended to be of even date, the mortgage of the defendant, as alleged in the bill, being a part of the consideration, without which the conveyance

to Henry S. Cochran would not have been made. The principal debt was made payable by installments, at intervals of two years, beginning on the 1st of January, 1872, with interest payable half-yearly, the last of the installments not falling due until January 1, 1892. Henry S. Cochran failing to pay the interest on his debt after the 1st of January, 1877, and, having made default in the payment of all of the installments of principal due up to that time, the complainant, by her husband and next friend, on the 20th of August, 1878, brought a suit in the equity side of the circuit court for Cecil county, praying for a decree of sale under the "Greenfield" mortgage to satisfy her claim. This suit was resisted by Henry S. Cochran, who filed a cross-bill alleging that the complainant and her husband, at the time of their conveyance of "Greenfield" to him, did not have a legal title to the same, and praying that his mortgage might be canceled, and he be released. Thereupon the complainant and her husband tendered to Henry S. Cochran a deed, dated October 26, 1878, perfecting the title, and curing the alleged defect, which he refused to accept. On the 11th of June, 1879, a decree was rendered by the court dismissing the cross-bill, and directing a sale of the mortgaged premises on a day named, unless the claim of the complainant should be satisfied; and in that event the decree should stand as security for the payment of future installments. This decree was appealed from, and so much thereof as dismissed the cross-bill was affirmed by the court of appeals of Maryland.¹ "Greenfield" was afterwards sold under the order of the circuit court, which distributed the proceeds of sale, and, after deducting credits arising from this source, there is now due from Henry S. Cochran four installments of principal, with interest, making the aggregate sum of \$25,766.35. After filing her bill, on the 20th of August, 1878, but prior to the decree thereunder, the court, upon the application of the complainant, and with the consent of Henry S. Cochran, appointed a receiver of the rents and profits of "Greenfield," pending the suit. William A. Cochran was duly notified of his son's default, and requested to make it good, and was also informed of the legal proceedings in Maryland, and advised to take such measures as he saw fit to protect his interests. Henry S. Cochran is insolvent. So far the facts are undisputed. The bill prays that an account may be taken of the amount due to the complainant under the mortgage of Henry S. Cochran and payable by the said William A. Cochran under the terms of his mortgage, and for a decree against William A. Cochran, the defendant, to pay the same, with costs, by a day to be named in the decree, and in default thereof that the lands mortgaged by the defendant be decreed to be sold for the amount found to be due, and that the said decree may stand as security for the other installments of principal and interest payable by the said Henry S. Cochran as the same shall respectively mature.

In behalf of the defendant it is contended that he is not liable as surety for the performance by his son of the latter's contract with the complain-

¹ 54 Md. 1.

ant, of August 5, 1871, because the mortgage now in suit was given to secure the performance of another and different contract, to-wit, one bearing date the 28th of July, 1871. The defendant insists upon his strict right to stand upon the precise terms of his guaranty as a surety, and without doubt he is entitled to have his claims, in this respect, fairly considered. His mortgage to the complainant sets out with the following recital:

"Whereas, the said Francis Pascault and Catharine C. Pascault by deed dated the 28th day of July, 1871, conveyed the land and premises in Cecil county, Maryland, therein described, unto Henry Cochran, and took from said Henry Cochran and Annie, his wife, a deed of mortgage of the same lands to secure the payment of forty thousand dollars, the purchase money therefor, in installments as therein set forth, [then follows the conveyance from W. A. C. and wife to C. C. P.:] provided, that if the said Henry Cochran, his heirs and assigns, pay and satisfy the said purchase money of forty thousand dollars and interest in installments as the same become due and payable, then this deed to be void."

The reply to this defense is twofold—*First*, that the defendant's mortgage, although dated on the 28th of July, was not delivered to the complainant until the 5th of August, from which last day only it took effect; and, *secondly*, that parol evidence being admissible to prove and correct a mistake in the recital of a deed, it has been conclusively shown that the deed and mortgage of August 5th are the identical ones referred to in the defendant's mortgage of July 28th, and that this fact was well known to the defendant at the time of the delivery of the instruments, and subsequently confirmed by his own admissions. On the question of delivery the testimony of the parties is contradictory, the complainant being clear and positive in her recollection that the defendant's mortgage was handed to her for the first time on the 5th of August, while the defendant states that immediately on the execution of his mortgage, on the day of its date, he delivered it to the complainant's husband, who, as her agent, was authorized to receive and accept it. The mortgage now in suit was signed and acknowledged at the defendant's residence, in Delaware. Mr. Pascault and the defendant's wife, who were present, are both dead. Henry S. Cochran, who was also present, has not been called as a witness, and the notary who took the acknowledgment testifies that several years afterwards the defendant asked him what he (the defendant) did with the mortgage on the day of its execution, thus indicating some doubt in his own mind about the actual disposition of the paper. The complainant admits that her husband was employed by her to conduct the sale of "Greenfield," but that nothing was done in relation to it without her knowledge and consent. Assuming, therefore, that the complainant, being at the time a *feme covert*, had the power to authorize her husband to accept the mortgage, there is no evidence that she delegated this special authority to him, or that she had knowledge of the delivery at that time, and ratified it. Under such circumstances, as was remarked by an eminent judge in a recent case, (*Blair v. Shaeffer*, 33 Fed. Rep. 227,) "regard must be had to the inherent probabilities based upon the situation of the parties." It must always be remembered, for the proof is clear on this point,

that the defendant bore an active part in all the negotiations which led up to the sale of "Greenfield," that he met his son, on more than one occasion, at "Greenfield," in the presence of the complainant and her husband, when the subject of the sale and its terms were under consideration; that he executed his mortgage promptly, and without questioning, on the day it was submitted to him for that purpose, showing that the whole business had been prearranged and was fully understood; and finally that he met the parties at Elkton, on the 5th of August, when the sale was consummated by the exchange and delivery of the deed and the two mortgages. These facts are all in harmony with the complainant's declaration that she saw the defendant's mortgage for the first time on the day it was delivered to her, and it is by no means an improbable inference that the defendant or his son had kept possession of it up to that time. It is not uncommon for a deed of conveyance and of a mortgage for the purchase money to be of different dates. Each takes effect, however, as a general rule, from the time of its delivery. The date is only presumptive evidence of the time of delivery, but the presumption may be rebutted by parol, and, when this has been done, the deed and mortgage are regarded as parts of the same transaction. *Marburry v. Brien*, 15 Pet. 21; *Parmelee v. Simpson*, 5 Wall. 81; *Lamb v. Cannon*, 38 N. J. Law, 362; *Porter v. Buckingham*, 2 Har. (Del.) 197; 1 Jones, Mortg. § 84; 1 Greenl. Ev. § 568a, note.

In *Hall v. Cazenove*, 4 East, 481, Lord ELLENBOROUGH said:

"It is quite immaterial when it (the deed) was indented, and equally so when it was made, by which it may be understood it was written. Then the only material word is 'concluded,' and a deed can only be said to be concluded when it is delivered. The time of delivery is the important time when it takes its effect as a deed."

And such has always been the law. There being satisfactory evidence that the intention of all the parties was that the defendant's mortgage was to be given, at the time of the sale, as additional security for the purchase money of "Greenfield," the circumstantial proof of its delivery on the 5th of August is equally conclusive, and it became valid and effectual from that day, and not before.

The time of delivery being ascertained, there is still less difficulty in applying this mortgage to the purpose for which it was given. The rule that parol evidence is inadmissible to contradict or vary the terms of a written contract, is founded on the presumption that the whole engagement of the parties and the extent and manner of their undertaking, were reduced to writing, and that therefore any oral testimony of a previous *colloquium*, or of conversations or declarations at the time when it was completed, or afterwards, would tend to substitute a new and different contract for the one which was really agreed upon, to the possible prejudice of one of the parties. But there are well-recognized exceptions to this general rule, and it has been well settled by repeated adjudications that parol evidence will be admitted to contradict or explain an instrument in some of its recitals of facts. 1 Greenl. Ev. § 285, and notes. Thus in *Hall v. Cazenove*, *supra*, the plaintiff was permitted to prove that a deed

was made and concluded on a day subsequent to that on which the deed itself stated on the face of it to have been made. In *Johns v. Church*, 12 Pick. 559, the recital in a mortgage called for a note of \$236, and the note offered in evidence was for \$256. Parol proof was admitted to prove that the note produced was the one referred to in the mortgage. In *Hall v. Turell*, 18 Pick. 455, there was a discrepancy between the note recited in the mortgage and the one produced, and evidence was allowed to show a mistake in date, also that there was no other note between the parties, and that the note offered was the one referred to in the mortgage. The court there held that parol proof of such facts came within the principle of parcel, or not, of the premises intended to be conveyed. So, in *Hough v. Bailey*, 32 Conn. 292, parol proof was admitted to prove the identity of the note recited in the mortgage. In *Jones v. Indemnity Co.*, 101 U. S. 622, the court, speaking through Mr. Justice SWAYNE, says:

"It is common learning in the law that parol evidence is admissible to show that a deed absolute on its face is a mortgage; to establish a resulting trust; to show that a written contract was without consideration; that it was void for fraud, illegality, or the disability of a party; that it was modified as to the time, place, or manner of performance, or otherwise; also to show the situation of the parties, and the surrounding circumstances, when it was entered into, and to apply it to its subject. * * * These are but a small part of the functions which such evidence is permitted to perform."

In support of the judgment of the court in that case he cites *Sherras v. Craig*, 7 Cranch, 34, where Chief Justice MARSHALL says:

"It is true that the real transaction does not appear on the face of the mortgage, * * * but if, on investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed of his real equitable rights, unless it be in favor of a person who has been in fact injured by the misrepresentation."

Parol evidence to identify the subject-matter of a written instrument is always admitted. De Coly. Guar. 156; Id. 180, 181.

There is no pretense that it was not the intention of the defendant to become a surety for his son, nor is it disputed that a deed takes effect from the time of its delivery only, but it is claimed that the actual delivery of defendant's mortgage was on the day of its date, and that it cannot be made by parol proof to apply to his son's mortgage of a subsequent date. The evidence does not sustain this contention. There can be no reasonable doubt that defendant's mortgage was delivered on the 5th of August, that it took effect on and from that day, and that it was contemporaneous with the execution and delivery of the instruments mentioned in its recital. And the law is equally clear that parol proof may be admitted to contradict or explain the erroneous recitals in a deed, whenever it becomes necessary, in order to ascertain the real transaction between the parties.

The defendant also relies on the defective title of complainant and her husband to relieve him from liability. It is admitted that on August 5, 1871, Mrs. Pascault and her husband did not possess the legal title to "Greenfield," or to any part of it, but it is not disputed that she and

her husband had at that time a right to a fee-simple title in the premises conveyed; that there was no intentional misrepresentation of any fact on her part; and that the origin and description of the title were fully recited in their deed to Henry S. Cochran. The Pascaults' deed sets out that their title was under the will of Mrs. Pascault's mother, and proceedings in partition in the orphans' court of Baltimore city, Mr. Pascault having bought his portion of "Greenfield" from one of the devisees; but it turned out that the orphans' court had no jurisdiction to make an allotment under the will; and as soon as the defect was discovered, the complainant and her husband obtained a conveyance from all the other parties interested, by which the legal title was vested in them, and they then executed and tendered a deed for the same to Henry S. Cochran. The deed of August 5th contained a covenant on the part of the grantors to "execute and deliver or procure to be executed and delivered such other and further assurances as may be necessary to secure said lands." The court of appeals of Maryland decided that the new deed, dated October 26, 1878, cured all defects of title; holding that there had been no fraudulent intent or purpose on the part of the vendors; that Henry S. Cochran had suffered no injury or damage by the defect; and from the fact that the source of title was disclosed to the vendee, as stated on the face of the deed, it was evident that both parties supposed the partition referred to was valid and effectual to convey in severalty the parts allotted to the several devisees, and that therefore it was a case of mutual mistake as to a question of law. *Cochran v. Pascault*, 54 Md. 1. The opinion of the court in that case is an able one, and is conclusive of the question of title between the parties to it, and the counsel for the defendant here do not seek to controvert the correctness of the decision. The defense on this point is that under the deed and mortgage of August 5th there was really no contract created between the complainant and Henry S. Cochran, because at that time a fee-simple title had not been conveyed to him, and therefore no obligation existed on his part for the payment of the purchase money, and that it was not until "a new and distinct agreement" had been made between the creditor and the principal debtor, by which the title to "Greenfield" was really conveyed, that the obligation to pay the purchase money became valid; that the conveyance of the fee by the deed of August 5th was the consideration of the defendant's guaranty, and the failure of that consideration discharged him as surety. It will be noticed that this branch of the defense assumes two things,—that Henry S. Cochran was not liable under his mortgage, because no debt had been created by it, and that before he could be made so liable it became necessary to make a new and distinct contract between him and the complainant,—which was a variation from the terms of the original one. In *Miller v. Stewart*, 9 Wheat. 681, the rule governing the liability of sureties is lucidly and concisely stated by Mr. Justice STORY, who, speaking for the court, said:

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the

circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may be even for his benefit. He has a right to stand upon the very terms of his contract, and if he does not consent to any variation of it, and a variation is made, it is fatal. And courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness. * * * All the authorities proceed upon the ground that the undertaking of the surety is to receive a strict interpretation, and is not to be extended beyond the fair scope of its terms."

The opinion of the court in that case was not unanimous, but the concluding sentence may be accepted as formulating the general rule.

Now, what were the precise terms of the defendant's guaranty? Simply, that in consideration of the conveyance by the complainant and her husband of "Greenfield" to Henry S. Cochran, and of the latter's mortgage for the payment of the purchase money, the defendant became a guarantor for the payment of that mortgage, according to the terms and conditions of the contract between Henry S. Cochran and the complainant. It is urged on behalf of the defendant that his contract was made on the basis of a fee-simple title having been conveyed by the deed of August 5th, and, as that was not done until long afterwards, he should be discharged. But this argument takes no account of the covenant for further assurances. It is not denied that at the date of the first deed the grantors did not possess the legal title, although they had the right to have such a title. What they did grant by the first deed was all the title and right they then possessed, believing that they held the fee, but, to guard against all mistake, and to provide for the curing of all defects, they, at the same time, and by the same instrument, covenanted with Henry S. Cochran, his heirs and assigns, to make such further assurances as might become necessary to secure a good title. The deed of October 26, 1878, was in fact nothing more than a carrying out of the original agreement,—a performance of the covenant that if the deed of August 5th should prove to be insufficient to convey a fee, the complainant and her husband would make it good by another conveyance. They did voluntarily what they could have been compelled to do by a court of equity on a bill for a specific performance of their covenant, equity holding that to be done which the parties had agreed should be done. It cannot be truthfully asserted that the deed of October 26th was a variation from the original contract between the grantors and grantee of "Greenfield," when it was actually made in compliance with the terms of that contract, which otherwise would have been violated by the refusal or the inability of the grantors to execute and deliver that deed. The covenant for further assurances was an essential part of the first deed, and bound all the parties to it. Such a covenant has always been held to be of great value to a purchaser. It relates both to the title of the vendor, and to the instrument of conveyance to the vendee; and operates as well to secure the performance of all acts for supplying any defects in the former, as to remove all objections to the sufficiency and security of the latter. It runs with the land whenever there is a privity of estate between the contracting parties, and inures, not only to the ben-

efit of the first purchaser, but to all who take title from him. Platt, Cov. 340-461. Judge MILLER, in *Cochran v. Pascault*, *supra*, in considering the effect of this covenant in the Pascaults' deed of August 5th, says:

"In the present case, however, there was no demand for a specific performance; but the vendors, acting voluntarily under their covenant, and at their own cost, effectually cured the defect before the bill for rescission could be brought to a hearing. It seems to us there is an element of mutuality in such a covenant, and that in this case the parties, by giving and receiving a deed with these recitals and this covenant, must have contemplated this very action on the part of the vendors. The covenant, while it secured the vendee a right of action at law for damages for breach of it, and a right to enforce in equity its specific performance, gave to the vendors the right, if they so chose, to act under it voluntarily, as they have done, and to cure the defect in the recited title as soon as it was discovered. We have no doubt whatever of their right so to act; and without considering other grounds of objection to the cross-bill, we hold that the curing of the defective title is a complete bar to the relief it prays for, unless the complainants have shown that they have suffered 'some loss, injury, or damage by the delay in perfecting the title.'"

The reasons assigned for the judgment of the court in that case are consistent with good sense and sound law. The vendee was attempting to repudiate a debt on account of an alleged defect in the contract by which it had been created, but the court justly held that as the contract had provided for the curing of such defect, and the same had been cured without any loss or damage to the vendee, the latter could not be released. How, then, can the vendee's surety be discharged? On the strictest interpretation of his undertaking, will it, in the language of Judge STORY, be extending it beyond the fair scope of its terms to hold him liable? There was, as has been shown, actually no such variation in the original contract between the creditor and the principal debtor as would discharge the surety under the rule laid down by the supreme court in *Miller v. Stewart*. Nothing was done for his benefit or injury, and he suffered no loss or damage. What might have been his position had the original contract between the complainant and Henry S. Cochran never been carried out and completed, is a different question; but, looking at existing facts, and not considering contingencies which never happened, it does not appear that the relations between the parties were changed by the deed of October 26th in such manner, or to such an extent, as to justify a court of equity in discharging the surety.

Another objection urged in behalf of the defendant is that the appointment of a receiver, at the instance of the complainant, and with the consent of Henry S. Cochran, during the pendency of the suit in Maryland, by which Henry S. Cochran was to be considered as a tenant, and not as the owner, of "Greenfield," to which appointment this defendant was not a party, and gave no consent, express or implied, discharges him. But how could this appointment have operated to endanger the rights of the defendant, or change the degree of his responsibility in any respect as a surety? It was the duty of the complainant to enforce the payment of the original debt. It was for the interest of the defendant that she

should do so; and, had she been remiss in the performance of that duty, the defendant would have had just cause for exception. Instead of allowing the debt and interest to accumulate, and the property to deteriorate by mismanagement or waste, the mortgage of Henry S. Cochran was put in suit, and to preserve the property the court took possession of it through a receiver, who received the rents and profits, and accounted for them after a final decree had been obtained. Such a receiver is uniformly regarded as the officer of the court, exercising his functions in the interest of neither plaintiff nor defendant, but for the common benefit of all parties in interest. Being an officer of the court, the fund or property intrusted to his care is regarded as being *in custodia legis*, for the benefit of whoever may eventually establish title thereto; the court itself having the care of the property by its receiver, who is merely its creature or officer, having no powers other than those conferred upon him by the order of his appointment, or such as are derived from the established practice of courts of equity. The purpose for which a receiver takes possession is closely allied to that of a sheriff in levying under execution, except that the scope of the receiver's authority is more comprehensive, since he is usually required to pay all demands upon the fund in his hands to the extent of that fund; and it has been held that the appointment of a receiver is, in effect, an equitable execution. It does not change the title to, or create any lien upon, the property, and ordinarily gives no advantage or priority to the person at whose instance the appointment is made over other parties in interest. High, Rec. §§ 1, 2, 5. The defendant had notice of the proceedings in the Maryland suit, and could have had full knowledge of all that transpired during their progress. He could have intervened had he chosen to do so, but neither his omission to interfere, or the want of his consent to the appointment, makes any difference. It is enough to say that the appointment and action of the receiver in no way affected his right as surety.

A final objection is that the defendant's mortgage, purporting to be a deed of bargain and sale, which is the common mode of assurance in Delaware, and operates under the statute of uses, does not contain the name of a bargainee. The grantor "bargains and sells unto the sole and separate use of the said Catharine C. Pascault," and not to C. C. P., and to the only use and behoof of the said C. C. P., and therefore it is alleged no use is effectually raised to draw the legal estate out of the bargainor. The mortgage is clumsily drawn, but the intention of the parties to it is manifestly clear, and it is the province of a court of equity to reform a deed, so that it will conform to the intention, unless controlled by the use of technical words which cannot be set aside. Here the land was conveyed to the sole and separate use of the complainant, which by force of the statute attaches the possession, and the *cestui que use* becomes the complete owner, both at law and in equity. Even if the construction of the defendant's counsel was the true one, it would be a gross perversion of justice to overthrow a deed on account of an obviously clerical omission which this court would have the power to rectify.

In the course of their argument counsel discussed several questions

which have not been adverted to in the foregoing opinion, under the belief that sufficient reasons have already been assigned for the judgment of the court. The doctrine that a surety is a favored debtor was brought prominently into view, as well as the hardship of the defendant's position in being compelled to answer for a debt from which he had not and could not have derived any benefit. It is a mistake, however, to suppose that by "favor" is meant "partiality," or any exclusion of a due consideration of the rights of others. The meaning is, as stated by Justice STORY, that the surety's undertaking is to receive a strict interpretation, and must not be extended beyond the fair scope of its terms. When a surety has deliberately and voluntarily contracted to answer for the default of another, without having been deceived or misled by the representations of the creditor, and there has been no departure from the terms of the contract, he cannot be released from his obligation. He must first satisfy the court that, on some legal or equitable ground, he is entitled to be discharged. The creditor also has the right, when he has parted with his money or property on the faith of the surety's guaranty, to be saved from loss, and will receive equal protection from the court. The peculiar hardship in the present case grows out of the serious depreciation in the value of real estate in Cecil county since the sale of "Greenfield." But the purchaser and his surety were not ignorant or inexperienced persons when they made the bargain. They stood on equal terms with the vendors. No charge of fraud, misrepresentation, or concealment of any material fact on the part of the vendors, by which the purchaser was betrayed into an unfortunate speculation, has been proved. The question in such cases always is, was the contract a reasonable and fair one at the time it was made? If such was the fact, the parties are considered as having taken upon themselves the risk of subsequent fluctuations in the value of the property. *Willard v. Taylos*, 8 Wall. 571. The adoption of a different rule would open the door to endless confusion and litigation.

Let a decree be entered for the complainant.

GEST v. PACKWOOD *et al.*

(Circuit Court, D. Oregon. March 19, 1893.)

1. VENDOR AND VENDEE—BONA FIDE PURCHASER.

One who takes a mere conveyance of another's interest in real property, or a quitclaim thereto, is not a purchaser for a valuable consideration within the rule in equity, which protects such a purchaser against a prior conveyance or right of which he had no notice; for by the very terms of his conveyance he has notice that he is purchasing nothing more than the interest or right his vendor then has in the land.¹

¹As to whether one who derives title to land through a quitclaim deed is a *bona fide* purchaser without notice or not, see *Johnson v. Williams*, (Kan.) 14 Pac. Rep. 587, and note; *African M. E. Church v. Hewitt*, Id. 540; *Hastings v. Nissen*, 81 Fed. Rep. 597; *Schradski v. Albright*, (Mo.) 5 S. W. Rep. 807; *Tram Lumber Co. v. Hancock*, (Tex.) 7 S. W. Rep. 724.

2. SAME—PURCHASER FOR VALUE—ANTECEDENT DEBT.

A purchase of real property, or the assignment of a mortgage thereon for an antecedent debt, does not make the vendee or assignee a purchaser for a valuable consideration so as to entitle him to protection against a prior conveyance of or right in or to such property.

(*Syllabus by the Court.*)

In Equity.

Zera Snow, for plaintiff.

C. P. Heald, for defendants.

DEADY, J. On November 2, 1878, William H. Gest, a citizen of Illinois, brought this suit against William H. Packwood, T. J. Carter, L. F. Grover, William S. Ladd and W. J. Leatherwood, to have a certain mortgage on the Eldorado ditch, in Baker county, Oregon, owned by Grover, and two judgments against T. J. Carter in favor of Ladd and Leatherwood, respectively, declared of no effect so far as the plaintiff and said ditch are concerned, and to compel said Packwood and Carter to convey the latter to the plaintiff and account for the rents and profits thereof since May, 1874. It appears from the bill that, on February 15, 1873, the defendants Packwood and Carter purchased the ditch at a sale on execution to enforce several judgments theretofore obtained by Packwood and C. M. Carter, the latter having assigned the same to T. J. Carter, against the Malheur and Burnt River Consolidated Ditch and Mining Company, the then owner of said ditch. On May 23, 1873, Packwood and Carter assigned the sheriff's certificates of such sale to Arthur T. Rice, the latter agreeing to give his notes therefor to the amount of \$29,700, payable partly to Packwood and partly to Carter, at various dates, the last one falling due on March 1, 1874, which notes were to be indorsed by Clarke, Layton & Co., and in the event of their non-payment, Rice was to reconvey the ditch to Packwood and Carter as security for such payment. The notes were made, indorsed, and delivered, and Rice went into the possession of the ditch, and so continued until May 4, 1874, during which time he operated the same and expended thereon in permanent improvements the sum of \$15,000, and paid a large portion of said notes. In July, 1873, no redemption having been made, Packwood and Carter secretly obtained the sheriff's deed to the ditch for the purpose, as it is alleged, of executing the mortgage now held by the defendant Grover, to C. M. Carter, in fraud of the rights of Rice. On May 4, 1874, Rice and Clarke, Layton & Co., and Packwood and Carter made what is called an agreement of lease, reciting therein the agreement of May, 1873, and that all the notes given on the purchase of the ditch were not paid, whereby Rice leased the ditch and certain other mining property which he had acquired in the meantime to Packwood and Carter for one year, and from year to year thereafter until certain indebtedness, including the unpaid notes of May, 1873, were paid, according to certain specified priorities, out of the net proceeds of the sales of water and the working and sales of mining claims, which proceeds were to be paid by Packwood and Carter, monthly, as rent for the property, to J.

W. Virtue, as trustee, who was to apply the same on said indebtedness, in pursuance of which lease Rice surrendered the possession of the property to Packwood and Carter, but without knowledge of a mortgage to C. M. Carter, which had been executed by T. J. Carter in the meantime, and upon the agreement that when said indebtedness was paid the possession of the property should be returned to him, and Packwood and Carter would execute to him a formal conveyance of the ditch. On January 4, 1874, T. J. Carter executed a mortgage to C. M. Carter of his interest in one-half of said ditch to secure the payment of his note to C. M. Carter of \$30,000 of even date therewith, payable in one year, with interest at 1 per cent. a month, which note and mortgage, the bill charges, were given without any consideration, and with intent to defraud Rice; that C. M. Carter had both actual and constructive knowledge of the agreement and sale of May, 1873, and that the mortgage was assigned to Grover in April, 1876, without consideration, and with the like intent and knowledge. The bill under appropriate allegations therefor, prays for an accounting from Packwood and Carter, and a conveyance by them to the plaintiff, as the successor in interest of Rice and Clarke, Layton & Co. in the ditch. The answer of Packwood and Carter shows that none of the debts secured by the agreement of May 4, 1874 were paid, except some that were paid by Clarke, Layton & Co., and that no proceeds were realized from the ditch or paid to the trustee. The case rested here until May 9, 1887, when on the application of the plaintiff a receiver of the property was appointed and took possession of the same. On October 14th the defendant Grover had leave to answer the bill, and on October 21st he filed a plea thereto, to the effect that he was a *bona fide* purchaser for a valuable consideration, without notice of the plaintiff's right. The plea states in substance that on and prior to January 8, 1874, Packwood and Carter pretended to be the owners in common of said ditch, and were, or pretended to be, in the actual possession thereof, free from all incumbrances whatsoever; that on January 8, 1874, C. M. Carter, believing that Carter and Packwood were so seized and possessed of the premises, received from T. J. Carter a conveyance of all his "estate, right, title, and interest, possession and claim whatsoever," in and to said ditch, to be void on the payment of T. J. Carter's note to C. M. Carter, of even date therewith, for \$30,000, payable in one year, with interest at 1 per cent. a month until paid, but otherwise to be and remain in full force as a mortgage; that the defendant does believe and aver that said sum of \$30,000 was then due C. M. Carter from T. J. Carter, for moneys paid and advanced, "at and before" that time by the former to and for the latter; that said mortgage was duly recorded in Baker County; that on April 17, 1876, in consideration of certain legal services rendered C. M. Carter by the defendant, between 1861 and 1876, and certain moneys theretofore paid and advanced by the latter to and for the former, C. M. Carter assigned his interest in said mortgage to the defendant in payment of said indebtedness, which services and moneys amounted to more than \$6,700 in value, but said sum was stated in said assignment as the consideration therefor, because the mortgage was not

in fact worth any more, but less than said sum; that on February 8, 1879, the defendant commenced a suit in the circuit court for Baker county to enforce the lien of said mortgage, wherein, on May 19, 1879, a decree was given against T. J. Carter for the amount of the note and interest, which decree was thereby declared a first lien on the premises from the date thereof, and that no payment has ever been made thereon; that the defendant is informed, and believes and so states, that at the date of said mortgage C. M. Carter had no knowledge of any "contractual relation" between Packwood and Carter and Rice and Clarke, Layton & Co., concerning the ditch, by reason of which any equities affecting said property existed in favor of Rice and Clarke, Layton & Co., and avers that C. M. Carter took said mortgage *bona fide* for a valuable consideration and without notice of the equities asserted by the plaintiff herein; that at the time of the assignment to the defendant he had no notice whatever of any "relations" between said parties "relating" to said ditch, whereby any equities affecting the same existed in favor of Rice and Clarke, Layton & Co., and "insists" that he is a *bona fide* purchaser, for a valuable consideration, without notice of the equities claimed herein by the plaintiff. In the allegations, by way of answer in support of the plea, the statements in the plea concerning the good faith of the defendant and his assignor and their want of notice of the plaintiff's equity, and the consideration in support of the mortgage and the assignment thereof, are repeated. They also contain denials on information and belief: (1) That on April 4, 1876, the agreement of May 23, 1873, had been or was recorded as alleged in the bill, or that the defendant had any notice of such record or the existence of such agreement prior to such assignment; (2) that on January 8, 1874, or at any time after May 23, 1873, or at all, Rice and Clarke, Layton & Co., or either of them, were in the actual possession of said ditch, and if they were, it was only through Packwood and Carter, who had the actual possession as their agents, of which agency neither the defendant nor C. M. Carter had any notice until after the execution and assignment of said mortgage; and (3) all manner of unlawful combination charged and implied against the defendant and C. M. Carter, in the bill. The case was argued and submitted on the sufficiency of the plea.

The origin or nature of the right or title of any of these parties to this water, ditch, and mining ground is not stated or mentioned in the bill or plea. In the absence of anything to the contrary, it may be assumed that the water was appropriated and conducted by means of the ditch between the *termini* thereof, in accordance with the custom of the district, the law of the state. 2 Laws Or., c. 60, "Mines;" Rev. St. §§ 2339, 2340. By section 3833 (section 1, act 1870) and section 3834 (section 2, act 1864) of said laws, ditches for mining purposes are declared real property, and "the laws relative to the sale and transfer of real estate" are made applicable thereto. Whether this includes the registration of deeds or conveyances of such ditches may be a question; but as the effect or operation thereof depends to some extent on registration probably it does. But even then neither the contract of 1873 nor that of 1874, al-

though relating "to the sale or purchase" of real property, was entitled to record, not having been acknowledged or proved as provided by statute. 2 Laws Or., c. 21, § 3055. But an unrecorded deed or contract of sale is good against a subsequent purchaser with actual notice thereof, no matter how obtained. *Moore v. Thomas*, 1 Or. 201; *Musgrove v. Bonser*, 5 Or. 313; *Baker v. Woodward*, 12 Or. 3, 6 Pac. Rep. 173. A plea that the defendant is a bona fide purchaser, without notice, for a valuable consideration, must directly deny the fact of notice and of every circumstance from which it may be inferred. *Murray v. Ballou*, 1 Johns. Ch. 575. It should deny notice in the fullest and clearest manner, whether the same is charged or not. 2 Pom. Eq. Jur. § 785. Here notice or knowledge of the alleged equities is denied, but not of the facts out of which it is claimed they arise. For instance, it is denied that the contract of sale of 1873 was duly recorded, which is an implied admission that it actually was recorded. The possession of Rice and Clarke, Layton & Co., as alleged in the bill on January 8, 1874, was enough to put C. M. Carter on inquiry as to the nature and extent of their claim, and was therefore notice to him of all he might have learned by such inquiry. The answer to this allegation is a denial on information and belief that the parties were at any time after May 23, 1873, in the actual possession of the ditch, and an averment that if they had any such possession it was only by Packwood and Carter as their agents. This is insufficient as being evasive and uncertain.

But the principal points made in the argument against this plea are (1) that neither the mortgagee, C. M. Carter, nor his assignee, L. F. Grover, appear thereby to be purchasers for a valuable consideration; and (2) that C. M. Carter, having taken a quitclaim deed from T. J. Carter, is not a bona fide purchaser without notice. In *May v. Le Claire*, 11 Wall. 232, it is held that a purchaser under a quitclaim deed is not a bona fide purchaser within the rule which protects such a purchaser from the operation of a prior conveyance or sale of which he had no notice. Notice sufficient to prevent the purchase from being bona fide is said to inhere in the very form of this kind of a conveyance. 2 Pom. Eq. Jur. § 753. In such case the purchaser only takes whatever the grantor could lawfully convey,—what there is left in him. To the same effect is the ruling in *Oliver v. Piatt*, 3 How. 340. A like conclusion was reached by the supreme court of this state in *Baker v. Woodward*, 12 Or. 10, 6 Pac. Rep. 173, where it was held that a deed of the grantor's "right, title, and interest" in the land, only passed the same subject to any prior disposition thereof. It is admitted that in some of the states this rule does not prevail. Mr. Pomeroy (2 Eq. Jur. § 753, note 1) without expressing any opinion on the question, gives the cases thereon, from which it appears that the weight of authority is in favor of the rule as announced by the supreme court of this state and the United States, with which agrees my own judgment. But this court is bound by the decision of the latter tribunal, and in the absence of any controlling authority would on this question be inclined to follow that of the former. There is another view of this matter which may be worth con-

sidering. It is provided by section 323, Code Civil Proc., that a mortgage shall not be deemed a conveyance, so as to enable the owner thereof to recover possession of the mortgaged premises without a foreclosure and sale. Under this statute, which is but the logical sequence of the equitable doctrine of mortgages, announced by Lord MANSFIELD in *King v. St. Michaels*, 2 Doug. 632, that a mortgage is only a security, the supreme court of this state has held that a mortgage is only a security, and that the mortgagee acquires thereby no right to or interest in the mortgaged premises. *Anderson v. Baxter*, 4 Or. 110; *Roberts v. Sutherland*, Id. 222. And see *Witherell v. Wiberg*, 4 Sawy. 232. From these premises the conclusion seems deducible that C. M. Carter acquired no estate or interest in the premises by virtue of his mortgage, but only the right to subject the grantor's interest therein to sale for the satisfaction of his debt, and that his assignee, L. F. Grover, whether he took the assignment with or without notice of the prior equity of Rice, is exactly in the same position. This equity, to which the lien of Carter's mortgage was subordinate, arose from the sale by Packwood and Carter of the property to Rice on May 23, 1873, whereby he became the equitable owner thereof and they the mere trustees of the legal title for his benefit.

Counsel for the plea, however, maintains that the Carter deed, although technically a quitclaim, is in effect within the ruling in *Van Rensselaer v. Kearney*, 11 How. 322, where it was held that even in the case of "a deed of bargain and sale by release and quitclaim," when it appears on the face thereof that the parties thereto bargained for and about an estate of a particular description or quality, that the grantor and those claiming under him, are thereby estopped to deny that he was seized of such estate in the premises at the date of the conveyance. But in this case the deed contains no evidence that the parties bargained with reference to any particular estate other than the then right, title, and interest of T. J. Carter in the ditch, and that was nothing more than the bare legal title to the undivided half thereof, which in equity and good conscience he then held in trust for Rice, his vendee of the property. Besides the controversy in *Van Rensselaer v. Kearney* was between persons in privity with the parties to the deed in question, and therefore the decision is not applicable to the case under consideration. Certainly Rice is in no way estopped or bound by the Carter deed, which is subsequent in point of time to his purchase and to which he is a stranger.

But as it appears from the plea, and was admitted on the argument, that the only consideration for the mortgage or the assignment is an antecedent debt, it must be held bad. Such a debt is not a valuable consideration within the rule invoked by the defendant for his protection against the prior right of the plaintiff. Where a conveyance is made or a security taken, the consideration of which is an antecedent debt, the grantee or person taking the security is not regarded as a purchaser for a valuable consideration. He has not parted with anything of value. He loses nothing by the transaction, and therefore there is no reason why equity should interfere to protect him against a prior right, although he may have taken such conveyance or security without notice thereof.

The only cases cited in which an antecedent debt is held to be a valuable consideration are from Indiana and California. See *Babcock v. Jordan*, 24 Ind. 14; *Frey v. Clifford*, 44 Cal. 335. In New York and Massachusetts, the rule is well established that a prior indebtedness is not a valuable consideration in such a case. *Padgett v. Lawrence*, 10 Paige, 180; *Wood v. Robinson*, 22 N. Y. 567; *Cary v. White*, 52 N. Y. 142; *Clark v. Flint*, 22 Pick. 243. In *Bank v. Butes*, 120 U. S. 556, 7 Sup. Ct. Rep. 679, the supreme court had the question before it for the first time. Mr. Justice HARLAN delivered the opinion of the court, in the course of which he refers with deference to the case of *Morse v. Bank*, 3 Story, 364, 389, wherein there was a controversy between a bank, the assignee of Godfrey, and his assignee in bankruptcy, concerning certain real and personal property, in which Mr. Justice STORY says:

"This leads me to remark that the bank does not stand within the predicament of being a *bona fide* purchaser, for a valuable consideration, without notice, in the sense of the rule upon this subject. The bank did not pay any consideration therefor, nor did it surrender any securities, or release any debt due * * * from * * * Godfrey to it. The transfer from Godfrey was simply a collateral security, taken as additional security for the old indebtedment and liability of the parties to the notes described in the instrument of transfer. It is true that as between Godfrey * * * and the bank the latter was a debtor for value, and the transfer was valid. But the protection is not given by the rules of law to a party in such a predicament merely. He must not only have had no notice, but he must have paid a consideration at the time of the transfer, either in money or other property, or by a surrender of existing debts or securities held for the debts and liabilities. But here the bank has merely possessed itself of the property transferred, as auxiliary security for the old debts and liabilities. It has paid or given no new consideration upon the faith of it. It is therefore in truth no purchaser for value in the sense of the rule."

Referring, then, to the cases of *Swift v. Tyson*, 16 Pet. 1, and *Railroad Co. v. Bank*, 102 U. S. 14, in which it was held in the interest of commerce that one who takes negotiable paper, before maturity, in the usual course of business, in payment of or as security for an existing debt, is deemed to have given a valuable consideration therefor, and takes it discharged of all equities or defenses existing between antecedent parties, without reference to his knowledge of the same, Mr. Justice HARLAN says:

"Do these principles apply to the case of a chattel mortgage, given merely as security for a pre-existing debt, and in obtaining which the mortgagee has neither parted with any right or thing of substance, nor come under any binding agreement, to postpone or delay the collection of his demand? Upon principle, and according to the weight of authority, this question must be answered in the negative. The rules established in the interest of commerce to facilitate the negotiation of mercantile paper, which, for all practical purposes, passes by delivery as money, and is the representative of money, ought not, in reason, to embrace instruments conveying or transferring real or personal property as security for the payment of money."

Some effect is sought to be given to the allegation in the plea that the assignment was made "in payment" of the defendant's demand against the assignor. But the assignment is not set out, nor is it alleged that it

was so received, or that the assignor was released or wholly discharged therefrom. Payment of a pre-existing debt may be made by the note of the debtor, or that of a third person, but according to the decided weight of authority a novation does not take place unless there is an express agreement to accept the latter in payment and discharge of the former. Otherwise the payment is only conditional, and the creditor may, if the note is not paid, surrender it, and sue on his original demand. *In re Ouimette*, 1 Sawy. 52, and authorities there cited; *The Katie*, 3 Woods, 182. Whether the complete satisfaction and discharge of an antecedent debt, without the cancellation or surrender of any written security by the creditor, constitutes a valuable consideration is a question which the courts of the different states have decided differently. Dr. Pomeroy evidently thinks the question ought to be decided in the negative, and says:

"To hold that a conveyance as security for an antecedent debt is made without, but that one in satisfaction of such debt is made with, a valuable consideration, when the fact of satisfaction is not evidenced by any act of the creditor, but depends on mere verbal testimony, is opening the door wide for the easy admission of fraud. It leaves the rights of third persons to depend on the coloring given to a past transaction by the verbal testimony of witnesses, after the event has disclosed to the creditor the form and nature in which it is for his interest to picture the transaction. A rule which renders it so easy for an interested party to defeat the rights of others is clearly impolitic."

The plea is bad, and is therefore disallowed.

CLAY v. FIELD *et al.*

(*District Court, N D. Mississippi, W. D. March 23, 1883.*)

1. PARTNERSHIP—RIGHT OF SURVIVOR TO CONTINUE BUSINESS.

The surviving partner in a cotton plantation, before the late war, not being authorized by the articles of copartnership, or the will of the deceased partner, was not authorized to continue the partnership business, after the death of the deceased partner, longer than was necessary to gather and sell the then growing crop.¹

2. SAME—RIGHT OF SURVIVOR TO THE PERSONALTY.

Upon the death of the deceased partner intestate, the title to the personal property, including the slaves belonging to the firm, vested in the surviving partner, for the purpose of being applied—*First*, to the payment of the partnership liabilities; *secondly*, for a division of the residue of any between the surviving partner and the personal representative of the deceased partner, according to the rights of each.¹

3. SAME—LIABILITY OF SURVIVOR ACCOUNTING.

It was the duty of the surviving partner to sell so much of the personal property, including the slaves, if necessary, to pay off debts due by the firm to himself or any other person, and to so apply it. Failing to do so, and continuing the planting business on the plantation, and with the slaves and other

¹Respecting the rights and liabilities of the surviving partner, where a partnership is dissolved by the death of one partner, see *Appeal of Shippe*, (Pa.) 6 Atl. Rep. 108, and note; *Klots v. Macready*, (La.) 2 South. Rep. 208; *Brown v. Watson*, (Mich.) 38 N. W. Rep. 493; *Williams v. Whedon*, (N. Y.) 16 N. E. Rep. 365.

personal property of the firm, he is liable to account for a reasonable rent for the land and hire for the slaves and personal property, after he should have sold so much of the property as was necessary to pay the debts against the firm, including the indebtedness to himself as a creditor of the firm; and was entitled to the crops raised during the time he was liable for rents and hire.¹

4. SAME—TITLE TO PARTNERSHIP REALTY.

The legal title to the lands owned by the firm, they being equal partners, upon the death of the deceased partner vested in the surviving partner and the heir at law of the deceased partner as tenants in common, subject to the dower right of the widow of the deceased partner out of one moiety of the land; but the equitable title to said land vested in the surviving partner, so far as the same was necessary to pay the liabilities of the partnership, including that due the surviving partner as a general creditor, or any balance due him on a settlement of the partnership accounts. The surviving partner had a right to sell the land, if necessary for said purpose, publicly or privately, and a court of equity would have compelled the heir at law to convey the legal title vested in him to the purchaser.¹

(*Syllabus by the Court.*)

In Equity.

Nugent & McWillie, for complainant.

Frank Johnston, Edward Mayes, and Mr. McKeighan, for defendants.

HILL, J. This cause is submitted upon bill, amended bill, answers, exhibits, and proof, from which the following facts appear: In September, 1854, David I. Field and C. I. Field, brothers, residing in the state of Kentucky, formed a copartnership for the purpose of purchasing a cotton plantation in this state, slaves, mules, etc., to be conducted by D. I. Field, who was to reside on the plantation, and control and manage the same. Each party contributed one-half the capital stock, and each was to share equally in the profits and losses. In pursuance to this agreement, a plantation, slaves, mules, etc., were purchased. D. I. Field resided on the plantation, and managed the business up to his death, which occurred in September, 1859. D. I. Field died intestate, and left the defendant (now Mrs. Freeman) his widow, and the defendant D. I. Field, his only child and heir at law. Being then an infant, E. H. Field, another brother, was appointed administrator on the estate of D. I. Field. C. I. Field took the paramount control of the partnership property, but placed said E. H. Field in the immediate possession and control of the property, for the reason assigned by him, that the slaves would be better satisfied, and more easily managed. Mrs. Freeman, the widow, then Mrs. D. I. Field, was with her son in Kentucky, when her husband died, and never afterwards came to this state. The crop of 1859 was gathered and sold and applied to the payment of the debts of the firm. The business was continued by C. I. Field through the years 1860, 1861, 1862, and commenced in 1863, but C. I. Field, [then in possession of the property, real and personal, both as surviving partner, and as administrator of D. I. Field,—E. H. Field having resigned his administration, and he having been appointed in his place,] being apprehensive that the slaves would leave and go to the United States army, took all but some of the women and children to Texas, and remained

¹See foot-note on preceding page.

there with them until after the close of the war, when he returned with them, and employed them on the plantation during the year 1866, after which he abandoned the cultivation of the plantation,—the slaves having been emancipated, as the result of the war,—and leased out the lands for the next year. C. I. Field died intestate the 18th day of July, 1867, when Brutus J. Clay administered upon both the estates of D. I. Field and C. I. Field, and took possession of the lands, and leased them out, until there was an attempted sale of them by him under the decree of the probate court of Bolivar county; and they were bid off by the complainant Pattie A. Clay,—she being the only child and heir at law of C. I. Field, his wife having died some time before his own death,—and who has retained possession of them ever since, except a portion of the same assigned as dower to Mrs. Freeman as the widow of D. I. Field, by decree of this court. The crop raised in the year 1860 was gathered, sold, and the proceeds applied to the payment of the debts of the firm; that raised in 1861 and 1862 was raised and gathered, but not sold,—and was burned by the Confederate soldiers, under orders of their commanders. The mules and other personal property were destroyed, or scattered and lost. The individual property of D. I. Field was sold and applied to the payment of his individual debts, and the support of his wife and child; also they received some support from the partnership assets. C. I. Field being a man of wealth, furnished from time to time money to the firm as its creditor, which appears from the written notes or acknowledgments executed by D. I. Field in the name of D. I. Field & Co.,—the firm name under which the firm business was conducted,—and which are in the words and figures as follows:

"On or before the 1st day of January, 1858, the concern of David I. Field & Co. will be owing C. I. Field the sum of seven thousand three hundred and eighty-seven dollars and thirty-one cents, (\$7,387.81,) for money advanced the concern, for payment of the Leach land, and cash advanced for the purchase of negroes in Kentucky, in the summer of 1856, to bear six per cent. interest from maturity to when due. *This 23d day of December, 1856.* D. I. FIELD & Co. [Seal.]"

"The concern of David I. Field & Co. is owing to C. I. Field the sum of five thousand six hundred and sixty-six and two-third dollars, (\$5,666 $\frac{2}{3}$,) it being that amount advanced by him of payment to Kirk balance on concern note, due him 1st day of January last. He is to be paid six per cent. for said amount from date until paid. *This 20th March, 1857.* DAVID I. FIELD & Co."

"Due C. I. Field or order, the sum of eleven hundred dollars, (\$1,100,) it being money this day advanced by paying to William Kirk, through his draft on Hewitt Norton & Co., of New Orleans. *This 5th day of June, 1858.* D. I. FIELD & Co."

"Due C. I. Field or order, one thousand three hundred and eighty-nine dollars and twenty-one one-hundredth dollars, (\$1,289.29,) for value received on settlement to this date, June 18, 1859. D. I. FIELD & Co."

C. I. Field, after the death of D. I. Field, probated the one-half of the amounts stated in these written obligations against the estate of D. I. Field, but died without taking further steps to enforce payment of the same; but after Col. Brutus J. Clay became the administrator, he took

steps to have the estate of D. I. Field declared insolvent by the probate court of Bolivar county, and obtained a decree of that court for a sale of the interest which said D. I. Field had in these lands at the time of his death for the payment of the amount claimed to be due upon these obligations from the estate of D. I. Field, being the one-half due upon the four obligations, with interest. The land was offered for sale to the highest bidder,—that is, the one-half undivided interest,—when the same was struck off to Mrs. Pattie Clay, the complainant, who, as before stated, went into possession of the same, which she still holds, except that portion assigned to Mrs. Lucy Freeman as her dower in said lands. This sale has been held void. The purpose of this bill is to subject the interest which D. I. Field had in these lands to the payment of the one-half of the amount of these written obligations, with interest, less one-half of whatever may have been received from the rents and profits thereof since the death of said D. I. Field, after payment for taxes, improvements, and other charges against said lands. These written obligations are not copied from the originals, which it is alleged were destroyed by fire, but from copies shown to have been taken from them before their destruction. The defendants claim, first, that the due-bill dated June 13, 1859, was taken from the balance then due on the three former obligations, and to close all accounts and indebtedness then due from the firm to said C. I. Field up to that date. It was evidently given to close some settlement, but what was included in it is uncertain, both parties being now dead, and there being no one to explain the transaction. The proof does not show sufficient means belonging to the firm to pay off this indebtedness and the other liabilities of the firm shown to have existed; therefore I conclude it did not embrace them. There is other proof going to show an indebtedness from the firm to C. I. Field after the death of D. I. Field.

It is insisted upon the part of the defendants, that if these obligations were not paid at the death of D. I. Field, that they were canceled by the negligence of C. I. Field as surviving partner to sell so much of the personal property, including, if necessary, the slaves, to pay off this indebtedness which it is insisted should have been done during the year 1860, when such property brought a high price, and before its destruction; that this personal property was then of much larger value than the amount due on these obligations, and all other indebtedness of the firm. I am satisfied from the proof that this indebtedness did exist against the firm, but not against D. I. Field individually, and that all the attempted proceeding to collect the same against the estate of D. I. Field by a sale of the lands was based upon a mistaken theory, and without authority, and are consequently void. Upon the death of C. I. Field the title to all the personal property, including the slaves, belonging to the firm, vested in C. I. Field, as surviving partner, whose duty it was to have sold so much of it, within a reasonable time, to pay off this and all other indebtedness against the firm. This he had the power to do, without the order or decree of any court, either publicly or privately, and if that was insufficient might have sold so much of the land as was necessary

in the same way. The legal title to the lands was vested in said C. I. Field and the defendant D. I. Field, to be sure; but the equitable title was vested in C. I. Field, for the purpose of paying off the indebtedness due himself, as well as all others, including any balance due him on settlement of the partnership accounts, and a court of equity would have compelled D. I. Field, the defendant, to convey the legal title to the purchaser. This question was fully settled in the case of *Shanks v. Klein*, 104 U. S. 18, and reference to other authorities is unnecessary on this point. The question is, did C. I. Field, by this neglect, render himself liable for the loss of this personal property, and the value of the slaves, as to the interest of defendants therein, or estop himself from setting up the claim here made. Considering the relationship of the parties, and all the circumstances, it would perhaps be inequitable to hold so strict a rule; but I am satisfied that he had no power to continue the operation of the plantation with the firm slaves, mules, and other property belonging to the firm, as a continuation of the firm business, during the years 1861, 1862, and 1863, and that he was liable for a reasonable rent for the land and hire of the slaves, stock, and other property used in the cultivation of the plantation during the years 1861 and 1862, to be applied to the payment of these obligations,—no other indebtedness is shown now to exist,—and that, as C. I. Field and his administrator, Brutus J. Clay, and the complainant, since her attempted purchase, has been in the possession of all the lands, with the exception of Mrs. Freeman's dower, since its assignment, the complainant must be charged with a reasonable rent for the lands and the hire of the slaves, mules, and other property used in making the crops of 1861 and 1862, and for a reasonable rent of the lands since the 1st of January, 1866, omitting the years 1863, 1864, and 1865; that such rents, and those for 1861 and 1862, be credited upon the amount due upon the obligations given to said C. I. Field, with interest up to the 1st of January, 1863, and that the rents accruing commencing with the 1st of January, 1866, with interest for 1866, on the 1st day of January, 1867, and so on from year to year up to the present time. The rents and hire to be estimated at what would be a fair and reasonable rent, or hire to a solvent tenant for cash, taking the plantation and property as a whole, and crediting the complainant, with the amounts paid for taxes and for such improvements as were necessary to rent the lands at a reasonable price; also for the value of such improvements as may have added to the permanent value of the lands,—not what they cost, but the value that they permanently may have added to the lands.

It is insisted that the complainant should be considered as a mortgagee in possession, and only chargeable with the rents actually received. I am of opinion that as C. I. Field neglected to sell the personal property when he should have done so, and by which neglect it was wholly lost to the defendants, that complainant is not entitled to be considered as a mortgagee in possession, and only liable for the rent received. The cause must be referred to a master to take and state an account under the rules stated, and report the same to the next term of court. As C.

I. Field was chargeable with the rents and hire for 1861 and 1862, he was entitled to the crops for those years; and, being the sole owner, the loss as a matter of course was his alone.

TOMLINSON & WEBSTER MANUF'G Co. v. SHATTO.

(Circuit Court, D. Minnesota. April 2, 1888.)

1. EXECUTION—SUPPLEMENTARY PROCEEDINGS—APPOINTMENT OF RECEIVER.

A judgment creditor is entitled on the return of an execution unsatisfied to an order for the examination of the debtor, and to an order forbidding any transfer of his property; and when such orders have been issued and served, the judgment creditor has a lien on the debtor's equitable assets disclosed, and can obtain the appointment of a receiver, the proceedings supplementary to execution being regarded in the light of a creditor's bill.

2. SAME—EFFECT OF ASSIGNMENT BY DEBTOR FOR BENEFIT OF CREDITORS.

The fact that a voluntary assignment of his property has been made by a judgment debtor to an assignee of his own choosing, subsequently to proceedings supplementary to execution taken against him by a judgment creditor, is no bar to the appointment of a receiver.

3. SAME—COMPELLING CONVEYANCE OF REAL ESTATE TO RECEIVER.

When, on examination of a judgment debtor in proceedings supplementary to execution, it appears that he is entitled to real estate subject to mortgages, it is competent for the court to compel him to convey to the receiver appointed at the instance of the judgment creditor.

4. SAME—WHEN PROCEEDINGS MAY BE COMMENCED.

An officer has 60 days within which to make a return to an execution; yet when execution is returned unsatisfied, a judgment creditor may take supplementary proceedings without waiting for the expiration of the said 60 days.

In Equity. Motion for the appointment of a receiver.

The Austin, Tomlinson & Webster Manufacturing Company, plaintiff and judgment creditor, apply by motion for the appointment of a receiver after disclosures upon examination of Charles W. Shatto, defendant and judgment debtor, in proceedings supplementary to execution. Application granted.

George C. Ripley, for plaintiff.

Charles H. Woods and *Fred W. Reed*, for defendant.

NEILON, J. A motion is made for a receiver, after disclosure, upon an examination in proceedings supplementary to execution, in accordance with the state law and practice.

The appointment of a receiver is opposed for the reason that after the proceedings had been instituted, and an order served upon the judgment debtor forbidding any disposal of his property or interference therewith, he made a voluntary assignment to an assignee of his own selection under the insolvent law of the state of Minnesota, enacted in 1881. I have duly considered the case presented by the arguments of counsel and find:

1. That the return of the execution unsatisfied entitled the plaintiff to the order for the examination of the judgment debtor, and the order

forbidding any transfer of his property, or interference therewith by him, so that property not subject to execution could be reached and applied to the payment of the judgment.

2. That the order for the examination of the debtor when issued and served gave the plaintiff a lien on the equitable assets of the debtor.

3. That he was at this time entitled to the appointment of a receiver to aid in the application of the debtor's property interests to the payment of the judgment, and the assignment after the commencement of the supplementary proceedings should not prevent the appointment.

4. This proceeding supplementary to execution is a substitute for a creditor's bill, and has a greater scope, and when properly commenced the vigilance of the judgment creditor is rewarded by a priority and lien upon equitable assets; and the discovery upon the examination in this case shows equitable assets; and that the plaintiff is entitled to a receiver.

5. The examination also shows real estate belonging to the judgment debtor in Dakota territory, which is only incumbered by mortgages, the legal title being in him. It is necessary for full relief that a conveyance should be made by the judgment debtor of this property, and the power and legal authority of this court is ample to enforce it, by an order, upon the defendant to make such a conveyance.

6. The law fixes the time of the return of the execution by the officer, at any time within 60 days. After the return of the execution unsatisfied supplementary proceedings may be commenced. The plaintiff is not required to wait until 60 days have expired.

An order will be entered granting the application for a receiver, and a further order that the said defendant, Charles W. Shatto, upon due notice upon the part of the plaintiff, and upon being served with a copy of the order appointing a receiver, attend before me at my chambers in the custom house at St. Paul, at a time to be named in said notice, and then and there, under my direction, execute to the receiver, a conveyance of the real property described in the disclosure of the defendant, and on assignment of such property in trust, to be disposed of and applied, so far as shall be necessary in pursuance of his trust duties as such receiver. Consult *Rid. & B. Supp. Proc.* (3d Ed.) tit. "Priority," etc.; *Porter v. Williams*, 5 How. Pr. 441, affirmed, 9 N. Y. 142; *McDermutt v. Strong*, 4 Johns. Ch. 687; *Edmeston v. Lyde*, 1 Paige, 637; *Corning v. White*, 2 Paige, 568; *Lynch v. Johnson*, 48 N. Y. 27; *Flint v. Webb*, 25 Minn. 264; *Towne v. Goldberg*, 28 N. W. Rep. 254; also *Wait. Pr.*

LEVISON *v.* BALFOUR *et al.*

(Circuit Court, N. D. California. March 19, 1888.)

1. FACTORS AND BROKERS—AUTHORITY—CONSTRUCTION OF CONTRACT.

A direction to sell "Blum's shells; total shipment; not under £35 per ton," does not authorize the consignee to sell parts of the shipment of average quality, at or above the limit, and thus throw the part unsold upon the hands of the owner. The consignee is only authorized to sell in one lot, or, at least, to sell the whole in such manner as to realize the price limited for the whole lot.

2. SAME—EXCEEDING AUTHORITY—LIABILITY TO CONSIGNOR.

Where a consignee of goods of different qualities is only authorized to sell the whole in one lot, at a limited price per ton, sells a part of average quality at a price above the limit, but does not sell the remainder, he is liable to account to the consignor for the whole at the price limited.

(Syllabus by the Court.)

At Law. Action by H. Levison against A. Balfour and others.

Fox & Kellogg, for plaintiff.

Page & Eels, for defendants.

Before SAWYER, Circuit Judge.

SAWYER, J. Prior to July 30, 1885, Leon Blum had a shipment of three qualities of mother-of-pearl shells, amounting in the aggregate to 25 tons and a fraction, in the hands of the defendants' Liverpool agents for sale. He transferred the shells to plaintiff, and on July 30th notified defendants of the fact. He introduced plaintiff to Mr. Bruce, one of the defendants, and a verbal arrangement was made between Mr. Bruce, on behalf of the defendants, and plaintiff, to continue them in defendants' hands for sale until they were otherwise disposed of. In the language of the plaintiff, they were to be sold at "eighty-five pounds sterling per ton for the total consignment." Plaintiff also used the word "telquel," signifying "as is." In the language of Mr. Bruce, defendants were authorized "to sell the total shipment not under eighty-five pounds per ton," and these statements are corroborated by two other witnesses, Blum and Marshal, who were present. Mr. Bruce made a pencil memorandum of a dispatch to be sent to his Liverpool house, and promised to send Mr. Levison a copy of his dispatch. Accordingly a letter dated on that day was immediately sent by defendants to plaintiff, in which they inclosed copy of invoice and other papers relating to the matter, and said, among other things: "As requested by you, we will cable our Liverpool friends as follows: 'Blum shells, total shipment, arrange at not under £85.' By mail we shall advise Messrs. Balfour, Williamson & Co. that Mr. Blum has transferred the entire shipment to you, and if unsold they will when called upon, deliver the same to your order on payment of freight and all charges which have been incurred at Liverpool. It is understood that if our friends sell the shells they will charge the usual commission of 2½ per cent., exclusive of brokerage, on the gross amount, in which case you will receive credit for commissions now charged by us on the amount

originally advanced to Mr. Blum, and which has this day been paid,"—the amount so advanced being \$7,000. Defendants on that afternoon sent to their Liverpool firm a telegram as follows: "Blum shells per Bell Rock. Total shipment. Arrange at not under 85 pounds per ton." On September 28th, by letter of that date, defendants notified plaintiff of a sale of four tons of the shells, made up of proportional parts of different qualities. The parts sold were taken from the different qualities of shells in such proportion as to leave the average quality a little higher than, or at least fully as high as, the portion sold. The shells sold for £87.10 per ton. The report of sales contained no charge of commissions. They report sales, and in their letter add: "And we trust same will be satisfactory." The plaintiff promptly replied to defendants' said report by letter dated September 30th, in which he says:

"In reply to yours of 28th instant, I beg to say, that the authority to sell shells ex Bell Rock was 'total shipment,' only, and not in lots. I reject the affirmation of your advice to me of the 28th instant. I am compelled to hold you to original terms, referring to your letter of July 30, 1885, quoting £85 for the total shipment."

To this letter the defendants replied by letter of same date:

"We are in receipt of your favor of date, and regret you do not seem willing to approve of our friends' small sale of shells ex Bell Rock. Their advices state that the four tons would be made up of proportionable quantities of the three lots, and as their buyer had good hopes of placing the remainder, they were induced to make the sale. We consider our friends acted entirely for your interest, and on their behalf we decline to view the matter in any other light. As it however does not appear that our friends are likely to give satisfaction, we will thank you to instruct your agent to take delivery of the shells—subject to payment of charges which have accrued thereon—and as we shall also request Messrs. Balfour, Williamson & Co. to take no further steps to sell them."

On the same date, September 30th, defendants sent plaintiff a note as follows:

"Referring to our letter of even date, we now hand you order on our Liverpool house for the delivery of the balance of the shipment of pearl shells per Bell Rock, and inclosed with it an order dated September 30, 1885, addressed to Messrs. Balfour, Williamson & Co., Liverpool, as follows: 'Please deliver to the order of Wm. H. Levison, San Francisco, the balance of the shipment of pearl shells per Bell Rock (ss) on payment of all charges which have accrued thereon.'"

Plaintiff again immediately confirmed his former letter, repudiated said sales, returned the order for balance of shells, demanded a delivery of the whole consignment of shells, and offered to pay all charges against the same upon such delivery, but refused to receive the said shells remaining after said sale, or less than the whole lot. The defendants, being unable to deliver the whole lot, declined on that ground, and thereupon the plaintiff demanded payment for the whole 25 and a fraction tons of said shells, less charges, at the price of £85 per ton, which defendants refused to pay, whereupon this suit was promptly brought, October 17, 1885, to recover the said sum as for a conversion. The account of sales furnished by defendants and introduced in evidence showed sales to the

amount of about one ton and a half more than the four tons before reported sold, the same being of an average quality, and at prices above the £85 limit, but this latter was not reported to plaintiff till long after suit was brought.

Upon the facts stated, the question arises whether the defendants' authority to sell was limited to a sale of the whole lot, at a single sale, or whether they were authorized to sell in small lots when opportunity occurred, provided the lots sold were of an average quality, and not sold below the limit of £85 per ton. The terms of the final contract must be regarded as expressed in defendants' letter of July 30, 1885, wherein they give the instructions as telegraphed to their correspondents in Liverpool, viz.: "Blum's shells; total shipment; arrange at not under £85." These are the terms of the contract as finally expressed in writing by defendants themselves, which were accepted by plaintiff by acquiescing without objection upon receipt of defendants' letter, and which he subsequently insisted upon by referring to it as containing the contract in his letter of September 30th, respecting the sale. The rights of the parties must therefore depend upon the construction of the contract as thus expressed. Upon a careful consideration of the contract, I think the reasonable and fair construction of the language is, that the defendants were limited to a sale of the shipment in a single lot at one sale, or that, if they assumed to sell in parcels, even at higher prices, they assumed the risk of being unable to sell the balance at such prices as to make a sale of the whole cargo yield £85 per ton. They were not authorized to sell small lots, and throw the remainder which they were unable to sell back upon the hands of the owner; and by so selling a part, without the authority of the owner, and thus putting it out of their power to return the whole shipment, they rendered themselves liable to account for the whole lot at the price limited. That the plaintiff understood that he had by the contract limited the authority to sell in one lot, or at least that defendants should sell all at the price stated; there can be no possible doubt, for that was the construction he put upon it, and insisted upon at all times. He was not a jobber, but a wholesale dealer, and this was manifestly understood by defendants. He was not engaged in selling goods in small quantities, but dealing in whole shipments. That this was, also, the construction put upon the contract by defendants themselves there can be no doubt. In their report of sales on September 28th, after stating amount of sales and prices without charging their commissions on the parts sold, etc., they close their letter of advice with "we trust the same will be satisfactory." This would seem to indicate a consciousness of having exceeded their authority, for there was no occasion for this suggestion of a desired approval, if they supposed they had kept within their authority. But plaintiff immediately repudiated the sale as being without authority, calling their attention to the terms of the authority, as expressed in their letter to him of July 30th. The defendants immediately replied, not that they put a different construction upon the language, but urging that their correspondents had, in their judgment, and in the judgment of the defendants, acted, not within their

authority, "but entirely for your [plaintiff's] interest;" that they "were induced to make the sale" as their buyer had great hopes of placing the remainder, and added that "since our friends are not likely to give you entire satisfaction, we will thank you to instruct your agents to take delivery of the shells, subject to the payment of all charges which have accrued thereon." Now, this is not the language of parties who feel conscious of having acted within their authority, but rather of expostulation, seeking a ratification because they had acted in good faith, believing their action, though unauthorized, to be for their principal's best interest, and seeking approval on that ground. There is not the merest suggestion, directly, or inferentially, that the defendants did not understand the contract precisely as the plaintiff did. And there is no intimation anywhere in the evidence that the defendants construed the contract differently from the plaintiff, till we come to their answer to the complaint. If they entertained a different view of the meaning of the contract, when they sold in lots and the sale was repudiated, they were here called upon at the time to so state, but they did nothing of the kind. Had they for a moment supposed they had acted within their authority, they would certainly have planted themselves upon this authority, in their first communication, and would never have sought to excuse themselves, and seek approval on any other grounds. It is quite apparent, therefore, I think, that both parties construed the contract alike, and that the construction now sought to be put upon it by defendants is an after-thought. In my judgment, by selling a part, without authority, instead of the whole, and thereby putting it out of their power to return the whole shipment of shells to plaintiff on his demand, the defendants rendered themselves liable to account for the whole shipment at £85 per ton.

There was an attempt to prove that by the custom of merchants at San Francisco, this contract authorized a sale in parcels at or above the price limited. But this, if admissible to prove the fact, would be directly against the construction which both parties, as we have seen, themselves manifestly put upon the contract. Besides, the evidence does not satisfy me that there is any such recognized established custom. The precise case, as stated in the contract in writing, was not stated to the several witnesses, and the evidence, when carefully analyzed, at best only shows, I think, that if the goods are sold in parcels, the whole must finally be sold so as to produce the required amount. I do not think the evidence established the meaning of such contract to be that the consignee is authorized to sell a part of the goods at or above the limit and throw the balance back upon the hands of the owner. Upon the views I have expressed, the defendant must account for the shells at the rate of £85 per ton, and a recovery must be had for that sum after a deduction of commissions, brokerage, and other proper charges, upon the whole, less commissions already paid on the sum of \$7,000. Of course the loss or gain to defendants will be only the difference between the price limited and the amount for which they ultimately sold the shells, which they had in their possession. It does not appear whether they have sold or not. An offer of £80 per ton for remainder appears to have been made. But upon the

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view expressed, what the defendants ultimately lose or gain, as the case may be, cannot affect the amount of the recovery. I am not certain that the evidence furnished the means for ascertaining with mathematical precision the amount of commissions and charges to be deducted, and consequently the amount to be recovered. If so, counsel can first agree upon the amount, and it will be inserted in the findings. If not, I will send it to a referee to ascertain the brokerage and charges. The contract fixed the commissions at 2½ per cent., and the evidence shows that commissions on \$7,000 have been paid. Let there be findings and judgment in pursuance of this opinion.

DENVER R. L. & C. Co. v. UNION PAC. RY. Co., (three cases.)

(Circuit Court, D. Colorado. March 26, 1888.)

1. EMINENT DOMAIN—NATURE OF THE USE FOR WHICH EXERCISED—RIGHT TO QUESTION.

The constitution of Colorado, art. 15, § 4, declaring all railroads to be public highways, does not prevent the raising of the question as to the character of a railroad in a proceeding by it to condemn land; article 2, § 15, providing that "whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."

2. SAME—PLEADING.

In condemnation proceedings an answer alleging that the plaintiff was organized and is a private corporation, for the purpose of constructing and operating a railroad, without averring that the railroad itself, when built, will be a private road, is defective, as it is the object to which the land is to be devoted, and not the party claiming the right to take land, that is required to be public.

3. SAME—CHARACTER OF LAND TO BE ACQUIRED—PLEADING.

When a petition in condemnation proceedings alleges that the land sought to be condemned is private land, held by defendant, a corporation, for other purposes than the business in which it is engaged, and the averments in the answer are, defendants' incorporation, the business in which it is engaged, and that the land is necessary for the purposes of such business, the answer is sufficient on demurrer.

4. SAME—PLEADING—DEFECTS IN CORPORATION.

An answer to a petition to condemn land, alleging that the articles of incorporation of the petitioner company, which are not set out either in the petition or answer, are not sufficient to enable it to maintain its action, without specifying the particulars in which such articles are deficient, will be stricken out.

5. PLEADING—ANSWER.

An answer averring that the petition does not state sufficient facts to constitute a cause of action is, in effect, a demurrer, and on motion will be stricken out.

At Law. On motion to strike out part of answer and demurrer to part of answer.

Proceedings to condemn land by the Denver Railroad Land & Coal Company against the Union Pacific Railway Company.

L. M. Culhbert, for plaintiff.

Willard Teller and *H. M. Orehood*, for defendants.

HALLETT, J. In the three condemnation cases the Denver Land & Coal Company against the Union Pacific Railway Company there was a motion to strike out the answers, which was passed upon a few days ago, on the ground that no such pleading could be allowed in a case of that kind. That motion was overruled. The plaintiff has raised objections to the several answers by motion and by demurrer as to their merits. The first answer is that the petition herein does not state sufficient facts to constitute a cause of action, and does not state facts which entitles the petitioner to the action and relief prayed for and demanded in said petition. The plaintiff is, of course, right in saying that this is only a demurrer and not an answer at all. It must be struck out. The second answer is that the articles of incorporation of the said petitioner are not sufficient, and do not authorize the petitioner to maintain this action, or to appropriate or condemn the land as prayed for in said petition. The articles of incorporation are not set out in the petition, and they are not set out here. Of course the defendant cannot make any objection to the articles of incorporation in this general way without specifying what his objection is or in what respect the articles are not sufficient. The answer will be struck out. The third answer is that "the defendant, further answering, respectfully shows to the court and alleges that the said company was organized and is a private corporation for the purpose of constructing and operating a railroad from certain coal lands owned, as alleged by the petition, to Denver, and for the purpose of hauling its coal from said lands to the city of Denver, as private enterprise, and not for the accommodation of the public in any way or manner whatever." This answer appears to be intended to present the question that the road built by the petitioner is a private road, and not for public use. It is, however, rather indistinctly stated. The averment is that the company was organized for this purpose, and as a private corporation, without a distinct statement as to what the road will be if built. The inquiry is not as to what the company was organized for, or whether it will be a private or public corporation, but what the road will be,—the structure itself,—if any such thing shall be made. I regard it as a serious defect in the answer, and don't think it can be a question of fact to be tried, whether this company is organized in one way or another, except it may be to inquire whether it conforms to the statute regulating such matters; but it may be a question of inquiry to be determined as matter of fact, whether the road, when built, will be a public or private road, and the question will be the same whether the road shall be built by a corporation or by an individual. That question does not in any way appertain to the other, by whom the road is built. It is a question what the road itself is, not as to the character, or the quality of the builder. But, taking the answer to be a statement that the road will be private and not public, and is intended so to be, petitioner denies that any such answer can be made or received in an action of this kind, and he founds

his argument upon provisions of the constitution of the state. In section 15, art. 2, Const., some provision is made as to taking private property for public use, and the last clause of that section is:

"Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."

Counsel for petitioner concedes that by this clause an inquiry may be made as to whether the road which it is proposed to build is of a public or private character; and that he cannot very well deny, because this is not a new principle in the law. It is affirming only what stood before in the law, probably that there might be no misunderstanding in respect to it. Mr. Mills, in section 10 of his work on "Eminent Domain," referring only to the general principle which stands in the law, without support from any constitution says:

"The legislature cannot so determine that the use is public as to make the determination conclusive upon the courts. The attempt of the legislature to determine the public character of the use does not settle that it has the right to do so, but the existence of the public use in any class of cases is a question to be determined by the courts. The presumption is in favor of the public character of a use declared to be public by the legislature, and unless it is seen at the first blush that it is not possible for the use to be public, the courts cannot interfere. The grant of the right of eminent domain is a determination on the part of the legislature that the objects for which it is granted are necessary. There can be no way for courts to be possessed of all the facts and circumstances which the legislative department had before in each particular case. An abuse of a general act authorizing condemnation for private purposes will not be tolerated," etc.

It may be that this provision of the constitution was inserted with a view to remove the presumption which is here referred to, or perhaps to allay all doubts which might arise at any time in respect to the question; but it is certainly true that this provision of the constitution is only a declaration of the law as it stood at the time the constitution was made. But petitioner's counsel contends that this is controlled by, and in effect nullified by, section 4, art. 15, of the same constitution, which declares that "all railroads shall be public highways, and all railroad companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any designated points within this state, and to connect at the state line with railroads of other states and territories. Every railroad company shall have the right, with its road, to intersect, connect with, or cross any other railroad." The argument of counsel is that, as by this clause of the constitution a railroad is made a public highway, no question shall be raised as to its character in any proceeding; but it shall always be taken to be and accepted as a public highway in all proceedings whatsoever. That appears to be reasoning in a circle. To say in one clause that whether it shall be taken to be of a public character is for the courts to determine, and then find in another clause that the constitutional convention has determined it itself, is going round and round

in the same course. I cannot accept any such position or proposition as that; in fact I regard it as exceedingly technical and far-fetched, and it is certain that in all proceedings in courts where these proceedings have been recognized elsewhere no such position has been taken, nor has it been thought necessary to discuss it.

Here is a case from a state in which the rights of corporations in condemnation proceedings certainly have not been ignored, which seems to go as far as the counsel for defendant asks the court to go in this instance. This case is *Railroad Co. v. Wiltse*, 116 Ill. 449, 6 N. E. Rep. 49. A question arose in the case as to the character of the use upon the evidence, no answer being received in that state as to any of these matters; but upon the hearing evidence was received to show that the track which petitioners sought to build was only for the purpose of connecting its main line with some brick-yards, which were not very far from the line of the road. Concerning the power of the court to make such an inquiry, the court says:

"The questions, however, of whether the use to which it is sought to appropriate the property is a public use or purpose, and whether such use or purpose will justify the exercise of the compulsory taking of private property under the statute and constitution, and where the power is attempted to be exercised by an incorporation, whether the power is delegated to the corporation by the legislature, and whether the uses and purposes for which such power is sought to be exercised fall within the legislative grant of powers, are proper subjects of judicial determination."

For which a large number of authorities are cited.

"It is evident from the evidence in this case that the sole use and purpose of the proposed track was to reach the brick works situated between a half and three-quarters of a mile from appellant railroad, and thereby create a feeder to its main line, and add to the value of its freights. There was no pretense that there was any necessity for any increased facilities in the locality of the proposed track, except for the purpose of saving the hauling of brick from these brick works, and the increased traffic brought to appellant's main line by the building of this spur."

Further on:

"It is conceded, substantially, and the evidence abundantly shows the fact, that this proposed track in no way increases or adds to the facilities for transacting the business of the railroad appellant is authorized by its charter to build and operate, but, on the contrary, by adding to the volume of its freights, would tend rather to embarrass the main line of road than otherwise."

This discussion is quite lengthy, and it is full to the point that whether the road is to be public use or a private road is fully open to inquiry and decision in all cases of this kind, and other authorities are not wanting. A year ago, or nearly so, in the case of *McPhee* and another against the Union Pacific Railway Company, (an equity case, in this court,) the same rule was followed; and upon the charges in the bill in that case it was held that a track which the Union Pacific Company was proposing to lay down in some parts of this town was only a private road for serving certain warehouses, not of a public character, which would enable them to proceed in opposition to the demands of property holders in

the neighborhood. If this answer were directed to the quality of the road which the petitioner proposes to build, rather than the purposes of petitioner's organization, it would be sound. As it stands it is not a good answer, and must be struck out. The fourth answer is that it is not necessary for the petitioner to appropriate for use or occupy the lands and premises in said petition described, or any part thereof. An averment of that kind cannot be made without stating the facts showing that the necessity does not exist. That answer also must go out. The fifth and last answer is the subject of a demurrer. In that the defendant shows its incorporation, and the service in which it is engaged, and alleges that these lands were purchased by it for its own use, and that they are necessary for the purposes of its organization. It is alleged in the petition that the lands are not in use at all, and in substance that they are private lands held by the Union Pacific Company for purposes other than the service in which it is engaged. This answer, in my judgment, meets those allegations. Whether there is any use now made of the lands, such as claimed by the respondent, and denied by the petitioner, can only be ascertained upon the evidence; and it is only after hearing the evidence that any decision of matters such as are presented in this answer can be reached. It is impossible to determine the rights of the parties upon petition and upon the answer only. They are in issue by these charges and counter-charges, and we must wait for the evidence before determining the merits of the controversy. The position of the petitioner that no such answer can be made is subject to the same rule as the defense in respect to the use to be made of the property. The argument of counsel that because these things are by the statute not to be submitted to the jury, therefore they cannot be considered at all, is of no weight. Probably it is true that questions which are directed to a jury or to commissioners by the statute are to be considered by them, and by them only. It does not follow from this that there may not be any other questions raised, or that there may not be any other methods of reaching a decision upon such questions than those that are mentioned in the statute.

The demurrer to the fifth answer must be overruled, and the motion to strike out as to all the others allowed.

HALTON v. UHLINGER.

(Circuit Court, E. D. Pennsylvania. January 17, 1888.)

PATENTS FOR INVENTIONS—ANTICIPATION.

Letters patent No. 184,037, issued December 6, 1876, to Thomas Halton for improvement in Jacquard looms, claim the construction of the griffs, or those parts which raise the hooks, of such breadth that when the griffs are elevated the blade still rests below the top of the hooks out of operation, and when the griffs descend the danger of striking the heads of these idle hooks is avoided. On evidence of prior use at Paterson and Brooklyn; of the British patent issued March 14, 1870, to John Morris for an improvement by mak-

ing double-headed hooks so as to employ two cylinders for the center and border, respectively, without changing the cards; of the French patent issued October 24, 1884, to James Besset, in which the Jacquard lifting plate was replaced by a fixed grate and movable frame so that the horizontal needle, when opposite a full portion of a card, can withdraw the hook from the grate when the card-cylinder is nearest the side of the machine, instead of when it is furthest; and of the publication in 1873 of "Geschichte der Jacquard Maschin," —the patent was held void for anticipation.

In Equity.

This is a suit brought by Thomas Halton, complainant, against William P. Uhlinger, respondent, for an alleged infringement of letters patent, No. 185,027, and dated December 5, 1876, granted to Thomas Halton, for improvement in Jacquard looms; the application for which letters patent was filed September 11, 1876. The invention is for a broad blade, or griff, which is not lifted above the top of the hook heads of the Jacquard machine. The griff is that portion of the Jacquard which elevates the hooks of the machine, the hooks in turn being operated upon by needles so as to be left in position or thrown out of position, to be elevated by the griffs. The patent claims the construction of the blades of the griffs of such breadth that when the griffs are elevated the blade still rests below the top of the hooks out of operation, and when the griffs descend the danger of striking the heads of these idle hooks is avoided. The defenses were prior use, prior patents, and publication. The first was supported by the testimony of witnesses who had operated, or seen operated, Jacquard looms, with improvements upon them similar to that described in complainant's patent, at Paterson, N. J., and Brooklyn, N. Y., at varying periods before the issue of complainant's patent. The defense of "prior patents was supported by offering in evidence a copy of letters patent granted by the British patent office, to John Morris, of Belfast, Ireland, dated March 14, 1870, the specification and claim of which was as follows:

"I, John Morris, of Belfast, in the county of Antrim, Ireland, do hereby declare the nature of the said inventions for 'improvements in Jacquard apparatus,' to be as follows: My invention has reference to the hooks employed in Jacquard apparatus. These hooks have hitherto been formed as seen at Figure 1 of the annexed drawings, and the heads, being single, have not allowed of using two cylinders, one on each side of the machine, unless two sets of needles were put in where with my improved hooks I have only one set. My invention consists in making double-headed hooks substantially of the form represented in figure 2, whereby I can employ two cylinders, one to weave the center and one to weave the border, so that it is not necessary to change the cards, for the cylinders can be put in motion sooner than the cards can be changed."

Also a translation of French patent 3427 dated October 24, 1834, granted to James Besset, of Lyons, for a loom for weaving, called by him a "fulling loom," described thereon as follows:

"It differs essentially from ordinary machines called 'Jacquard machines,' in that, in the latter the lifting plate, or grate, is movable, and actuates the cylinder which carries the cards. In my machine this grate is replaced by a fixed grate and a movable frame, so arranged that when the horizontal needle, which serves to unhook the bent top of the crochet-wire, which is above the

grate, is opposite to a full or unpierced portion of a card; it performs the said operation [withdrawing hook from the grate] when the card-cylinder is nearest the side of the machine, instead of when it is farthest therefrom."

To support the defense of prior publication, "*Geschefts der Jacquard Maschin*," a work printed in 1873, was cited by respondent.

Geo. B. Carr, for complainant.

George J. Harding, and *George Harding*, for respondent.

BUTLER and McKENNAN, JJ., in an oral opinion, held complainant's patent to have been anticipated, and dismissed his bill, with costs to respondent.

CAREY *et al.* v. MILLER *et al.*¹

(Circuit Court, E. D. New York. March 6, 1888.)

1. PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—INJUNCTION—PREVIOUS ADJUDICATIONS.

Where a patent, involving the subjection of steel springs to heat, had been before the courts, and had been sustained to the extent of covering such process "when the springs are kept below red heat," *held*, in this suit, on application for preliminary injunction, that the patent would be presumed valid only to the extent expressly covered by the decisions referred to.

2. SAME.

As upon the preliminary affidavits it appeared that defendants, in the process used by them, heated the springs above this limit, *held*, that the application for preliminary injunction should be denied, with leave to renew should complainants be able to produce such further evidence of defendants' process of manufacture as to indicate that complainants' patent was infringed.

In Equity. On application for preliminary injunction.

Duncan, Curtis & Page, for complainants.

Philip J. O'Reilly, for defendants.

LACOMBE, J. This is an application for a preliminary injunction to restrain the defendants from making and selling spiral wire springs, which, in the process of manufacture, are subjected to heat, after the wire is wound into a spiral form, with the effect of restoring to the wire the strength and elasticity lost in winding,—and from in any way practicing the invention described and claimed in letters patent No. 116,266, granted to Alanson Carey, on June 27, 1871. The claim of the patent is for "the method of tempering furniture or other coiled wire springs, substantially as hereinbefore described." The process set forth in the specification consists in the subjecting of the springs to a degree of heat known as "spring temper heat, which is about six hundred degrees, more or less," for about eight minutes. The patent has been several times before the courts, (*Cary v. Wolff*, 24 Fed. Rep. 139, 141; *Cary v.*

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

Spring-Bed Co., 27 Fed. Rep. 299, 31 Fed. Rep. 344,) and has been sustained to the extent of covering such process, "when the springs are kept below red heat." It may be that the patent is sufficiently broad to cover any degree of heat whatever; but that has not as yet been held by the courts which have had it under consideration, and therefore, upon application for preliminary injunction, the patent will be presumed valid only to the extent expressly covered by the decisions referred to. Upon the case as it now stands the weight of evidence indicates that the defendants, in the process used by them, heat the springs above this limit. It may be that the defendant's affidavits are disingenuous, and that when the later details of their process, now so briefly described, shall be set forth, it will appear that they do infringe the patent even when given the limited construction which would confine it to a heating not above red heat. This motion, however, can only be decided upon the papers before the court, and giving due weight to the sworn statements presented by both sides.

The motion, therefore, is denied, with leave to renew should the complainant hereafter be able to produce such further evidence as to the defendant's process of manufacture as will indicate that the claim of the patent is infringed by them.

SINGER MANUF'G CO. v. SPRINGFIELD FOUNDRY CO. *et al.*

(Circuit Court, D. Massachusetts. April 2, 1888.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—PATENT FOR SEPARATE PARTS—REPAIRS.

Where different parts of a machine are covered by separate patents, a purchaser of such machine from the patentee, who replaces one of the parts or elements covered by an individual patent, when worn out, is guilty of an infringement.

2. EQUITY—PLEADING—MULTIFARIOUSNESS.

It is within the discretion of the court to decide whether or not a bill in equity is multifarious in its nature, such question depending upon the circumstances of each individual case.

In Equity. Action for infringement of patent.

C. F. Perkins, for complainant.

J. L. S. Roberts, for defendant Duckworth.

COLT, J. This suit is brought for the infringement of the sixth claim of letters patent No. 208,838, dated October 8, 1878, all the claims of letters patent No. 229,629, dated July 6, 1880, and the second claim of letters patent No. 274,359, dated March 20, 1883. These several patents were issued to the complainant for improvements in sewing-machines. The bill has been taken *pro confesso* as against the Springfield Foundry Company. The present controversy is between the complainant and the remaining defendant, Duckworth. Duckworth is a machin-

ist, and has made a specialty of repairing sewing-machines. He admits that he makes certain parts of the Singer I M machine to replace worn or broken parts in machines sold by the complainant, and that he has also made and furnished these parts to one John Thornton, Jr., of New York, a dealer in sewing-machine supplies, and engaged in the business of repairing sewing-machines. The parts introduced in evidence are the feed-cam, forked connecting feed-bar, feed-lifting rock-shaft, feed rock-shaft, shuttle-driver, and shuttle-race. He contends that the making of these parts does not constitute an infringement because—*First*, they are each but one of many other parts constituting an organized sewing-machine; *second*, that the parts so made by the defendant have been made for the purpose of replacing parts which have been broken or worn out in organized sewing-machines sold by the plaintiff; *third*, that neither he nor any other person has assembled the parts so made in one machine, but that each part has been made to replace a corresponding part in some organized machine made and sold by the plaintiff. He admits, however, that the parts could fit no other machine, without considerable alteration, than the Singer I M. The position taken by the defendant is that he has a right to make and sell these parts, provided the article is not made or sold with the intent to put it to an unlawful use; that the use here is lawful because the purchaser of a patented machine has a right to repair it, and to replace parts as often as may be necessary, provided he does not destroy the identity of the machine. The cases relied upon by defendant are *Wilson v. Simpson*, 9 How. 109; *Chaffee v. Belting Co.*, 22 How. 217; *Gottfried v. Brewing Co.*, 8 Fed. Rep. 322.

In *Wilson v. Simpson* it was held that an assignee having a right to use Woodworth's planing-machine had a right to replace new cutters or knives for those which were worn out. The court says:

"The right of the assignee to replace the cutter-knives is not because they are of perishable materials, but because the inventor of the machine has so arranged them as a part of its combination that the machine could not be continued in use without a succession of knives at short intervals. Unless they were replaced, the invention would have been of but little use to the inventor or to others. The other constituent parts of this invention, though liable to be worn out, are not made with reference to any use of them which will require them to be replaced. These, without having a definite duration, are contemplated by the inventor to last so long as the materials of which they are formed can hold together in use in such a combination. No replacement of them at intermediate intervals is meant, or is necessary. They may be repaired as the use may require. With such intentions they are put into the structure. So it is understood by the purchaser, and beyond the duration of them a purchaser of the machine has not a longer use for them. But if another constituent part of the combination is meant to be only temporary in the use of the whole, and to be frequently replaced, because it will not last as long as the other parts of the combination, its inventor cannot complain, if he sells the use of his machine, that the purchaser uses it in the way the inventor meant it to be used, and in the only way in which the machine can be used. Such a replacement of temporary parts does not alter the identity of the machine, but preserves it, though there may not be in it every part of its original material."

In *Chaffee v. Belling Co.*, 22 How. 217, the court says:

"When the patented machine rightfully passes to the hands of the purchaser from the patentee, or from any other person by him authorized to convey it, the machine is no longer within the limits of the monopoly. According to the decision of this court in the cases before mentioned, it then passes outside of the monopoly, and is no longer under the peculiar protection granted to patented rights. By a valid sale and purchase the patented machine becomes the private, individual property of the purchaser, and is no longer protected by the laws of the United States, but by the laws of the state in which it is situated. Hence it is obvious that if a person legally acquires a title to that which is the subject of letters patent, he may continue to use it until it is worn out, or he may repair it or improve upon it, as he pleases, in the same manner as if dealing with property of any other kind."

In *Gottfried v. Brewing Co.*, 8 Fed. Rep. 322, the patent was for an improvement in pitching the inside of barrels, and Judge BLODGETT thus states the rule:

"From the functions of the different parts of this machine it is obvious that some of them will wear out much faster than others, and I think there can be no doubt that the defendant has the right to replace those parts as often as necessary, so long as the identity of the machine is retained. The proof in this case shows to my satisfaction that as the grates, pipes, and blowers were worn out, they were renewed, and therefore, the identity of the machine is retained. If, for instance, this patent had been upon a peculiar grate, and there had been no patent upon the other parts of the machine when the grate was worn out, the defendant would have no right to put in another like it, because the grate was covered by the patent; but if the grate is only a part of an entire combination, I think it has a right to replace the worn-out parts, and it cannot be said to be a different machine."

In *Aiken v. Print Works*, 2 Cliff. 435, the purchaser bought a knitting-machine with which the vendor sent a package of needles to be used with the machine. The needles were subject to a separate patent. The court (Mr. Justice CLIFFORD) observes:

"Right to repair is limited by the same rules that operate in the repair of other property. The owner may repair, but he cannot appropriate the materials belonging to another man in effecting the purpose. Purchasers in this case may repair the needles they purchased, but they cannot manufacture new ones without license. Reference is made to the case of *Wilson v. Simpson*, 9 How. 123, but a careful examination of the case will show that it affirms the very rule here maintained. 'When we speak of the right to restore a part of a deficient combination, we mean,' say the court, 'the part of one entirely original, and not of any other patented thing, which has been introduced into it to aid its intended performance.' The cutters and knives in that case were not subject to a patent, and of course the respondent had a right to use them as materials to repair his machine; but unfortunately for the defendants in this case, the needle is subject to a patent, and in making and using it they have infringed the right of the plaintiff."

As illustrated by these cases the rule seems to be that where a patent covers as an entirety a machine composed of several separate and distinct parts, the purchaser of such machine from the patentee will not infringe by replacing such temporary parts as wear out, so long as the identity of the machine is retained; but if the patent is for a distinct part or element of the machine, a purchaser will infringe by replacing such part or

element. Tested by this rule, I think the defendants are guilty of infringement in the present case. The sewing-machine of complainant is not patented as an entirety, but different parts of the machine are covered by different patents. Claims 1 and 2 of patent No. 229,629 cover an improved shuttle-driver, and the defendant makes and sells the same device to be used in a Singer machine. The second claim of letters patent No. 274,359 is for a shuttle-race for an oscillating shuttle, provided with an elastic side or flange. The shuttle-race cannot be used in the Singer I M machine without the elastic flange. The defendant makes the shuttle-race for use in such machine. He therefore makes the major part of the patented combination, intending that it should be provided with an elastic flange, and used in complainant's machine. Claims 3 and 4 of patent No. 229,629, and claim 6 of patent 208,838, are combination claims. The main elements found in these patented combinations are made and sold by defendant for use in the Singer machine. Under the authority of *Wilson v. Simpson* and other cases this cannot be done.

The defense of multifariousness is also relied upon. The defendant Duckworth has answered, proofs have been taken, and a hearing had upon the merits of the bill. I do not see in what respect the defendant suffers any injury by having these causes of action heard together. All the patents sued upon relate to one machine, and the defendant is not prejudiced by this joinder. Whether a bill is multifarious or not must depend upon its own circumstances, and must necessarily be left to the discretion of the court. *Oliver v. Pratt*, 3 How. 333, 412.

Upon the whole I think a decree should be entered for the complainant; and it is so ordered. Decree for complainant.

THE VIDETTE.

WILSON *et al.* v. THE VIDETTE *et al.*

(*District Court, S. D. Alabama. March 20, 1893.*)

SHIPPING—STOPPAGE IN TRANSIT—LIABILITY OF VESSEL TO CONSIGNEE.

Where the vendor of goods aboard a vessel has exercised his right of stoppage *in transitu* while the vessel was out, the vessel is not liable in damages for refusing to deliver the goods to the vendee upon demand and production of the bill of lading at the port of destination; and this is especially the case where the vendee, prior to filing the libel, has seized the goods under a writ of statutory detinue issued by the state court.

In Admiralty. On exceptions to libel.

Wilson & Lozano, a firm engaged in the retail dry goods business in Mobile, Ala., purchased on credit from Tefft, Weller & Co., of New York, a number of packages of merchandise, and these were shipped by the steam-ship Vidette, of the New York & Mobile Steam-Ship Line, in

the latter part of January, 1887, consigned to libelants, and bills of lading were also duly forwarded them at Mobile. On presentation of the bills of lading, February 11, 1887, by libelants to said ship at Mobile, delivery of the goods was refused by the ship's agent on the ground of contrary instructions received from shippers, sent while the vessel was out. On February 15th, Wilson & Lozano brought suit in the city court of Mobile in statutory detinue, causing the sheriff to seize the goods, and on the same day filed this libel for \$5,500 damages in business from detention of necessary goods, injury to business standing, and for expenses of the detinue suit. Lombard, Ayres & Co., intervened as claimants and charterers.

G. L. & H. T. Smith, for libelants.

R. H. Clarke, for complainants.

TOULMIN, J., (*after stating facts as above.*) A seller, who has sent goods to a buyer, at a distance, may stop them at any time before they reach the buyer, on the ground of the insolvency of the buyer. The right to do this is called the right of stoppage *in transitu*. Pars. Merc. Law, 60; 2 Benj. Sales, § 1229; *Loeb v. Peters*, 68 Ala. 243; 1 Pritch. Adm. Dig. 541. Nothing short of a *bona fide* sale of the goods for value, or the possession of them by the vendee, can prevent the vendor's right of stoppage *in transitu*. *Loeb v. Peters*, *supra*; *Lesassier v. Southwestern*, 2 Woods, 35. A notice of stoppage *in transitu* by the vendor to the carrier is sufficient to charge the carrier. And upon the vendor asserting his right to stop the goods, and demanding them of the carrier while the right of stoppage *in transitu* continues, the carrier is bound to redeliver them, and will become liable for a conversion of the goods if he refuses to redeliver them to the vendor, and delivers them to the vendee. His refusal to redeliver on demand is sufficient evidence of conversion. 1 Pritch. Adm. Dig. 541; 1 Pars. Shipp. & Adm. 522; 5 Wait, Act. & Def. 615, and authorities there cited; Hutch. Carr. § 420. It is held by some authorities that in case of doubt as to the vendor's right the carrier's duty is to file a bill of interpleader. 1 Pritch. Adm. Dig. 514. And in 1 Pars. Shipp. & Adm. 522, it is said that if both vendor and vendee claim the goods of the carrier, he should ask an indemnity. There is, however, no legal obligation on either party to give such indemnity. But if it is asked and refused, and the carrier thereupon refuses to deliver the goods, the rightful claimant could recover them or their value; but nothing by way of costs or damages for the detention. But all the authorities agree that it is the duty of the carrier to redeliver the goods to the vendor on his giving notice of stoppage *in transitu*, and making demand for them. And it is held that for his refusal to do so he is liable for a conversion of them. See authorities cited *supra*. Upon the exercise of the right of stoppage by notice to the carrier the buyer loses the right to take possession of the goods under the bill of lading. 2 Benj. Sales, § 1287, and note. The effect of the notice is to revest the vendor's possession. 5 Wait, Act. & Def. 616, 618; 2 Benj. Sales, § 1295. And the carrier has no right to say that he will retain the goods for delivery to the true

owner after the conflicting claims have been settled. 2 Benj. Sales, § 1281; Story, Bailm. § 580. I have found but one authority, and that a text writer, (Blackb. Sales,) which holds that the carrier delivers the goods to the vendor at his peril, and would probably be responsible to the vendee therefor if the stoppage was wrongful. But I have found no case where a court has followed this rule. It is said in the case of *The Tigress*, Brown. & L. 45, (which is quoted with approval in the opinion of the judge in the case of *The E. H. Pray*, in 27 Fed. Rep. 474,) that "the vendor exercises his right of stoppage *in transitu* at his own peril; and it is incumbent on the master to give effect to that right so soon as he is satisfied that it is the vendor who claims the goods, unless he (the master) is aware of a legal defeasance of the vendor's claim." The seller, who stops the goods, takes the risk on himself, and if he stops them wrongfully, would doubtless be answerable for any damages the buyer should sustain thereby. 1 Pars. Shipp. & Adm., 518.

The question now considered is not whether the stoppage *in transitu* here complained of was wrongful, and what damages the libelants have sustained thereby, but whether, (the goods having been stopped *in transitu* by the sellers,) the libelants can recover damages from the vessel for the non-delivery of the goods to them on the bill of lading. The libelants, in their libel, claim damages for a breach of contract in that the vessel refused to deliver the goods to them on their demand. The libel, however, shows that the vessel's refusal to deliver the goods to libelants was because of the stoppage *in transitu* by the sellers, Tefit, Weller & Co., to whom the law made it the vessel's duty to redeliver the goods on their notice. I have found but one case directly in point, and that is a case just like this. There the vendee of a cargo of clay brought suit on a bill of lading against the vessel to recover damages for non-delivery of the cargo. One Hayes was the vendor, and before the delivery of the cargo to the libelant required the master of the vessel not to deliver it to libelant, asserting the insolvency of libelant and the non-payment of the price of the cargo. The court says:

"Here Hayes was the vendor of the goods; he had not been paid by the libelant; there was no legal defeasance of the vendor's claim and the vendor demanded the goods upon the ground of the insolvency of the vendee. These circumstances justified the master in refusing to deliver the goods to libelant, and constitute a good defense to such an action as this." *The E. H. Pray*, 27 Fed. Rep. 474.

In the case of *Schmidt v. The Pennsylvania*, 4 Fed. Rep. 548, the report of the opinion of the judge trying the case is so meager that it is difficult to determine what his views were except on the question of damages. But it appears that the court held the detention of the goods by the vessel was wrongful, and that libelant was entitled to recover damages for such detention. This, doubtless, was on the ground that the claimant was the assignee of the bill of lading, and a purchaser for value; that there was a legal defeasance of the vendor's claim, of which the master of the vessel had been informed, and the detention of the goods was therefore wrongful. There the stoppage *in transitu* was conceded to have-

been wrongful, and was recalled, and the goods were in the possession of the vessel when the libel was filed. But however this may be, as the law makes it the duty of the vessel to redeliver the goods to the seller on notice by him of a stoppage *in transitu*, it seems to me there can be no liability on the vessel for the performance of this legal duty, and it should not be held liable in damages for a refusal to deliver the goods to the buyer. Besides, the libel shows that the libelants commenced an action of detainee for the goods before filing their libel. Are they not thereby concluded from maintaining this action, which is inconsistent and incompatible with the former remedy to which they resorted? *Insurance Co. v. Cochran*, 27 Ala. 228. My opinion is that on principle and the weight of authority this libel cannot be maintained; and as the exceptions to it raise the point here decided, it is unnecessary for me to consider the case on its merits.

The exceptions to the libel are therefore sustained, and the libel is dismissed at libellant's costs.

THE CHELMSFORD.¹

MAYO *et al.* v. THE CHELMSFORD.

(District Court, E. D. Pennsylvania. February 27, 1888.)

1. MARITIME LIENS—SUPPLIES—HOME PORT.

There is no implied maritime lien against a vessel for supplies furnished to her at her home port.

2. SAME.

There is an implied maritime lien against a vessel for supplies furnished by one at the home port, at the owner's request, and shipped to the vessel elsewhere.

3. SAME—WAIVER—BY TAKING DRAFT.

Taking a draft for supplies furnished to a vessel in a foreign port is not a surrender of the right to a lien for the same. The right to the lien is a security, and passes with a draft to the indorsee.

4. SAME—HOME PORT—WHAT CONSTITUTES.

The home port of a vessel is where her owner has a *bona fide* residence, and this rule binds all who know where the owner resides, even though the vessel has a foreign register, and sails under a foreign flag.

5. COURTS—FEDERAL DISTRICT—PRACTICE—FOLLOWING SIMILAR DECISIONS.

The decisions of other district courts in similar cases will be followed in order to secure uniformity, although those decisions do not seem to be based upon sound principles.

In Admiralty.

Henry R. Edmunds and John C. Dodge & Sons, for libelants.

Driver & Coulston and Goodrich & Goodrich, for respondent.

BUTLER, J. In the years 1882 and 1883, the libelants, ship-chandlers in Boston, furnished the respondent at various times, (the last being

¹ Reported by C. Berkely Taylor, Esq., of the Philadelphia bar.

in December, 1883,) with necessary supplies, at the instance of her owner, Mr. Warner, when in the port of Boston. In the months of October and November, 1883, they furnished her other supplies to the value of \$694.45, at the owner's instance, forwarding them to Portland, where she then was. In June of the same year, Quimby & Co., of Bangor, Me., furnished the ship (then at that port) with supplies of the value of \$215.26, taking therefor a draft drawn by the master in their favor on the owner. This draft was transferred by indorsement to the libelants, who cashed it for Quimby & Co. After crediting several payments made, there remains a balance due on the accounts of \$3,467.02, with interest from December 6, 1883, to recover which the attachment was issued. In November, 1884, the claimant purchased the ship for \$10,000, and took possession. Prior to the date when the indebtedness to libelants, or any part of it, was contracted, the purchaser had made advancements to the owner amounting to \$9,700, or thereabout, and had taken a mortgage on the ship to secure payment. The consideration for the sale was this indebtedness, and an additional sum of \$300. At the time libelant's claim arose, and for several years prior thereto, the home port of the vessel was Boston, and so continued until after her sale. The owner resided there, and still does. She was built at Quebec, was registered there, and started out with the British flag, which she continued to carry. The owner went from Boston, where he had been located for some time, to Quebec, to build her, and remained there until she was finished and started out to sea. Since then he has resided in Boston for a period of eight or more years. About this latter fact there does not seem to be room for reasonable doubt. Mr. Atwood, of the libelant firm, testifies distinctly, on cross-examination, that he had known him there for 10 years; that he was living with his nieces, where he spent nine months or more of each year. There is no evidence that he had any other home within this period. When not there he was with the vessel, or in pursuit of other business. His own testimony is singularly unsatisfactory and unreliable. He starts out with a statement that his memory is very defective, and that in consequence little dependence should be placed upon what he says. His testimony, on its face, fully supports this statement. I would infer that he is wanting in intelligence, and that he testifies under a strong bias in favor of the libelants. Much that he says is difficult to understand. I conclude from his entire statement that he was born in England, and came to this country when quite young, locating in New York, where he resided with one MacKay. While there (how long he remained is very uncertain) he married MacKay's sister-in-law. He then went to Boston, where he lived for some time; how long, is also uncertain. From there he moved to Quebec, and engaged in ship-building with MacKay, (who, I infer, had also moved there,) and continued in the business for some years. He withdrew from the partnership, and (his wife having died) visited England. After a time he returned to this country, and again located in Boston. Subsequently he went to Quebec to build the vessel in question, remaining only so long as was necessary to complete the work and start her to sea,—a period of three

or four months. He left Quebec with her, (or directly after,) visited England, France, and other places, and finally returned to Boston with the ship, where he has continued to reside ever since, being absent occasionally on business, probably as much as three months of the year. After his return to Boston, which occurred eight to ten years ago, he became part owner of several Boston vessels, and entered into numerous shipping enterprises. In some of these vessels, and in one or more of the enterprises, the libelants were interested with him; and, in addition thereto, he and they had considerable business intercourse. In the registration, mortgage, and bill of sale of the ship, the owner stated his residence as Boston. There cannot, therefore, I repeat, be reasonable doubt that the owner's home was Boston, at the time in question. This fact determines the home port of the vessel. See *The E. A. Barnard*, 2 Fed. Rep. 712; *The Mary Morgan*, 28 Fed. Rep. 333.

Were the libelants misled respecting the owner's residence? This question has received careful attention. I have, however, not found anything to justify an affirmative answer. It must be borne in mind that the misleading, to be material, must have been in respect to this fact—the owner's residence. The testimony of Mr. Atwood, of the libelant firm, shows that they were not so misled. They knew that he had lived in Boston for many years, and were bound to know that this constituted Boston his place of residence. If they had not known this, and his residence had been difficult of ascertainment and doubtful, the foreign registration and foreign flag might be appealed to as evidence on that point. As the residence, however, was known, they are unimportant. To one ignorant of the law they might mislead respecting the home port of the vessel, but the libelants cannot plead ignorance. Knowing that Warner resided in Boston, (or having the means within reach of ascertaining this fact even,) they were bound to know that the home port of the vessel was there. It follows that no implied lien can exist for the supplies furnished in Boston.

It is urged, however, that the evidence shows an express lien. Aside from the question (raised and discussed) whether such a lien could be created by parol, it is sufficient to say that I find no evidence of an express contract for a lien. Without such contract no express lien can exist. It is plain that there was no such contract. The libelant's evidence shows that the subject was never alluded to by the parties. Mr. Atwood says the libelants charged the ship, intending to look to her; and that he believed that Warner so understood; though nothing was ever said between them on the subject. This is the ordinary foundation for an implied lien, where one may exist, nothing more. It has no tendency, even, to support the allegation of an express lien.

For the debt represented by the draft given Quimby & Co., there was a lien. The supplies were necessary, and were furnished in a foreign port, at the master's instance. Taking the draft did not affect the lien. The transfer of the indebtedness, transferred the lien. The latter was security simply for the debt, and as in all other instances it follows the debt to the transferee.

As respects the claim for supplies furnished in Boston, at the owner's instance,—\$694.45,—and forwarded to the vessel at Portland, I should have no hesitation in disallowing it, in the absence of authority on the subject. I am unable to understand how an implied lien can be sustained, consistently with the principles governing such liens, under the circumstances. Supplies furnished at the home port are presumed to be furnished on the credit of the owner; and the presumption is conclusive, in the absence of a contract for an express lien. How and why it should make any difference that the supplies so furnished are forwarded to the vessel elsewhere, by the owner's direction, I am unable to comprehend. Why does not the presumption that the owner's credit is relied upon, in the latter case, arise as clearly and as strongly as in the former? Furthermore, why should not the merchant be regarded as the owner's agent in forwarding the supplies purchased. I find, however, that the precise question has been decided the other way, in *The Sarah J. Weed*, 2 Low. 555; *The Agnes Barton*, 26 Fed. Rep. 542; and *The Huron*, 29 Fed. Rep. 183. It seems probable that the same question was involved and so decided in *The Union Express*, Brown, Adm. 537, and *The Hiram R. Dixon*, 33 Fed. Rep. 297, also, though the reports of the latter two cases are not sufficiently perfect to render this certain. In neither of the cases is the subject discussed at any length, or any adequate reason assigned, in my judgment, for the conclusion reached. So great, however, is the importance I attach to uniformity of decision, by courts of co-ordinate jurisdiction, that I feel constrained to adopt the rule thus established in the several districts in which these cases arose. It seems more important that the rule should be uniform and certain than that it should be consistent with principle. This claim is therefore allowed. A decree will be entered in the libelants' favor for the two sums indicated, amounting together, with interest, to \$1,163.96, with costs.

THE GLENMONT.¹

HANSEN *et al.* v. THE GLENMONT *et al.*

(Circuit Court, D. Minnesota. March 13, 1888.)

MARITIME LIENS—SUPPLIES—HOME PORT.

A month after the hull of the steam-boat was built and the propelling power put in, the libelants furnished her with stores, fuel, tiller-line, check-line, copper wire, packing for machinery, pails for roof, beds and bedding, etc. These articles were supplied the day before the vessel made her trial trip, and at the request of one R., who was a resident of Iowa, where she was built, and who, with G. and H., residents of Minnesota, owned her. R. also superintended the construction of the boat, and was to be and was her master. The vessel was temporarily enrolled at Dubuque, where she was built, but her per-

¹Affirming 83 Fed. Rep. 708.

manent enrollment was made at St. Paul, Minn., when she reached that place, two days after she received her outfit. *Held*, that the libelants were not entitled to a lien for what they had furnished, the purchase having been made by the owner in the home port.

In Admiralty. Appeal from district court.

Dan. W. Lawler, for appellants.

Clark, Eller & How, for respondents.

BREWER, J. This is an appeal from the decree of the district court dismissing a libel. The facts are these: The libelants were merchants in Dubuque, and furnished all the goods and material for which this libel was filed. The steam-boat Glenmont, to which all these articles were delivered, was built at Dubuque in the spring of 1885. The larger part of the goods were delivered on or before April 23d. On that or the day before the boat made its trial trip, and was temporarily enrolled at Dubuque. Her permanent enrollment was at St. Paul, two days thereafter, April 25. She was built by Harper and Gillespie, who resided in Minnesota, and Romans who lived in Iowa, each owning one-third. The goods were ordered by Romans, who superintended the completion of the boat, and was to be and was its master. The district judge dismissed the libel, on the ground that the materials furnished were part of the original construction, and necessary to complete the vessel and make it serviceable for navigation; holding that because of this fact no maritime lien existed, citing: *Ferry Co. v. Beers*, 20 How. 393; *Roach v. Chapman*, 22 How. 129; *Morewood v. Enequist*, 23 How. 494; *Edwards v. Elliot*, 21 Wall. 532; *The Pacific*, 9 Fed. Rep. 120; *The Count de Lesseps*, 17 Fed. Rep. 460; *The Norway*, 3 Ben. 163. Of the correctness of the general proposition that no maritime lien exists on a contract for building a vessel, or for furnishing materials for such building, or the supply of machinery for the original construction, or work done thereon, there can be no doubt. The cases cited abundantly establish that; and I think it clear from the testimony that a portion of the articles for which this libel was filed came within that rule. It may be doubted whether that is true of all or whether some of the articles were not rather supplies furnished to the vessel after its completion, and while it was engaged in navigating the Mississippi. Still, I think the decree of the district court dismissing the libel *in toto* was right, for one, if not more, reasons. As already stated, Romans was one of the owners. He was the master of the vessel, superintended the construction, and ordered these goods. He was a resident of Iowa, the state in which the boat was built, and in which the articles were furnished, and where the boat was first and temporarily enrolled. It is true that in the permanent enrollment, Gillespie, of Minnesota, was stated to be the managing owner, but this is only *prima facie* evidence, and from the testimony in the case it would rather seem that Romans was the manager. Be that as it may, he was a joint owner, and Dubuque must be considered as a home port.

It further appears that libelants had business dealings with Romans for many years, and regarded him as good, and that when he contracted

for these goods he told libelants that they would have to wait for their pay until he had made some money with the boat. It also appears that they regarded all of the owners of the boat as good, and that after the boat was sold in August, 1885, they made no attempt to collect the bill from the boat until some time after Harper and Gillespie had failed, and assigned for the benefit of their creditors, on November 25, 1885. Now, upon these facts, I remark that it seems to be settled that where goods are ordered by an owner in the home port, no maritime lien is created, and while, upon the authorities, it may not be so clear, yet I think that Dubuque must also be declared to have been a home port. See cases of *Pratt v. Reed*, 19 How. 359; *The Rapid Transit*, 11 Fed. Rep. 322; and *Stephenson v. The Francis*, 21 Fed. Rep. 715. The first case, while not directly in point, for there the supplies were not purchased at the home port, yet in its line of remark it is very pertinent. I quote these observations of the court :

"Now, the supplies having been furnished at a fixed place, according to the account current, and apparently under some general understanding and arrangement, the presumption is that there could be no necessity for the implied hypothecation of the vessel; there could be no unexpected or unforeseen exigency to require it. For aught that appears, the supplies could have been procured on the personal credit of the master, and in this case especially, as he was the owner. We do not say that the mere fact of the master being owner, of itself, excludes the possibility of a case of necessity that would justify an implied hypothecation; but it is undoubtedly a circumstance that should be attended to in ascertaining whether any such necessity existed in the particular case. *The Sophie*, 1 W. Rob. 369. These maritime liens, in the coasting business, and in the business upon the lakes and rivers, are greatly increasing, and, as they are tacit and secret, are not to be encouraged, but should be strictly limited to the necessities of commerce which created them. Any relaxation of the law in this respect will tend to perplex and embarrass business, rather than furnish facilities to carry it forward."

The last case is very clearly in point, and the opinion, which is full and elaborate, is very satisfactory. I quote some observations made by the learned judge in that case:

"Maritime liens for repairs and supplies, being secret incumbrances, are not favored. They are allowed upon grounds of commercial convenience and necessity. In the state of the owner's residence, where he is presumptively present, or within easy communication, no mere maritime lien for repairs and supplies there furnished is by our law in any case allowed. In that case the presumption of law is conclusive that the owner or his representative is within reach; that he is able to supply his ship upon his ordinary responsibility; and that he intends to do so, without burdening her with secret liens. In a foreign port, when the owner is present, and procures the supplies in person,—not being master,—in the absence of any express reference to the ship as a source of credit, the same presumption as to the owner's means, and as to his intention, exists *prima facie*; but this presumption is not conclusive, as in the home port, and may be repelled by proof drawn either from the express language of the parties, or from any other circumstances satisfactorily showing that a credit of the ship was within the common intention; and when this intention appears the lien will be sustained. This is allowed because even an owner in a foreign port may be without means, reputation, or credit, and hence may be under the same necessity as the master for making use of the

credit of the ship. But, as I have said, this necessity in the case of an owner is not presumed. It must appear in proof, either from the circumstances, or from the terms of the negotiation, which may afford conclusive evidence both of the intent and of the necessity. It is only when the material-man deals with the master, or the ship's agent, or some officer of the ship by the master's sanction or acquiescence, that he deals presumptively with the ship herself, and sells to the ship upon her credit. In other cases the common intent to charge the ship must be shown."

Beyond the fact of this being in the home port, the transactions between the libelants and Romans leave it certainly a matter of doubt whether the sales were made really upon the credit of the boat, and not in pursuance of the general credit which Romans had acquired by virtue of his past dealings. However, I place my decision rather upon the ground just noticed, of the purchase by the owner in the home port. It is unnecessary to add more, and the ruling of the district court was right, and a decree will be entered dismissing the libel at libelants' costs.

THE C. G. CRANMER.¹

FELLS *et al.* v. THE C. G. CRANMER.

(District Court, E. D. Pennsylvania. February 29, 1888.)

SALVAGE—WHO ARE SALVORS.

The schooner C., while on a voyage from Norfolk to Philadelphia with a cargo of cedar logs, part of which were above and part below deck, encountered heavy weather, during which part of the deck-load was lost. This caused the vessel to list, and in consequence ship considerable water. This was pumped out, enough of the deck-load was thrown off to right the vessel, and the colors were run up for a tug. The libelants were shipwrecked sailors, who had been drifting about for 80 hours, without food or water. They were taken on board and fed, and were then asked to assist in working the vessel, as the crew had been worked very hard. This they agreed to do. Soon after they were taken aboard a passing brig tendered assistance, which was declined. On arriving in port they claimed salvage. *Held*, that they were not entitled to salvage, but that under the circumstances they ought to receive more than ordinary compensation for the services rendered.

In Admiralty.

The schooner C. G. Cranmer, being well and sufficiently manned and equipped, while on a voyage from Norfolk to Philadelphia with a cargo of cedar logs, partly below and partly on deck, on the 17th day of December, A. D. 1887, met with tempestuous weather, the wind rising almost to a hurricane, during which she lost part of her deck-load, being part of the gunwale tier on the starboard side. About half past 6 the same evening, the wind shifted to the north-west, and the vessel went on to the starboard tack, and the vessel (being lighter on the starboard side, by reason of the loss of a portion of the deck-load as aforesaid) took a

¹ Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

strong list to port, being almost on her beam ends. The anchors were let go, and about 8 o'clock she parted her starboard chain, and dragged seaward with her small anchor. The vessel, while in this position, took in considerable water, and the men worked all night to pump her out. About 7 o'clock next morning (December 18th) all hands went to work to throw off deck-load to right the ship, and the colors were set for a tug. After the vessel had been righted, and most of the water pumped out of her, (she did not leak,) to-wit, at about 9 o'clock A. M., the libelants were discovered coming towards the Cranmer in an open boat, and in about half an hour afterwards libelants were taken aboard. The libelants were shipwrecked sailors, having been connected with the Philadelphia schooner Catharine W. May, which had been lost, and from which they had escaped in open boat, about midnight of 16th, or the early morning of December 17th. They had had nothing to eat or drink from the time they left their vessel until taken aboard of the Cranmer, about 30 hours. They were properly taken care of, and were asked to assist at the pumps, and to throw over cargo. Some of them did so; one assisted the cook. About 3 o'clock P. M. a brig hove in sight. The colors were taken down, no assistance being then needed; the Cranmer being almost dry, not leaking any, and entirely straightened up. The brig came near them, and libelants wanted to go to her, but at the request of the master of the Cranmer they remained aboard. An hour later the Cranmer got under way, and sailed to the Delaware breakwater, or near there, when she was taken in tow. The libelants came aboard about 25 miles E. S. E. from Cape Charles, and when picked up were heading direct to sea. Upon the arrival of the vessel at Philadelphia, the master paid libelants each five dollars, and the owners offered them ten dollars each additional, which they refused.

Flanders & Pugh, for libelants.

Henry R. Edmunds, for respondent.

BUTLER, J. I find the material facts to be substantially as set forth in respondent's statement, filed in the case. There is serious disagreement between the witnesses on the one side and the other. The burden of proof, however, is on the libelants; and their evidence consists entirely of their own statements. Without making allowance for their interest, and consequent bias, the weight of evidence seems to be clearly against them. Making such allowance, the preponderance is seriously increased. The witnesses on the other side are disinterested. They are in no respect responsible for the situation of the vessel, and no motive for falsifying can be seen. I do not feel any hesitation, therefore, in concluding that the material facts are substantially as detailed by these witnesses, and set forth in the respondent's statement. Nor do I feel any serious hesitation in concluding from these facts that the libelants did not render a salvage service. Whatever may have been the vessel's situation, as respects peril, before the libelants were picked up, she was not, in my judgment, in serious danger at that time, or afterwards. She had been so far pumped out that the water was reduced to about three feet; the

deck-load (which had become unbalanced by losing a part in the storm, and thus caused the list, and shipping of water) had been so far thrown over that the vessel had righted. That, however, is not the period of time at which her situation is material to the question involved. Even if she had then been in peril, I would hold that the libelants—picked up from the sea, (for they were unable to get on board without help,) rescued from great danger, if not almost certain death, (for they were hungry and without provisions, wet, stiff with cold, and running out to sea in the storm)—are not entitled to compensation as salvors for any work they performed. Thus rescued and taken care of, it was their duty to do all they did, prior to the time when the brig came by,—about 3 o'clock in the afternoon. Then they had an opportunity of leaving, and it was their right to embrace it. They proposed to leave, but remained, at the master's request, to assist in working the vessel. This is the material period to which inquiry must be directed respecting the vessel's situation. She was then substantially free of water; her deck-load was so far removed as not to present serious difficulty, and she was virtually out of danger. Her anchors were gone, but this was all, or nearly all, the loss her tackle had suffered. The hull had suffered none. She was in condition to sail for port, and did sail in about an hour. The loss of her anchors was not, therefore, serious. The fact that she declined the services of the brig, declaring that she did not need assistance, must be regarded as conclusive that she was not in peril, and did not apprehend difficulty in getting to port. Early in the morning (before libelants came aboard) she raised a signal on seeing the smoke of a passing vessel,—mistakenly supposed to be a steamer, which might tow her to port. The signal was left up in the hope of attracting a tug. Whether it is called a signal of distress or signal for a tug is unimportant. It is clear that when the master was informed of the brig's approach he took it down, saying he needed no assistance; and that when the brig hailed, her proffered aid was declined. These circumstances seem to be conclusive on the subject of peril at this time. It is impossible to believe that if the vessel had been in peril, great or slight, the master would have so acted, and thus without motive or excuse have risked the lives of himself and crew, as well as the vessel and cargo. He desired the libelants' assistance in working the vessel. This, however, was because his crew had been overtasked during the storm, and were tired; and because the situation made the presence of such additional help a wise measure of precaution. The libelants are not, therefore, entitled to salvage compensation. They are, however, entitled to be paid for the services rendered after the brig passed. They remained on board by request, with an understanding that they should be so paid. In determining how much they should receive, the circumstances existing at the time—the condition of the weather, the possibility of trouble and delay in reaching port—should be considered. The services (under the contracts) extended over a period of about three days. Twenty-five dollars each, in my judgment, is a fair allowance. Five dollars have been paid to each; for the balance, with costs, they must have a decree.

THE MANHASSET.¹

THE PORTSMOUTH AND BARGE 40.

LILLISTON *et ux.* v. THE MANHASSET AND THE PORTSMOUTH AND BARGE 40. LILLISTON v. SAME. COOPER v. SAME. THE OWNERS OF THE MANHASSET v. THE PORTSMOUTH AND BARGE 40.

(District Court, E. D. Virginia. March 5, 1888.)

1. COLLISION—BETWEEN TUG AND FERRY-BOAT—LOOKOUTS.

The necessity of a lookout properly stationed on a steamer navigating a harbor at night is imperative. A ferry-boat is not exempt from this obligation, and has no special privileges or exemptions not possessed by other steamers.

2. SAME—LIGHTS AND SIGNALS—OBSCURING LIGHTS.

A tug which had placed herself on the west side of a large car float, in stress of weather, being forced thereby to leave a wharf, and attempt to reach another, in which position the colored lights of the tug were hid from a ferry-boat approaching from the other side by the intervening barge, was not, under the circumstances of the case, negligent for so doing.

3. SAME—CAR-FLOATS.

A car-float is not required by the rules of navigation to carry any light. One which was rigged with colored lights, but was being towed backwards under the necessities of the occasion, thereby hiding her colored lights, and which had a white light on the end which was moving forwards, was not, under the circumstances of the case, guilty of negligence in the matter of lights.

4. SAME—FERRY-BOATS—RIGHT OF WAY.

The tug and barge were not bound to delay their departure from their wharf till the ferry-boat had arrived at her dock. Ferry-boats have no prior rights of navigation over other boats.

5. SAME—CROSSING VESSELS.

Under the facts the position of the colliding vessels was not a case of crossing, and rule 19 does not apply.

6. SAME—FAILURE TO SIGNAL.

Nor was it negligence in the master of the tug not to have blown several short danger whistles.

7. SAME—NEGLIGENCE.

On the whole facts of the case the ferry-boat was solely to blame for the collision.

In Admiralty.

These were three libels against the ferry-boat Manhasset, the tug Portsmouth, and the Barge 40, jointly, and one libel against the tug and barge, for damages from collision, which were consolidated, and heard together.

The evidence submitted in these cases fills 885 type-written pages of legal-cap paper, and is augmented in volume by the usual complement of documentary exhibits. In the main, it is very conflicting, and an undue proportion of it consists of tedious, unenlightening cross-examinations. In stating what I conclude to be the facts of the case, it would be well if I could, in this paper, take up the evidence bearing on each contested point, balance conflicting statements, and set out my reasons

¹Reported by Robert M. Hughes, Esq., of the Norfolk bar.

for adopting the conclusions arrived at. As this would be impracticable, I must follow the method pursued by the supreme court of the United States in a case in which there were but 400 pages of evidence, (*Chamberlain v. Ward*, 21 How. 558,) where it said:

"A particular analysis of the testimony of each witness, and a comparison of their respective statements, will not be attempted, as its effect would be to extend the investigation beyond all reasonable limits, without any practical benefit to either party. All that can be done will be to state the material facts proved. Conflicting testimony we have endeavored to reconcile, where it is possible; and when not so, we have drawn our conclusions from the weight of evidence, and the probabilities of the case. With these explanations we will proceed to state the material facts of the case."

I shall follow, in dealing with the important case before me, the authoritative example of the supreme court. From a patient study of the vast mass of evidence presented, I derive the following statement of principal facts, which includes some public facts, not in the record, but of which I take judicial notice. The upper part of Norfolk harbor is formed by the east and south branches of Elizabeth river, which flow into it from the south, Norfolk lying on the north side, Portsmouth on the south side, and Berkeley between the two rivers. The south branch passes the United States navy-yard at Gosport, and the wharves of the Seaboard Railroad of Portsmouth on the south side, before entering the harbor; the wharves of the Norfolk Southern Railroad, and of its coal pier, being on the opposite side, in Berkeley. The east branch passes the wharves of the Norfolk & Western Railroad, and of the Clyde and Old Dominion Companies' steamers on the Norfolk side; and the wharves and slips of large saw-mills and other enterprises on the Berkeley side. A considerable trade from the sounds of North Carolina comes into Norfolk harbor from the South Branch river, through the Albemarle & Chesapeake Navigation Line, and the Dismal Swamp canal, borne in vessels of light draft. A great portion of this commerce is brought into the harbor by tugs towing very often long lines of small sail-vessels, and barges, and rafts of lumber and logs. This trade passes from south branch, between the wharves of the Seaboard Railroad on the Portsmouth side, and those of the Norfolk Southern Railroad on the other. The width of the navigation here is but about 210 or 215 yards, and this is not much less than the average width of the stream for half a mile above its mouth, including the navy-yard. This part of the river is narrow in respect to the size of the large vessels, and the number of small ones, and the heavy commerce, which pass over or lie in it. The upper part of Norfolk harbor has an average width of about half a mile, and is less than a mile in length, from the front of Berkeley to Naval Hospital point, which latter pierces the harbor from the west. Before reaching Hospital point going north out of the upper harbor, the wharves of Town point, in Norfolk, are passed to the right; that occupied a year ago by the New York, Philadelphia & Norfolk Railroad Company, one of the respondents in these libels, lying nearest on the right, and distant from the seaboard wharf at Portsmouth about four-fifths of a mile, or 1,400 yards. Continuing be-

yond Hospital point, we get into the lower part of Norfolk harbor, into which the west branch of Elizabeth river empties, and which extends about two miles to the coal pier of Lambert's point. Continuing beyond Lambert's point for a few miles, the Elizabeth river flows northward, until, in conjunction with James river, it forms Hampton roads. With respect to the increasing magnitude of its commerce, and the extraordinary dimensions of many of the ships entering it, the upper part of Norfolk harbor is constrained in size; more especially where the south branch enters it. Just at this point, and next below the wharves of the Seaboard Railroad, which have been mentioned, are the ferry slips of the Norfolk and Portsmouth ferry on the Portsmouth side; next below these slips, to the north, one or two wharves, and north of these, the Portsmouth wharves of the Old Dominion Steam-Ship Company. Finally, on the same side, is Robinson's wharf, north of which is the expanse of water called "Portsmouth Flats," which are the principal anchorage of the upper harbor, and which extend to Naval Hospital point on the west side, opposite Town point on the Norfolk side. Opposite the Portsmouth ferry slips, which have been mentioned, looking towards Norfolk, is another anchorage in front of Berkeley, called "Berkeley Flats." The boats of the Norfolk and Portsmouth ferry do not cross the harbor at right angles, but they run on a very oblique line pointing eastwardly of north 1,058 yards, to their slips at Norfolk. To these slips at Norfolk also run the ferry-boats from Berkeley, over a course about 550 yards, or about one-third of a mile, in length. One boat runs on each of these ferries, at intervals of 20 minutes at each side, in the day-time, and 30 minutes in the night. These two lines of ferriage both cross the mouth of the East Branch; and the Norfolk and Portsmouth line also crosses the mouth of the South Branch. They affect the ingress and egress of all steam-ships, tugs, sail-vessels, barges, and other craft which belong to the navigation of those two rivers. They lie upon the vitals of the upper Norfolk harbor. The ferry-boat which plies between Norfolk and Portsmouth makes but a slight offing in moving out of or into the Norfolk slip; but in leaving and entering the slip at Portsmouth, she is obliged generally to make an offing as great as two or three times her own length, or more than 300 feet, straight out from the slip. Her usual path between Norfolk and Portsmouth is therefore on a line drawn from the outer end of Norfolk slip to a point directly out 300 feet from the outer end of the Portsmouth slip. The usual time consumed by the ferry-boat in making this trip is five minutes from unhooking on one side to hooking on the other, or about four minutes from the outer end of one slip to the outer end of the other, allowing half a minute at each end for leaving the slip, and getting under way; the distance between the two points last named being 1,058 yards, (3,175 feet.) The boat's usual rate of speed, while out in the harbor, (1,058 yards in four minutes,) is nine miles an hour.

On the 28th of March, 1887, the tug-steamer Portsmouth left Cape Charles city, east of Chesapeake bay, with two very large barges in tow, which were loaded with railroad cars filled with freight. The cars and barges were so constructed that the cars could be rolled from the railroad

wharf at each end of the route to the decks of the barges, and again from the decks to the wharf. The barges which were in tow of the Portsmouth on this occasion were No. 1 and No. 40. Barge No. 1 had cars destined for the Norfolk Southern Railroad at its wharf in the South Branch river, at Berkeley; and barge No. 40 had 14 cars destined primarily for Town point, and then for the Norfolk & Western Railroad wharves on the East Branch, at Norfolk. The loaded cars each weighed some 50,000 pounds, including freight. Barge 40 was 240 feet in length and 36 feet in breadth, and drew 7 feet of water when loaded. Barge 1 was somewhat smaller in dimensions. The tug Portsmouth was 125 feet in length, and drew 10 feet of water. During the passage of tug and convoy from Cape Charles city to Lambert's point, the tug had the barges in tow, one behind the other, upon a long 80-fathom hawser. After turning Lambert's point, Capt. Cason, who was master of the tug, and had charge of the towing, took the two barges along-side and astern of the tug, barge 40 next the tug, and barge 1 on the port side of barge 40, all practically abreast. Before entering Hampton roads a high wind came down from the northward; and this wind acting on a flood-tide, which then had set in, made a very strong current under the tug and barges proceeding southward, and made it quite a difficult feat for Capt. Cason to take in his hawser and bring the huge barges with freight cars upon their decks, along-side of the tug. After succeeding in thus handling the barges, and on approaching the wharves of the New York, Philadelphia & Norfolk Railroad Company, at Town point, at Norfolk, with the intention of temporarily leaving barge 40 there, and then proceeding with barge 1 to Berkeley, the passenger steamer Cape Charles, of the same company, which had just come in from across the bay heading southward, was seen vainly attempting to land, and much baffled in the effort by the extraordinary force of the wind and tide then prevailing. Capt. Cason, being himself under stress of wind and tide, deemed it impracticable and unsafe to attempt to land his own vessels then at Town point, and proceeded, looking out to port as he passed along the wharves of Norfolk for one at which to fetch up; his barges being on the port side of the tug. None were observed on the Norfolk side of the harbor, and he found it necessary to continue on to the railroad wharf at Berkeley, which was the destination of barge 1. There were a dredge and attendant mud-scoops, a pile-driver and a small sail-vessel near the railroad wharf, which obstructed the approach to it; and he was under the necessity of heading for the coal-pier wharf further on, and south of the railroad wharf. He succeeded in nearing the coal pier, and getting out and making fast his lines to it. The Phillips, a stout steam-tug belonging to the Norfolk Southern Railroad Company, lay at the time in the slip between the two wharves just mentioned. This slip was too short for the admission of either barge 40 or barge 1. Meantime the passenger steamer Cape Charles had failed to effect a landing at Town point because of the force of wind and tide from the north in her rear, and had come on to Portsmouth, intending to land there first, and return to Town point, where she expected to effect a landing more easily when she should ap-

proach the wharf with bow to the wind and tide. This expectation was realized. Capt. Cason lay with his tug and barges at the Berkeley coal pier for nearly an hour, hoping for an abatement of the wind, which increased, rather than diminished, during the period. The night had become very dark, and there were squalls of rain. Fearing at length to lie longer there with both barges, he determined to leave barge 1, and return with barge 40 to Town point. His fear to hold both barges at the coal pier arose from the fact that the bottom near that pier had not then been dredged to its present depth, except immediately in front of the pier along a distance but half the length of his barges. He found that if one end of barge 1, which was next the pier, should ground, it would be impracticable to prevent barge 40, under the chafing that would ensue, from breaking loose; in which event there was danger of her being driven by the storm up the south branch, and drifting against the naval and other vessels that were anchored in that direction. He therefore determined to return with barge 40 to her original destination at Town point; leaving barge 1 where she was. In this design he turned his tug around, with bow to the wind and tide, heading towards Town point; and made fast to barge 40, his starboard to her starboard, and his bow towards her stern. It was important, in order to his effecting an easier landing at Town point that he should have his tow on his starboard, the wharf at which he was to land being on that side. The evidence shows, what reflection makes obvious, that it was impracticable to turn so long, bulky, and heavily loaded a vessel as the barge, in that place at that time, in the face of the wind and tide then prevailing, except at unwarrantable risk. The evidence also shows that it is customary in Norfolk harbor for large barges to be frequently towed stern foremost. The limited dimensions of the upper part of the harbor seem to render such a mode of towing a necessity of frequent recurrence in the navigation of this port. The barges of the New York, Philadelphia & Norfolk Railroad Company are built with bow and stern; but the usual method of building barges is with the two ends alike. Comparatively few of them are built with stern and bow; and it is shown in the evidence that those which are so built are towed, (when the tugs are along-side of them,) with as much facility when moving stern foremost as when moving bow foremost; and are even more manageable when thus moving, if circumstances allow the barge's rudder to be brought into play. It is only when towed with hawser that the form of bow and stern is important in barges. Capt. Cason knew the time-schedule on which the ferry-boat ran between Norfolk and Portsmouth. This boat, the Manhasset, whose owners are both libelants and respondents in this trial, left Norfolk then at 15 minutes before and 15 minutes after each hour; and left Portsmouth at each hour and half-hour when running at night. Several minutes before the departure of the Manhasset from Norfolk on the night of the 28th of March last, on her 15 minutes before 9 o'clock trip, Capt. Cason, with his tug to windward of barge 40, and in tow of her, the tug's stern nearly even with the hindmost end of the barge, or projecting not more than five or six feet beyond that end, pushed off from the coal pier at Berkeley,

and, after making an offing into mid-channel in the direction of the ferry slip, which was 233 yards distant across the channel, headed for Town point; having the barge stern foremost on his starboard side in tow. All the tug's lights were in their places and burning properly, namely, her colored side-lights, and her central range-lights, consisting of a white light on the stem in her bow, and two white lights, one above the other, at the usual elevation on a staff above the after-part of the deck. Although barges under tow are not required by any rule of the road or law of navigation to carry colored side-lights, and few of them ever have these lights, yet it had been the practice to carry side-lights on barge 40 similar to those required by law on sail-vessels. But, inasmuch as this barge was then moving stern foremost, her colored side-lights, which were in place and properly burning, did not, and from their structure could not, show forward in the direction in which the tug and barge were now moving. No light at all was shown on the barge to the front, except the white light of a large lantern that was placed on the end of one of the railroad cars nearest the foremost end of the barge as it moved.

On setting out from the coal pier Capt. Cason had left his mate, Richardson, at the wheel in the tug's pilot-house, and had himself taken position as lookout on top of a railroad car at the foremost end of the barge; whose master, Capt. Stokely, was on the bridge erected at an elevation above the tops of the cars adjoining the pilot-house in the aft part of the barge. Capt. Stokely had becketed the barge's helm in such manner that it could be instantly let loose and brought into use whenever occasion should require. Below Capt. Cason, and near him, on the foremost end of the barge as she was moving, a colored deckhand, Reed, was placed on the deck of the barge. The usual complement of crew were on the tug Portsmouth. Along the wharves of Portsmouth, from that of the Seaboard Railroad on to Robinson's, are powerful electric lights, erected by the owners of the wharves for the purpose of lighting up that part of the harbor. When the eyes are looking towards these lights in a dark night, intervening objects, and lights from oil lamps, are always more or less dimmed or obscured by the glare of the electric lights. After pulling out into the channel and getting his heavy barge, moving against wind and tide, under headway, and after passing the Portsmouth ferry slip, Capt. Cason headed for Town point, bearing more or less towards the Portsmouth shore to get the protection of its warehouses from the force of the wind. In passing the Portsmouth slip he crossed the usual pathway of the ferry-boat, and was proceeding on the west of it, in his course to Town point, at a speed of about two miles an hour, when he saw the green light of the Manhasset after she had come out from her Norfolk slip. He very soon afterwards saw both of the Manhasset's lights. Desiring her to pass to starboard, he blew two whistles, but received no reply. After half a minute he again blew two whistles, and then ordered his tug's engine first to reverse, and then to back with full power, which orders were obeyed, and thereby the headway of the tug and barge were checked up. The Manhasset had continued her course until she crossed the Berkeley flats, and until she had come within

20 yards of the barge and tug, when she blew one whistle, showed her red light, and shortly afterwards was in contact with the barge on its then north-western corner. Both Capt. Smith and Capt. Cason say in their protest made next day that the Manhasset was 20 yards off when she blew one whistle. The joiner's work of the cabin, forward of the port wheel of the Manhasset, was raked and destroyed by a gliding blow, the cabin itself was staved in; her port wheel was disabled, and besides other damages to the hurricane deck, a piece of timber from it was driven into one of the railroad cars on the barge in such a manner as to hang the ferry-boat and barge together until they became separated by the grounding of the barge and tug shortly afterwards, near Thomas' ways, which are south of the Berkeley coal pier. The master and pilot of the Manhasset, Capt. Smith, in his protest entered on the day after the collision, says, among other things: "All his lights were burning. The wind was due north, and the weather cloudy and very dark, blowing a strong gale. After crossing Berkeley flats, saw a bright light, and thought it was the stern light of the [tug] Phillips towing a barge; slowed his boat down immediately, so as to let her go by; gave one whistle; there being no response, stopped the engine, and immediately afterwards the steamer was struck by the barge. Just as she struck he saw the lights of the tug, which up to that time had been hidden from view by the intervening barge, which was loaded with cars."

The evidence shows that there was no lookout on the Manhasset, on this trip. It usually had two deckhands, but one of these had purposely remained on shore, and the other, after the boat had left the wharf, had gone into some room amidships, and stood by a stove. There was a deck-officer charged with police duty; but he had passed rapidly through the cabins when the boat had left the wharf, and then gone into a shelter having in it a stove. No person whatever, having duties to perform on this ferry-boat, was on its deck during this trip, except one man, Capt. Smith, and he was performing alone the duties of master and pilot in the pilot-house. The evidence further shows, on this latter point, that the bridge and pilot-house of the barge, which were at an elevation above the tops of the railroad cars, had probably prevented the towing lights of the tug Portsmouth on the flag-staff of her rear deck from being seen by the Manhasset. Before the time of the collision, the Manhasset had been moving under her usual power of steam in her engine which produced her customary speed of nine miles an hour. On the occasion under consideration this speed had been accelerated by the flood-tide on which she was moving, and by the "strong gale" of wind from the north, which was increasing her speed. A "gale of wind," according to the signal service classification, is one which blows at a minimum speed of 40 miles an hour. I stated above that a "high wind" was blowing, the minimum of which is 25 miles an hour. I think it is a reasonable estimate to suppose that the speed of the Manhasset in crossing from Norfolk on this occasion was accelerated at least by 3 miles an hour, and therefore that she was moving at the rate of 12 miles an hour.

The point at which the collision occurred is fixed by the evidence at the figure 26, marking that depth of water on the chart of the harbor, filed with the evidence, that is to say, at the number 26, which is on a direct line drawn from the end of the ferry slip at Berkeley to the Old Dominion wharf on the Portsmouth side. This point falls on the letter "R" in the word "Route" on the smaller chart of the harbor. The evidence shows this point to be three-fourths of the distance of 1,058 yards between the ends of the two slips of the Norfolk and Portsmouth ferry; or 763 yards from the Norfolk slip, and 265 yards from that of Portsmouth. At the rate of 12 miles an hour, the Manhasset had made this 793 yards in 2 minutes and 15 seconds, and, allowing her half a minute for clearing the slip and getting under headway, the Manhasset reached the point of collision in rather less than 3 minutes from the time of leaving her Norfolk wharf. But if she moved at the rate of only 9 miles an hour, than she moved 793 yards in 3 minutes, and reached the point of collision in 3½ minutes after leaving her wharf. The time which the tug and barge had spent in reaching the point of collision after leaving the coal pier at Berkeley may be accurately ascertained in like manner. The point of collision being 265 yards from the Portsmouth ferry slip, and that slip being 233 yards from the coal pier, the aggregate of these distances is 498 yards, so that the distance traversed by the tug and barge on the curved line pursued could hardly have been less than 380 yards. The time required for moving over this distance at the rate of two miles an hour was six minutes and a half; and if we add one minute for the time necessary for leaving the coal pier and getting under headway, the time consumed in going from the pier to the point of collision was seven minutes and a half. It thus appears that the tug and barge left the coal pier in Berkeley four or four and a half minutes before the Manhasset left her wharf at Norfolk. It is for this reason that it has been stated above that the Portsmouth and barge 40 left the coal pier several minutes before the Manhasset left Norfolk, and had crossed the usual pathway of the ferry-boat when the latter boat came out of her Norfolk slip, and shortly afterwards showed her green light. The shipyard and stocks of Thomas & Co. are south of the coal pier, on the Berkeley side of the South Branch, in the direction of the navy-yard. The protest of Capt. Cason, made on the day after the collision, after other recitals, proceeds: "The Manhasset in colliding was considerably damaged, and became unmanageable; tried to put her in at Thomas' ways, but [we] grounded before reaching the ways; not being able to manage the tug properly while both boats were foul, [meaning the Manhasset and barge 40,] and having also caught a log in her wheel. Between the Berkeley slip and Thomas' ways the tug grounded with the barge, and the Manhasset got clear of her. After getting clear, the tug went along-side of the Manhasset, took off the passengers, and landed them at the steam-boat wharf, [meaning the Seaboard wharf.]" In this narration, Capt. Cason omits to mention what the evidence taken supplies—that after he got loose from the Manhasset, she drifted south, up the river, and finally grounded. The Berkeley ferry-boat went after her,

to give relief, but failed in this purpose after coming in contact with one or more naval vessels anchored in the South Branch river. Capt. Cason, after getting clear of the Manhasset, the wind having greatly moderated, succeeded in depositing the barge at the Seaboard wharf; and, being now free of incumbrances, followed the Manhasset up the river, until he found her helpless and aground. Taking her in tow he brought her to Portsmouth, and succeeded in landing her passengers, and relieving them from the fears and dangers to which they had been subjected. Besides the injuries which the Manhasset had sustained in the collision the casualties of the occasion were very serious. Mrs. Cooper, the wife of one of the libelants here, who was sitting in the port cabin of the Manhasset, forward of the wheel, was killed outright. Damages for her loss have been sought by her husband in a common-law court. Cooper himself was seriously injured, and in one of the libels now under trial he demands damages for these personal injuries, and their consequences to himself. Mrs. Lilliston, wife of T. M. Lilliston, both of whom are libelants in one of the libels now under trial, was very painfully, dangerously, and well-nigh fatally, injured.

Walke & Old and R. C. Marshall, for libelants.

J. F. Crocker and G. H. Gorman, for the Manhasset.

Sharp & Hughes, for tug and barge.

HUGHES, J., (*after stating facts as above.*) There can be no doubt that the libelants that have been named are entitled to damages. If the ferry-boat was in fault they had contractual relations with it which justify damages for injuries. If the tug and barge were in fault, they are entitled to recover damages from them as for tort; and so I will first dispose of that part of the case before entering upon the question of fault. The case of Mrs. Lilliston is the most serious one. She was dangerously and painfully injured, though, fortunately, as has turned out, not permanently so. She suffered excruciating agonies for a series of many days. She was prostrated and helpless for months. Her injuries would doubtless have proved fatal, but for the skill of her physician, the recuperative energies of a strong constitution, and the careful and assiduous nursing of friends. I will sign a decree awarding her \$2,500, and one in favor of her husband individually, for the amount of her medical bill, and for the sum of \$200 besides. This latter amount is intended to cover loss of time from work, and miscellaneous expenses incidental to the illness of Mrs. Lilliston. I will sign a decree in favor of Cooper for \$750, plus the amount of his medical bill,—the first sum to stand for loss of time and the expenses incident to his wounded condition.

I come now to pass upon the crucial question in this trial, namely, whose was the fault which caused the collision? The cause of the accident may be stated in a nutshell. That cause was the mistake made by Capt. Smith in supposing the white light which he saw before him was that of the tug Phillips moving from him, and in porting his helm in order to let it pass out of his way. Instead of that being the case, the light was upon a barge moving towards him when first seen, and moving in such

a manner that when he did make his tardy movement, that movement rendered the collision inevitable. If the light had been moving from him, his determination to pass under the stern of the supposed vessel was, no doubt, right enough; but the light being in fact on a vessel that was approaching him, his movement was an attempt to cross her bow when he was already upon her, and the collision was rendered an absolute certainty. Therefore, the real question to be considered is, through whose fault was it that Capt. Smith made the mistake that has been described? It may have been his; it may have been Capt. Cason's; it may have been the fault of both.

First, as to the Manhasset. She was moving, in that dark, rainy night, across a harbor navigated day and night by many vessels, at the rate of 9 to 12 miles an hour, before a strong wind and tide, without a lookout or a deckhand above decks to serve as eyes and ears, except the man at the wheel, who was acting, alone and singly, as master, pilot, wheelsman, and lookout, all in one. Moving, thus blind and deaf, with such force and rapidity, in a harbor, in the dark, loaded with passengers, with but one solitary man above decks, such was the condition in which she encountered disaster. There are cases in which *res ipsa loquitur*,—fault is self-proclaimed. In respect to lookouts, the law is positive and absolute. The decisions of the courts are replete with admonition of the necessity of the lookout as a *sine qua non* of safe navigation. It were vain to devise laws of navigation, or to agree upon rules of the road, if ships were not required to keep one or more lookouts constantly and properly posted during the time they are in motion. The specific duty of the lookout is constantly to search the horizon for objects that may affect the navigation of his ship, and to report the varying conditions the ship finds herself in in relation to other vessels in the same waters, in order that she may be navigated in obedience to the law or rule of navigation applicable to the conditions reported. The lookout's duty is distinct and different from that of the navigator. He is in a different position on deck. His mind and eye are differently occupied; his work and duty as different as that of one man can well be from the work and duty of another. The lookout of a ship is its eyes and ears; without him, she is blind and deaf. There is close and responsive relation between him and the pilot. His eye constantly and searchingly scans the face of the water before and on either bow of his ship and his voice is prompt to warn of every object that presents itself to the vision. The pilot's mind is intently upon the lookout, and his hand on the wheel intuitively responds to the lookout's voice. A lookout is only a lookout thus attracting the pilot's constant attention when he is regularly on duty. There is no such thing as an amateur or volunteer lookout. Such person has not the ear of the pilot, and his communications to him are little better than an impertinence and distraction. The real lookout and the pilot are essential counterparts of each other. In the absence of a pilot, the lookout's office is useless. In the absence of the lookout, the pilot is helpless, except to the extent that he subordinates his proper duty in order to act as lookout away from the lookout's proper position.

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Neither can do his own duty in the absence of the other; and without a pilot a steamer is a blind and deaf engine of mischief threatening every object in its pathway. I repeat that the language of the admiralty courts on the subject is clear, positive, and unqualified. It admits no double interpretation. The supreme court of the United States held in the case of *Newton v. Stebbins*, 10 How. 607, that a steamer was in fault in not having a proper lookout at the forward part of the vessel, there being no one but the man at the wheel on deck. The supreme court said in the case of *St. John v. Paine*, Id. 585:

"The steam-boat was in fault in not keeping on deck at the time a proper lookout on the forward part of the deck. The pilot-house, in the night, especially if dark, and the view obscured by clouds in the distance, was not the proper place, whether the windows were up or down. A competent and vigilant lookout stationed at the forward part of the vessel, and in a position best adapted to descry vessels approaching at the earliest moment, is indispensable to exempt the steam-boat from blame in case of accident in the night-time, while navigating waters on which it is a custom to meet other water craft."

The supreme court said in *The Genesee Chief*, 12 How. 463:

"It is the duty of every steam-boat traversing waters where sailing vessels are often met with, to have a trustworthy and constant lookout, besides the helmsman. It is impossible for him to steer the vessel, and keep a proper watch in his wheel-house. His position is unfavorable to it, and he cannot safely leave the wheel to give notice when it becomes necessary to check suddenly the speed of the boat. And whenever a collision happens with a sailing vessel, and it appears that there was no other lookout on board the steam-boat but the helmsman, or that such lookout was not placed in the proper place, or not actually and vigilantly employed in his duty, it must be regarded as *prima facie* evidence that it was occasioned by her fault."

The supreme court, in *The Catharine*, 17 How. 177, speaking of a lookout on a sail-vessel, said:

"Custom or usage cannot be permitted as an excuse for dispensing with a proper lookout while navigating in the night, especially on waters frequented by other vessels. Under such circumstances, a competent lookout, stationed upon a quarter of the vessel affording the best opportunity to see at a distance those meeting her, is indispensable to safe navigation, and the neglect is chargeable as a fault in the navigation."

The supreme court said, in *Chamberlain v. Ward*, 21 How. 570:

"Steamers navigating in the thoroughfares of commerce must have constant and vigilant lookouts stationed in proper places on the vessel, and charged with the duty for which lookouts are required, and they must be actually employed in the performance of the duty to which they are assigned. To constitute a compliance with the requirements of law, they must be persons of suitable experience, properly stationed on the vessel, and actually and vigilantly employed in the performance of their duty; and for a failure in either of those particulars, the vessel and her owners are responsible."

The supreme court, in *Haney v. Packet Co.*, 23 How. 292, used this language:

"The captain of a steamer, whose theory of action appears from his own testimony to be that all small vessels are bound at their peril to get out of the way of a large steamer carrying the United States mail, although he had seen

the schooner, and knew that the vessels were approximating at the rate of twenty miles an hour, retired to his cabin. He left on deck one man, besides a colored man at the wheel, to act as pilot, lookout, and officer of the deck. These two persons constituted the whole crew on duty, besides firemen and engineers. This person who had to perform these treble functions was the second mate. His theory is that the best place for a lookout is in the pilot-house, where, he says, 'I generally lean out of the window, and have an unobstructed view.' Accordingly as pilot he remained in the pilot-house, to direct the steersman; and, as lookout, he occasionally leaned out of the window."

After speaking thus derisively of master and second mate, and after repeating the law of the duty of lookouts, the supreme court held that it was "the captain's duty to have been on deck, which he was not; and that the only man on deck, acting as pilot, lookout, and officer of the deck, was not in the proper place for a lookout to be when he was in the pilot-house." The supreme court in the case of *The Ottawa*, 3 Wall. 268, held that "lookouts must be persons of suitable experience, properly stationed on the vessel, and actually and vigilantly employed in the performance of their duty; and that the master of a steamer, when acting as officer of the deck, and having charge of the navigation of the vessel, is not a proper lookout, nor is the helmsman." The circuit court of the Northern district of New York, in *The Northern Indiana*, 8 Blatchf. 92, held that in a steamer running along a track frequented by sail-vessels, the inside of a pilot-house in a dark night is not the proper position for a lookout. Adopting the rulings of the English high court of admiralty, Mr. Justice NELSON held that "the want of a lookout, detailed and stationed for that specific duty, is in itself a circumstance of a strong condemnatory character, and exacts in all cases from the vessel neglecting it, clear and satisfactory proof that the misfortune encountered was in no way attributable to her misconduct in that particular." In none of the decisions of the courts enforcing the duty of having competent and vigilant lookouts properly stationed on steamers while in motion, is any exception made or implied in favor of ferry-boats. The circuit court of the United States for the Southern district of New York, in the case of *The America*, 10 Blatchf. 159, held that "in the navigation across the crowded channel of the East river at New York a most vigilant lookout from some place on the ferry-boat is required." The district court of the Southern district of New York, in the case of *The Monticello*, 15 Fed. Rep. 474, held that a ferry-boat was liable for a collision which occurred about 140 feet outside of her slip, where she started without a lookout upon her bows. The district court of New Jersey, in the case of *The Ant*, 10 Fed. Rep. 294, held that steamers navigating on the thoroughfares of commerce are bound to have a lookout, independently of the helmsman. English and other American authorities on the subject might be multiplied indefinitely, if it were necessary. It is safe to say that no rule of navigation is more thoroughly established than that which requires every moving vessel to have a lookout, specifically charged with the duties of lookout, and none other, and to have him properly stationed. There can be no rules for the government of ferry-boats varying from those prescribed for shipping in general. The laws

of navigation are universal, and are binding on all water craft. Ferry-boats usually ply in harbors, and the existence of different rules of navigation for different vessels in the same harbor would be fruitful of calamity. There was once a provincial notion that vessels carrying the United States mails were entitled to the right of way; but it has been scoffed out of the code of navigation. The idea that a ferry-boat has an exclusive right of way in a harbor, and is exempt from the conventional canons of navigation obtaining all the world over, is a provincialism unworthy of an enlightened age, and pregnant with disaster to life and property. There would be no use for settled and universal canons of navigation, if vessels were not required to have competent lookouts, properly stationed, whenever they were in motion. Rules would be a dead letter, and unsusceptible of application, if there were no lookouts. They are the key to the whole code of navigation. The Manhasset was fearfully in fault in having no lookout on the unfortunate trip which we are considering. Who can say that, if she had had a special and vigilant lookout when she emerged from her Norfolk slip, charged with the special duty of closely and timely scanning the whole harbor from the outset, he would not have discovered Capt. Cason's barge's light in the distance, and narrowly studied it from the moment of first seeing it? Could such a lookout, intent upon the special duty of interpreting such a problem, have supposed that a light which was approaching him steadily for two and a half or three minutes, was a light on the stern of a receding vessel, brightening as it receded? Is it possible that his ears set for the reception of sounds could have failed to hear two loud, coarse whistles sounded and afterwards repeated, which were heard by as many as three passengers on his boat, and were heard all around the harbor by every man whose business led him to expect the tug which gave them, and whose attention was on the alert in regard to them? I am firmly persuaded that if there had been a special, experienced, vigilant lookout on the Manhasset on the night in question, proper attention would have been given in time to the light of the barge, and proper response made to the double whistles repeated, which were sounded by the tug. I am persuaded that Capt. Smith's mistake in supposing an approaching light was a receding one, and the consequent collision, was due to the want of a keen-sighted and sharp-eared lookout on the Manhasset. The Manhasset was in fault in respect to the lookout, and is responsible for the collision, unless it can be shown that the tug and barge were also in fault, and by their fault contributed to the accident. I come, therefore, to deal with this *tu quoque* plea.

The principal complaint against the tug and barge is in regard to their lights. As to the tug, the charge is that, although she may have had the regulation lights in their places, and burning, yet she took a position beside the barge which prevented them from being seen by the ferry-boat. The law, in rules 3 and 4 of navigation, not only defines the number and kind of lights to be carried by a steamer in towing another vessel, but fixes with precision the places at which these lights are to be carried. Its requirements were complied with by the tug. The same law forbids

the carrying of any other signal-lights than those designated, and, in doing so, forbids by necessary implication any change in the position of the lights it provides for. The tug, therefore, had no right to elevate her lights above their legal position, and, if she had done so, her lights would have been misleading, false, and unconventional. Therefore the objection to the manner in which the tug carried her lights resolves itself into an objection to her taking position on the west side of the barge, where the ferry-boat could not see them, and not on the east side, where that boat could have seen them. But the tug had sufficient reason for placing herself to leeward of the barge. The wharf to which she was towing the barge was on the side on which she placed it; and the tug was exclusive judge of the position she should occupy towards the barge. Her lights were visible to all the vessels she would pass lying on her port side; all the vessels which might be at the Portsmouth wharves; all that might be at anchor on the Portsmouth flats; all that she might pass or meet on her port side, coming in from or going out to the lower harbor. To say that she should have ignored all this shipping, and, at great inconvenience, changed sides with her barge, and crossed over to Town point in a manner to make it difficult to land the barge at that wharf, is virtually to say that she should have navigated the harbor, not with reference to other shipping, but exclusively with reference to the ferry-boat; not with reference to the facility of effecting the landing which she had in contemplation, but solely with reference to meeting the ferry-boat. Such a contention is only another fruit of the theory that the ferry-boat has some special rights and importance in the harbor superior in dignity to those which attach to other vessels. I cannot recognize such pretension. There was no obligation upon the tug to place herself on the east side of the barge in order that her lights might be visible to the Manhasset, rather than to all the vessels she might pass on her Portsmouth side. She was not in fault in the fact of her lights being on the side of the barge where the Manhasset could not see them. The case of *Chamberlain v. Ward*, 21 How. 564, is not in point. The court held there, simply, that the lights of a vessel must be kept trimmed and replenished with oil, and not permitted to grow dim and go out by midnight.

It is complained, as to the barge, that her side-lights were visible only from her wake and were invisible from the direction towards which she was moving. This was not fault. There is no law of navigation requiring side-lights to be carried on barges under tow, and the side-lights of this barge, on the night under consideration, were, to all vessels ahead of her, as no lights at all. As to white lights, the navigator of the barge had no right to improvise a set of lights to serve the purposes of that particular occasion. No signal-lights are of value, and I might add, of legality, in navigation, except the conventional lights known and understood of all mariners, prescribed by law and the rules of the road. The barge had a right to move stern foremost, especially under the necessities which then required it; and one thing only was legitimate for her to do, in moving in that manner, which was to display one white light in a

manner not to be mistaken for any regulation light, and so placed as to warn all comers that it marked an object on the water. A plain white light, whether on land or on water, whether on a street or a country road, in an anchorage, or in a channel of navigation, means always, "Take care, for there is something here you must not run against!" Its purpose and universal effect is to put every comer on inquiry. That was the meaning of the single white light on the barge. It was visible to the Manhasset; and if she had had eyes on the outlook, vigilant eyes searching the harbor in the calm moments of the beginning of her voyage; experienced, expert eyes to peer into the darkness, and wrest from it its inconspicuous as well as its conspicuous objects,—that single white light would have been seen and understood; and the lookout would have been cautioned by it, and put upon inquiry, and would have discovered that it was approaching him; and Capt. Smith would have been prevented from mistaking it for the stern-light of a familiar tug going off into the railroad slip at Berkeley. It was not fault in the barge to have displayed this light. Nor was it fault in her to have had no other visible lights upon her. The laws of navigation, by an omission that ought to be supplied, fails to require other lights on barges under tow; and if others had been displayed, they would have been anomalous, unintelligible to navigators, misleading, and probably illegal.

Much stress of objection is laid upon the fact that Capt. Cason knew the night schedule of the Manhasset, and that she would be on her passage to Portsmouth before he could get away from her route. I attach no importance, in this connection, to the fact, arithmetically shown, that he left the wharf of the coal pier four minutes or more before the Manhasset embarked from Norfolk. Vessels having occasion to move in this harbor are under no obligation of either morals or law to delay their departures until a ferry-boat shall have made a trip. The harbor is free to all, and the laws of navigation are as democratic as cosmopolitan. They recognize no privileged characters, and stand upon the catholic principle of equal rights and common duties. The barge and tug of the respondents here had the absolute choice of the time of setting out on their trip to Town point, and the unqualified right to choose it at their own will. If the vessels having the right to navigate this harbor were bound to stay five minutes for the ferry-boat to cross it in one direction, and five minutes also to cross in the other during every 20 minutes of the day, they would have but half the time to move in; and if another boat were added to the ferry service, the upper part of Norfolk harbor would be closed to general navigation. This pretension thus resolves itself into an absurdity; and cannot be countenanced. But it is claimed that, though the right to move at will might have belonged to the tug, yet prudence should have counseled delay for the passage of the ferry-boat in view of the danger of encountering her; and that venturing out at that particular time was fault in the tug and barge. If my duty calls me into a public street, where a strong man claims special occupancy, discretion or cowardice might dissuade me from venturing forth; but if, exercising my right, I do go into the street, and the strong man assaults

me and gets hurt, surely the fact of my being on that street is not to be deemed the fault of the occasion. Surely the prudential argument is untenable. Besides, why should the ferry-boat alone be given the wide berth? The only possible answer is, that she alone of the vessels of the harbor is likely to run into vessels crossing her pathway, and is the most dangerous one to encounter. Such a pretension is not flattering to the reputation or the character of a ferry-boat, and may be dismissed for that reason alone.

It is urged that the tug and barge were in fault in having disregarded rule 19 of navigation. That rule declares that "if two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." The rule applies to vessels that are on courses which cross each other. The tug left the Berkeley coal pier about four minutes before the Manhasset left Norfolk. She had less than 233 yards to go before crossing the usual route pursued by the Manhasset in coming into her Portsmouth slip. The ferry slip was 233 yards from the coal pier. The tug and barge, as I have already estimated, did not approach within 100 yards of the slip. She had, therefore, but 133 yards to move from the coal pier before crossing the route of the ferry-boat. At the rate of two miles an hour, she made these 133 yards in two minutes five seconds after getting under way from the coal pier, and allowing one minute and a half for getting under way, then the tug and barge had crossed the route of the ferry-boat in three minutes and thirty-five seconds after leaving the coal pier, and fully one minute before the Manhasset had left her Norfolk slip. The case is therefore not one of crossing courses, and rule 19 has no application. The tug and Manhasset, after the latter left Norfolk, were pursuing courses that did not cross, and that involved no danger of collision, if each vessel held its course, and neither adopted any eccentric movement. They were on courses that naturally required each vessel to leave the other on its own starboard; in other words, to pass to the left. And accordingly, as soon as Capt. Cason saw both lights of the Manhasset, he blew two whistles, and half a minute afterwards blew two more, admonishing the Manhasset that he proposed to pass to the left. He received no response from the Manhasset, until the two vessels were within 20 yards of each other, approaching at the rate of 11 to 14 miles an hour; that is to say, were within 8 to 5 seconds of collision.

It is also urged that Capt. Cason did not obey the requirements of rule 3 of pilot regulations, which provides that "if, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short blasts of the steam-whistle; and if the vessels shall have approached within half a mile of each other," etc. It is complained that Capt. Cason did not give these alarm blasts. The rule applies to vessels which are far enough distant from each other for such blasts to avail when the pilot who first signaled discovers that the other has misunderstood him, or proposes some other movement. In

the present instance, Capt. Cason was not informed by the whistle of the Manhasset that she rejected his signal to pass to the left, and substituted a movement to the right, until the two vessels were within 20 yards, or 5 seconds, of each other; and the rule did not admit of compliance. The case came within navigation rule 24, which admits a departure from all rules in moments of immediate danger. *Lex non cogit ad impossibilia*. Not only with reference to pilot rule 3, quoted above, but to navigation rule 19, previously quoted, it is to be considered that the tug and barge were moving against wind and tide,—a mammoth barge, heavily loaded, in tow of a tug, in sore stress of water and weather; while the ferry-boat was moving free before both wind and tide, in perfect command of helm, side-wheels, and course. When vessels are in such relative conditions, a court of admiralty will not be exacting in regard to mere technical shortcomings on the part of a vessel moving with heavy incumbrances, even though they were apparent; as they are not in this case. I do not discover fault in the management of the tug and barge after they had crossed the usual route of the ferry off her Portsmouth slip, and had got under way for Town point.

It remains for me only to notice, in closing this discussion, the contention of proctors for the Manhasset, that the absence of a lookout on their boat was immaterial in this case, because the collision was not due to such absence; inasmuch as he could not have seen the lights or heard the whistles of the tug, though he had been in place. In answer I have to say that there were at least three persons on the Manhasset, one of whom both saw the light on the barge and heard the four signal whistles, and all three of whom heard the whistles. The witness who saw the light seems to me to have established his claim to credit with exceptional strength. Under a severe cross-examination in an uncharitable direction, he told truths extremely disagreeable to himself in a very manly manner; and we have a right to conclude that if a witness will adhere to truth under such an ordeal in matters of deep personal interest to himself, he may be believed implicitly, when testifying to facts which he has no interest in concealing. The proof is positive that whistles were blown, and the white light shown; and the necessary inference is that if the Manhasset had had a vigilant lookout properly stationed, he would have heard and seen, and the collision thereby avoided. I therefore, on the whole case, find that the tug and barge were without fault, and that the Manhasset was solely in fault, in not having had a lookout properly stationed, who would have so informed Capt. Smith of the barge's light and the tug's whistles, that he would not have made the mistake of crossing the tug's bow at the critical moment of the occasion. I will decree in accordance with this finding. It will have been observed that I do not object in what has been said to the speed at which the Manhasset was running. It is doubtless true that 12 miles an hour is too rapid a speed for a steamer in a crowded harbor; but I do not think that 9 miles is necessarily too great. The excess of speed on this occasion was due wholly to the wind and tide; and I do not think, when the usual speed of a vessel is thus accelerated,

that the fact calls for animadversion from an admiralty court. That speed, thus produced, is not itself criticised in the present discussion, except so far as it aggravates the negligence of the want of a lookout. No steam vessel ought to move in any navigated water fast enough even to give her steerage-way, without a lookout, who is its eyes and ears. It is the absence of a lookout that was the presumptive cause of this collision, and I have treated the rapid speed of the ferry-boat only as an aggravation of that cardinal fault.

THE HELENA.¹

THE LORD O'NEILL.

THE HELENA v. THE LORD O'NEILL.

(Circuit Court, E. D. Pennsylvania. March 10, 1888.)

COLLISION—BETWEEN STEAMERS—CROSSING VESSELS.

The steamers A. and B. were sailing down the Delaware bay, the A. being a few miles ahead of the B. When the A. arrived at the break water, she signaled for a boat to take off her pilot. None responding, she determined to put back up the bay a few miles, and anchor for the night, it being then about 7.45 P. M. The A. selected an anchorage east of the regular channel for outbound steamers, and was slowly proceeding to it, with all lights burning brightly, and obeying every requirement of the law touching the mode of giving notice to approaching vessels. She discovered another steam-vessel approaching on her port side, involving danger of collision, and kept her course as required by the rules of navigation. The B.'s officers saw the A.'s lights, but mistakenly supposed them to be those of another vessel passing down the bay, and did not discover their error until too late to avoid the collision. *Held*, that the B.'s officers were guilty of carelessness or recklessness, and that the B. must be held accountable for the consequences.

In Admiralty. Cross-libels for damages.

On appeal from district court. 26 Fed. Rep. 463.

M. P. Henry and H. R. Edmunds, for the Lord O'Neill.

Charles Gibbons, Jr., for the Helena.

McKENNAN, J. These are cross-libels for damages resulting from a collision between the Helena and the Lord O'Neill, each vessel insisting that the other was solely in fault. On the afternoon of February 13, 1885, were steaming down the Delaware river from Philadelphia, the Helena on her way, in ballast, to Baltimore, and the O'Neill, with a full cargo on a voyage to Liverpool. The tide was flood. The O'Neill was in the lead. She was followed by the Agnes, a sister ship of the Helena, and the Helena was in the rear. As the night closed in, the O'Neill was over four miles in advance of the Helena, and, as the faster vessel, was increasing this distance; and the Agnes about two miles and a half ahead

¹Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

of the Helena, which was "following the track of the two ships as near as possible." Both vessels were in charge of pilots. The Lord O'Neill went down towards Cape Henlopen, burned blue lights for a boat to take off her pilot, and, receiving no answer, the master concluded to anchor for the night higher up the bay, and to the eastward of the deep-water channel, because he could get better anchorage, and would be out of the way of passing vessels. She then turned on her course and went up the bay, steering a northward and easterly course, moving at half speed, and occasionally slowing to take soundings. It was then dark, and the lights of the O'Neill were properly set, and burning brightly. After she changed her course and was moving up the bay, the Agnes passed, going down on the port side, and about one-fourth of a mile distant from her. After these vessels thus passed each other, the pilot of the O'Neill, in proceeding to the intended anchorage ground to the eastward of the channel, and in shallow waters, changed his course to the eastward, steering east by north by the compass. "At this time the head-light of another steamer, which afterwards proved to be the Helena," was reported on the port bow of the Lord O'Neill by the lookout of that vessel, and seen about the same time by the pilot at a considerable distance off. The Lord O'Neill ported and continued slowly at half speed on this course, occasionally taking soundings, and stopping while on this course. The other vessel showed a green light, indicating that the two vessels were approaching each other by converging courses, the lines of which would, if continued, necessarily cross each other. The pilot of the Lord O'Neill, observing that the green light was rapidly approaching so as to endanger a collision, stopped his vessel, reversed at full speed, and put the helm hard aport; but the Helena continued to approach until she ran into the O'Neill, striking her on the port side, about 25 feet from the stern, and doing her serious injury. This was about 7.45 at night. The O'Neill afterwards came to anchor. At the time of the collision the O'Neill was in eight fathoms of water, and it was the place of anchorage intended by the pilot, towards which he had for some time been holding an eastward course, moving at a slow rate of speed. The lights of both vessels were burning brightly, and could have been clearly seen; the red or port light of the O'Neill, on which side the Helena was approaching, being visible to the latter; and it was not until the collision was imminent that the engines of the O'Neill were reversed, and her helm put hard aport. The Helena was steaming down the Delaware bay in the track of the Agnes, and during her progress a snow squall came up, and her pilot concluded to come to an anchor. The vessel was accordingly slowed down, and the anchor cleared away. Her lookout assisted in clearing away the anchor, and did not see or expect the lights of the Lord O'Neill. The engine of the Helena was stopped to get a cast of the lead before coming to an anchor; but she was again put at half speed, and as the horizon was clearing up, the pilot concluded to go to Cape Henlopen. The wheelsman of the Helena, who was steering on the bridge, first saw the light of the O'Neill. It was approaching, coming forward of the bridge, but he did not expect it. The head-light and red

light of the O'Neill were afterwards seen by the master of the Helena from the bridge at the same time on his starboard beam, a little abaft of it. Both he and the pilot were seeking to discover the Cape Henlopen light, and not looking out for the light of other vessels. He did not wait to verify the course of the approaching vessel, but inferred that it was the light of a vessel bound down the river in the same direction being pursued by him, and he put the telegraph ahead full speed. In a brief period thereafter the master of the Helena called the pilot's attention to the fact that the vessels were rapidly approaching each other, who thereupon ordered her helm hard a starboard, and reversed her engines, but too late to prevent the collision.

These are all the material facts which I deem it necessary or proper for me to find. They are, in my judgment, the fair result of a preponderance of the proofs carefully considered and collated, and they indicate clearly the comparative nature and measure of the responsibility of these two vessels for the disaster complained of. The O'Neill was proceeding on her outward voyage, intending to prosecute it continuously. She had on board a pilot to conduct her down the Delaware bay, and it was her duty to discharge him at the mouth of the bay. Failing in obtaining a conveyance for him, she changed her purpose, and concluded to come to anchor for the night. She accordingly reversed her course, and moved up the bay, towards a safe anchorage ground, where she proposed to remain till the next day, and could discharge her pilot. She moved slowly, and with due caution, and had nearly reached her place of anchorage when the collision occurred. There she would have been out of the track of descending vessels, and in a place of safety for herself. In all this she was in the exercise of her undoubted legal right, and was free from any culpability if she observed all the precautions prescribed by the law touching the mode of giving notice to approaching vessels and her own cautious movements. She was not derelict in any of these duties. Her rate of speed was slow. She was provided with all the lights which the law requires. They were set in their proper places and were burning brightly, and when she discovered another steam-vessel approaching on her port side, involving danger of collision, she kept her course as required by the rules of navigation. She did not, therefore, by any fault of hers, contribute to the collision.

The Helena was sailing down the bay, and in view of the location of the O'Neill, on the eastern side of the main channel. If her lookout and officers were vigilant, they must have seen the light of the O'Neill, from her starboard side, that the courses of the vessels were crossing each other, and involved danger of collision, and they must be presumed to have known that under such circumstances the law required them to keep out of the way of the O'Neill. If through want of due vigilance or recklessness, they failed to discharge this duty, as they did, they must be held accountable for the consequences.

The decision of the district court is affirmed, and a decree for same sum awarded to the O'Neill in that court, with interest, will be entered in this court with costs.

THE JAS. A. DUMONT.¹

THE FRAMMAS WARSAKTIEBOLAG v. THE JAS. A. DUMONT.

(District Court, S. D. New York. March 7, 1898.)

1. COLLISION—MEASURE OF DAMAGES—STIPULATION OF CHARTER-PARTY FOR DEMURRAGE.

The stipulations of a charter-party as to the rate of demurrage are not competent legal evidence in favor of the ship-owner, in an action brought by him against third persons for damages by collision.

2. SAME—VALUE OF USE OF VESSEL—EVIDENCE.

The amount to be allowed for the detention of a vessel is the value of her use, and evidence of the expenses of the voyage and the time it has taken, including loading and unloading, is competent evidence to show the net value of the vessel per day.

3. SAME—WHARFAGE—COMMISSIONS—INTEREST.

A charge for wharfage and necessary commissions, and interest are proper items of damage, and when not included in the demurrage charge, should be allowed as a separate item.

In Admiralty. On exceptions to commissioner's report.

As the bark *Maria Margaretta* was lying at anchor ready for sea, she was injured in collision by the respondent's vessel. She had been chartered for a voyage from New York to Callao, and in consequence of the collision was obliged to put back to New York, and report for repairs. The damages have been assessed by the commissioner at \$1,451.30, besides interest, including demurrage for 14 days, at the rate of \$40 per day. The charter provided for demurrage at the rate of 4d. per ton per day, amounting to \$59.70 per day. The claimants, to prove the value of the use of the vessel, gave evidence of the expenses of the voyage, the time it had taken, including loading and unloading, showing that the net value of the vessel per day was less than \$30. The amount paid by the vessel for wharfage during the detention caused by the collision amounted to \$40.10. Both sides filed exceptions.

H. Putnam, for libellant.

Carpenter & Mosher, for respondent.

BROWN, J. The charge for wharfage, as an expense made necessary by the collision, should have been allowed. When the charter rate of demurrage is adopted, and that rate is shown to include the charge for wharfage, it is, of course, disallowed as an additional item. *The C. P. Raymond*, 28 Fed. Rep. 765. As the charter rate of demurrage was not in this case adopted by the commissioner, the wharfage should have been allowed; and it was undoubtedly omitted only by accident. The stipulations of a charter as to the rate of demurrage is not, I think, competent legal evidence in favor of the owner, in an action brought by him against third persons for damages by collision. Such stipulations are *res inter alios actæ*, and are not necessarily based on the supposed value of the vessel alone. Upon this point the commissioner justly observes

¹Reported by Edward G. Benedict, Esq., of the New York bar.

that "though the rate of 4d. per ton is customary in these charter-parties, it is probably in many cases a liberal estimate somewhat in the nature of a penalty, which the charterer can avoid by the exercise of diligence." The damages in collision cases are to be fixed upon the basis of *restitutio in integrum*. The amount to be allowed for the detention of the vessel is the value of her use. *Williamson v. Barrett*, 13 How. 101; *The Potomac*, 105 U. S. 631. But the stipulations of a charter to third persons, as respects demurrage, when offered by the owner in his own favor, stand in no better position, it seems to me, than the owner's declarations, which, though competent against him, are not legal evidence in his own behalf. *The Hermann*, 4 Blatchf. 441. For the same reason the customary rate fixed by the regulations of the Produce Exchange of this city are not of themselves competent evidence.

On examination of the testimony I am satisfied that the commissioner properly took into consideration the claimant's evidence as respects the value of the use of the vessel. This evidence was competent. *The Potomac*, *supra*; *The Heroine*, 1 Ben. 227. Taking into account all the expenses of the ship and crew, the necessary repairs, and the ordinary depreciation upon her voyages, I think the sum of \$40 per day for this bark of 740 tons register a fair and just allowance. Although the rate charged by the stevedore was somewhat higher than in ordinary cases, in view of the special circumstances which affected the reasonableness of the charge the commissioner's conclusion should not be disturbed. Some additional charges for an unnecessary third captain as surveyor, an unreasonable allowance to the diver, and a brokerage charge in addition to the usual percentage of 5 per cent., should have been disallowed. The case of *The Williams*, 15 Fed. Rep. 558, is not applicable to an expense actually and necessarily incurred by the vessel. These, together, offset the sum of \$40.10 that should have been allowed for wharfage.

The other exceptions I cannot sustain. The amount reported should therefore stand without change. By the practice of this court interest is allowed, and the report should therefore be confirmed. I cannot find that the litigation has been so unreasonable as to change the ordinary rule as to costs.

THE CITY OF CHESTER.¹

HILTETRANT v. THE CITY OF CHESTER.

(District Court, S. D. New York. March 14, 1888.)

COLLISION—MEASURE OF DAMAGES—ACTUAL COST OF REPAIRS.

When a vessel, damaged by collision, has an estimate made of the cost of repairs at the place of the injury, but is afterwards repaired at another place at less cost, the latter amount is the measure of her recovery. The rule in insurance cases, that the cost of repairs at the place of injury or the nearest port is the measure of damage, does not apply to such case as this.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

In Admiralty. On exception to commissioner's report.

Carpenter & Mosher, for libellant.

Wilcox, Adams & Macklin, for respondents.

BROWN, J. The collision in this case was within New York harbor. A survey was had here, and an estimate of the cost of the repairs reported by the surveyors. The boat was thereafter taken up the North river to Rondout, where the repairs were completed at a considerably less sum, which sum the commissioner has allowed. The libellants have excepted on the ground that, as in cases of insurance, the owner is entitled to have the boat or vessel repaired at the place of the injury or the nearest port, and that the cost of repairs at that port is accordingly the legal measure of damages without reference to the cost at a more distant port, whether less or more. See *Center v. Insurance Co.*, 7 Cow. 564, 580; *Insurance Co. v. Southgate*, 5 Pet. 604, 609; *The Catharine*, 17 How. 170. Whatever may be the rule as regards insurance upon ocean voyages, it is not, I think, applicable to cases like the present. Complete restitution is the extent of the damage recoverable. *The Potomac*, 105 U. S. 630, 632, and cases there cited; *The Baltimore*, 8 Wall. 377, 385, 386. The libellant will obtain in the amount reported by the commissioner complete restitution. To allow more would be to award him a profit for voluntarily taking his vessel to another place for repairs. Moreover, to admit such a rule, and to award more than actual indemnity on the ground that the estimates at the port of collision exceeded the ultimate cost of repairs at another place, would be extremely impolitic, as offering the strongest temptation to exaggerated estimates of damages, and to fraudulent litigation. So manifest are the risks of such a course, that in the case of *The Catharine*, *supra*, it was held by the supreme court that where the repairs had been made, and the cost of making them was known, the estimates of experts as to the probable expense of repairs should not even be received in evidence, because unnecessary.

As a general rule, no doubt, the person damaged has the right to have his boat repaired at the place where the injury occurs. But the duty not to incur unnecessary expense is well settled. *The Baltimore*, 8 Wall. 377, 386-388; *Warren v. Stoddart*, 105 U. S. 224, 229; *Dolph v. Laundry Co.*, 28 Fed. Rep. 553, 558; *The Thos. P. Way*, Id. 526. The person sustaining damages by collision is, therefore, bound to act with reasonable prudence as respects the repairs. Where the expense of repairs at the place of collision would be exceptionally great, if the owner of his own motion takes his boat for repairs to another place less expensive, I see no good reason why he should recover more than his actual loss, including the time and expense of going from the one place to the other. And upon request of the party in fault, with a tender of the expense of going and returning, within reasonable limits, I have no doubt that acquiescence would be the owner's legal obligation. The surveys in this case were, as I understand, the usual surveys, which were a necessary preliminary towards making the repairs, and should therefore be allowed. If they were made for no other purpose, and had no other use than as a

mere estimate of the amount of the damage, they would not in this case be allowed, because the duty to repair, rather than abandon, was obvious. The exceptions are overruled, and the report is confirmed.

THE STELVIO.¹

PHELPS v. THE STELVIO.

(District Court, E. D. New York. February 1, 1888.)

1. ADMIRALTY—PRACTICE—COSTS—EXCESSIVE CLAIM.

A libellant who has filed a claim for \$20,000, and recovered only \$500, will not be allowed costs where it appears that by waiting two days he could have ascertained, without risk, that his loss would be less than \$1,000.

2. SAME—EXCESSIVE CLAIM AS PUNISHMENT.

The law does not permit the insertion of an excessive demand in a libel against a ship by way of punishment for previous wrong-doing on the part of the ship's owner.

In Admiralty. On exceptions to commissioners' report. See 30 Fed. Rep. 509.

Ulo, Ruebsamen & Hubbe, for libellant.

E. B. Convers, for claimant.

BENEDICT, J. I find no occasion to disturb the findings of the commissioner as to the amount of damages recoverable in this case. Upon the question of costs, I remark that it is plain that the claim of \$20,000 put forth in the libel was excessive. The recovery is little over \$500. To the suggestion that when the libel was filed it was not known but that the damages would be in the neighborhood of the sum claimed, the answer is that by delaying the libel from Saturday to Monday the amount of the loss could have been ascertained with reasonable certainty to be less than \$1,000. The delay could have been had without risk of loss to the libellants. To the other suggestion that if the claim of \$20,000 was in excess, it is excused by the unlawful action of the ship's owner in refusing to deliver the oranges on Saturday, it is sufficient to say that the law does not permit the insertion of an excessive and exorbitant demand in a libel against the ship by way of punishment for previous wrong-doing on the part of the ship's owner.

Let the exceptions be overruled, and a decree entered in favor of the amount reported by the commissioner, without costs.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

OLESON v. THE IDA CAMPBELL.

(District Court, D. Minnesota. March 9, 1893.)

ADMIRALTY—JURISDICTION—TORTS—DEATH BY WRONGFUL ACT.

Gen. St. Minn. p. 825, § 2, providing that, "when death is caused by the wrongful act or omission of any party, the personal representatives of the deceased may maintain an action, if he might have maintained an action had he lived," etc., does not confer upon the United States district court jurisdiction of a libel *in rem*, filed by the administratrix of an injured person to enforce a marine tort, as in case of death from such a tort the action does not survive in admiralty.

Edward H. Ozmun, for libellant.

Warren H. Mead, for claimant.

NELSON, J. A libel *in rem* is filed by the administratrix of the deceased to enforce a marine tort. The remedy is prosecuted under the statute of the state of Minnesota, (Gen. St. p. 825, § 2.) It reads as follows:

"When death is caused by the wrongful act or omission of any party, the personal representatives of the deceased may maintain an action, if he might have maintained an action, had he lived, for an injury caused by the same act or omission," etc.

An answer and claim are interposed, and it is insisted that the statute gives this court in admiralty no jurisdiction. It is true that a remedy can be enforced in admiralty for a marine tort, if the injured party survived, but in case of death from such a tort the action does not survive in admiralty. It is therefore a disputed and unsettled question whether or not a state statute, like the one cited, is applicable in such case to authorize an action in admiralty by the representatives. Elaborate views *pro* and *con* have been expressed by eminent judges. Without referring to them *in extenso*, I shall follow the expression of opinion denying the jurisdiction of a court of admiralty to entertain such an action under the statute. Decree ordered dismissing libel.

In the admiralty suit *in personam* of Annie Oleson, Adm'x, etc., v. Peter F. Ritchie, owner of steam-boat Ida Campbell, a decree dismissing libel is also ordered.

MILLER-MAGEE Co. *et al.* v. CARPENTER.*(Circuit Court, S. D. Ohio, W. D. February 29, 1888.)***1. COURTS—FEDERAL JURISDICTION—JURISDICTIONAL AMOUNT—PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT.**

Neither Rev. St. U. S. § 711, vesting in the United States courts exclusive jurisdiction of patent and copyright cases, nor section 699, providing for appeals and writs of error in such cases, without regard to the sum in dispute, was repealed by act Cong. March 3, 1875; and neither can therefore be repealed by act March 3, 1887, which only purports to amend the former act. Both acts merely refer to those cases where the state and federal courts have concurrent jurisdiction.

2. SAME—VENUE—DEMURRER.

Where a bill shows on its face that defendant is not an inhabitant of the district wherein the suit is brought, defendant may assert his objection to being served out of the district of his residence by demurrer as well as by motion to dismiss.

In Equity. On demurrer to bill.

Jere F. Twohig and Howson & Sons, for complainants.

Parkinson & Parkinson, for defendant.

JACKSON, J. The complainants, citizens of Ohio and Pennsylvania, as the present owner and licensees of letters patent No. 281,101, for certain new and useful improvements in book binding, issued February 26, 1883, to Andrew J. Magee, instituted this suit September 3, 1887, against the defendant, a citizen and resident of Covington, Ky., to restrain his use and infringement of said patent. Service of process was had upon the defendant at Cincinnati, Ohio. In obedience to said process, defendant has appeared, and demurred to the jurisdiction of this court "for that it appears by said bill of complaint that this defendant is not an inhabitant of the district wherein this suit is brought, and for that it does not appear by said bill of complaint that the amount in controversy is sufficient to give jurisdiction to this court." The bill makes no allegation or averment as to the amount involved in the controversy; and the second ground of demurrer assumes that, under the act of March 3, 1887, it must appear upon the face of the bill, in patent cases as in other civil suits, that the matter in dispute exceeds, exclusive of interest and costs, the sum of \$2,000, in order for this court to entertain jurisdiction. This position is not well taken. Under the statutes of the United States the circuit court has exclusive jurisdiction of all cases arising under the patent-right laws of the United States, without reference to the amount involved. The act of 1875 in no way changed or affected the jurisdiction. The act of March 3, 1887, is only amendatory of the act of March 3, 1875, and in respect to patent cases, leaves the jurisdiction of this court just as it stood prior to and after the passage of the act of 1875, so far as the amount involved is concerned. Before the act of 1875, this court had jurisdiction in patent suits without reference to the amount involved. That act did not change this jurisdiction or introduce any requirement as to amount in dispute in patent cases; and in

amending the act of 1875, no change in this respect is made by the act of March 3, 1887. The court is of the opinion that this ground of demurrer is not well taken and should be overruled.

The other ground of demurrer, viz., "that it appears by said bill of complaint that the defendant is not an inhabitant of the district wherein this suit is brought," presents a valid objection to the suit against the defendant in this district. It is not intended in holding this objection valid to decide that this court cannot, under the act of 1887, exercise any jurisdiction in cases like the present, when the defendant is not an inhabitant of the district wherein he is sued or served. This court is inclined to the opinion that the act confers only a personal privilege upon the defendant in such cases, which he may waive; but, without deciding that question, it is sufficient to hold—as the court does in the present case—that the facts appearing upon the face of the bill the defendant may assert his objection to being served out of the district whereof he is an inhabitant by demurrer as well as by plea or motion to dismiss. This practice was sanctioned by the court in the case of *Reinstadler v. Reeves*, 33 Fed. Rep. 308, (Feb. 21, 1888,) which involved the same question raised by the present demurrer.

The conclusion of the court is that the first ground of demurrer is well taken, and should be sustained. It is accordingly so ordered, and the complainants' bill will be dismissed with costs, but without prejudice to the right to sue in the proper district.

ADDITIONAL OPINION.

(May 7, 1888.)

The question presented by one ground of demurrer in this case, viz., whether the jurisdiction of this court is defeated because the matter in dispute does not exceed, exclusive of interest and costs, the sum or value of \$2,000, has, at the request of counsel for the defendant, been reconsidered by the court, and as the result of that re-examination the court is confirmed in the conclusion heretofore announced, that the \$2,000 limitation placed upon the jurisdiction of the court by and under the act of March 3, 1887, does not apply to patent cases or to suits for infringement of patents. The exclusive jurisdiction vested in the courts of the United States in cases arising under the patent-right and copyright laws of the United States, (section 711, Rev. St.,) and the allowance of writs of error and appeals in such cases, without regard to the sum or value in dispute, (section 699, Rev. St.,) were not repealed, either expressly or by implication, by the act of March 3, 1875. The act of March 3, 1887, only purports to amend the act of March 3, 1875, and by no fair or proper construction can it be held to repeal the foregoing statutory provisions relating to the exclusive jurisdiction of this court in cases arising under the patent laws without reference to the amount involved. The acts of 1875 and 1887 both refer to that class of cases in which the federal courts have concurrent jurisdiction with state courts. They do not apply to cases arising under the patent and copyright laws, as to which exclusive jurisdiction is vested in the courts of the United States, with-

out reference to the amount involved. The court accordingly adheres to its former ruling on this question, and overrules this ground of demurrer with costs.

WREN v. ANNIN *et al.*¹

(*Circuit Court, E. D. New York. March 12, 1888.*)

COURTS—FEDERAL JURISDICTION—PATENTS FOR INVENTIONS—ENFORCING ASSIGNMENT.

An action where the relief demanded is an assignment of letters patent, and damages, and where all the parties are residents of the same state, does not lie within the jurisdiction of the federal courts. Following *Trading Co. v. Glaenzer*, 30 Fed. Rep. 387.

In Equity. On demurrer.

Complainant Wren, the inventor and patentee of an improvement in metallic wheelbarrows, assigned his letters patent to defendant, Annin, in consideration of one dollar and an agreement by Annin to furnish money for the manufacture of the wheelbarrows. The bill in this suit alleged that Annin had failed to pay the consideration, and had assigned the letters patent to the defendant, the National Barrow & Truck Company, in fraud of complainant, and therefore prayed for a decree compelling defendants to reassign the letters patent to complainant, and for damages. The bill was demurred to on the ground that as all the parties were residents of the state of New York, the jurisdiction of this action lay with the New York state courts, and this court had no jurisdiction.

I. S. Catlin, for complainant.

John L. Hill, for defendants.

LACOMBE, J. I am unable to distinguish this case from *Hartell v. Tilghman*, 99 U. S. 547, and *Trading Co. v. Glaenzer*, 30 Fed. Rep. 387. Demurrer is sustained.

GOTTLIEB v. THATCHER.

(*Circuit Court, D. Colorado. March 21, 1888.*)

1. JUDGMENT—OPERATION AND EFFECT—CONCLUSIVENESS AS TO PRIOR GRANTEES.

As against a prior grantee and purchaser at an execution sale under a preceding judgment, a subsequent judgment against the grantor and debtor is not conclusive, either as to the amount of the debt, or as to the circumstances and character of the transaction out of which the indebtedness arose, and where made defendant to a bill by the holder of such judgment to set the conveyance aside as in fraud of debtors, and to subject the land, such prior grantee and purchaser may show that the debt for which the judgment was

¹Reported by Edward G. Benedict, Esq., of the New York bar.

rendered had been more than paid when the judgment was obtained and that the creditor had taken an unfair advantage of the debtor in the matter of interest.

2. FRAUDULENT CONVEYANCES—ACTIONS TO SET ASIDE—BY CREDITOR WHOSE DEBT HAS BEEN PAID.

The keeper of a house of ill fame, having bought \$6,000 worth of furniture, borrowed of G., who had negotiated the sale, \$2,700, to apply to the purchase money. She gave him her note for that amount, with an accommodation indorser, secured on the furniture, and, in addition, on 820 acres of land belonging to the indorser. This note bore interest at 5 per cent. a month. She was also charged \$300 as a bonus, and gave G. her note for that amount. She paid \$910 as interest on the first note, and having then defaulted, G. seized the furniture, and sold it at auction for \$1,519.48. He also foreclosed on the land, and got from it \$258.10, thus realizing, with interest, \$2,682.58 on a debt of \$2,700 in about a year. He then sued the indorser for the full amount of the note, and, the defendant's attorney being drunk at the trial, and a new man being assigned in his stead, got a judgment against him for \$2,171. When this suit was commenced, he issued a writ of garnishment, and thus came into possession of a note for \$1,850, secured on lands worth many thousands of dollars. This note was advertised for sale without any reference to the security, and bought in for \$80 by G., who foreclosed, and took the land. He then filed a bill against the brother of the indorser, who had bought in certain land of the indorser at an execution sale under a judgment rendered against him prior to his indorsement on the \$2,700 note, setting up that he had levied on the land to satisfy his judgment for \$2,171, and bought it in, and that the purchase by and the deed to the brother was the result of conspiracy to defraud creditors. *Held*, that under the circumstances the bill should be dismissed, the creditor having, in equity, been more than paid in full.

In Equity.

J. W. Horner and *A. J. Bentley*, for complainant.

H. G. Dillon, for defendant.

BREWER, J. This case is now before me on final hearing. The facts are these: On July 23, 1877, complainant recovered judgment in the district court of Arapahoe county for \$2,171, against Samuel H. Thatcher, a brother of defendant. On November 13, 1876, Samuel H. Thatcher conveyed to defendant, by warranty deed, for an expressed consideration of \$4,000, the lands in controversy. Complainant caused execution to issue on his judgment, levied upon the lands as the property of Samuel H. Thatcher, bought them in, and now seeks to have this warranty deed set aside as a cloud upon his title, and such title quieted as against all claims of defendant. He insists that that deed was fraudulent and void, because made by Samuel H. Thatcher with intent to defraud his creditors, complainant among the number.

Many questions are raised and discussed by counsel. In the view which I have taken of this case I shall have occasion to refer to but one or two, and, in order to present these, some other facts must be stated. The judgment against Samuel H. Thatcher grew out of these transactions: In November, 1875, one Zella Glenmore, the proprietress of a house of ill fame, purchased a lot of furniture from Rhoda Sevins, the proprietress of a like house. She borrowed \$2,700 of complainant; gave her note with Samuel H. Thatcher's indorsement for that amount. This note was secured by a chattel mortgage on the furniture, which at

the time was worth \$6,000; also by trust deed on 320 acres of land in Douglas county, belonging to Thatcher. Thatcher had no interest in the transaction, and was only an accommodation indorser. The note ran one year, and drew 5 per cent. per month interest. At the time of taking this note complainant also took a note for \$300, signed by Zella Glenmore alone, which note was given to him, as he says, for his services in making the trade between the two women. According to his testimony, Zella paid six months' interest, and \$100 on the seventh months' interest, or \$910 in all. Zella testifies that she paid 11 months' interest. It may be, however, that her testimony is not properly before the court, as, when her deposition was taken, the issues were different; and under an order made by this court after the issues were put in their present shape she was not produced for cross-examination. When the year for which the note was given expired, and in November, 1876,—perhaps on the day before the note matured,—complainant seized the furniture under his chattel mortgage, and caused it to be sold at public auction. From this, by his own testimony, he realized \$1,519.43; in December, 1876. The trust deed on the Douglas county lands he also enforced, and from that realized \$258.10. Thus, according to his own testimony, he received \$2,682.53 from Zella Glenmore personally, and from the mortgaged property. Nevertheless he commenced suit for the full amount of the note against Thatcher, and recovered judgment, as has been stated, for \$2,171. When the case was called for trial, Thatcher's counsel was intoxicated, and the case was continued a few hours, until new counsel could be substituted,—counsel who had no previous knowledge of the transactions,—and under those circumstances the case was tried. At the time of commencing the suit against Thatcher, he garnished Gray and Eichaltz, and from them obtained possession of a note for \$1,350 belonging to Thatcher, secured by deed of trust on 20 acres of land worth more than the amount of the note. Although this note was thus secured, it was advertised for sale without any notice of the security, and bid in by him for \$80. Thereafter he had the trust deed foreclosed, and under that foreclosure obtained title to the lands now shown to be worth many thousand dollars. It is true that this advertisement and purchase of this note by him was not until after the purchase of the lands in controversy, but the fact that the note was thus secured was disclosed by the records in the case prior to its advertisement and sale. Again, on May 7, 1875, before even the borrowing of the money by Zella Glenmore, one Samuel Kaucher had obtained judgment against Thatcher in the district court of Arapahoe county, for \$2,710.40. This judgment was taken on error to the supreme court of the territory,¹ and thence to the supreme court of the United States, and by each court affirmed,—by the latter on December 17, 1877. On this judgment execution was issued on January 29, 1878, the land bought by defendant, and deed made to him November 15, 1878.

There is a question in the case as to whether the lien of this judgment

¹2 Colo. 693.

had not been lost, but I do not care to pursue an inquiry into that question. Returning to the facts previously noticed, it may be stated that the judgment of July 23, 1877, is conclusive between complainant and Samuel H. Thatcher as to his indebtedness; but it is not conclusive upon defendant, a grantee from Samuel H. Thatcher before the judgment, either as to the amount of the debt, or as to the circumstances and character of the transaction out of which the indebtedness arose. The authorities upon this question are uniform and clear. I cite a few of them: *Hafner v. Irwin*, 4 Ired. 529; *Collinson v. Jackson*, 14 Fed. Rep. 309; *Clark v. Anthony*, 31 Ark. 549; *King v. Tharp*, 26 Iowa, 283; *Esty v. Long*, 41 N. H. 103; *Bruggerman v. Hoerr*, 7 Minn. 337, (Gil. 264;) *Sargent v. Salmond*, 27 Me. 539; *Caswell v. Caswell*, 28 Me. 233; *Downs v. Fuller*, 2 Metc. 135; *Carter v. Bennett*, 4 Fla. 283; *Hall v. Hamlin*, 2 Watts, 355; *Warner v. Percy*, 22 Vt. 155; *Boutwell v. McClure*, 30 Vt. 676; *Ingals v. Brooks*, 29 Vt. 399; Freem. Judgm. § 336; Bump, Fraud. Conv. 558.

In the case of *Ingals v. Brooks* the facts were as follows: Israel Brooks conveyed all his lands to his son, Clark Brooks, and as part consideration therefor said Clark Brooks agreed to pay all the debts of his said father. Leafy Brooks, who had become the wife of Ingals, presented a claim against the father, Israel Brooks, against which the son, Clark Brooks, maintained he had a set-off. They compromised; Clark Brooks released his set-off, and Ingals and wife threw off half the amount of their claim. Ingals then went to the father, Israel Brooks, and got him to allow judgment to go against him for the other half of the claim, of which proceeding Clark Brooks had no notice. Ingals then levied execution under this judgment on the lands held by Clark Brooks, and sold the same, and in course of time got a sheriff's deed, and began his action in ejectment. The court uses the following language:

"The judgment, being altogether *inter alios*, and in express violation of the understanding of Clark when he surrendered the claim against Leafy, one of the plaintiffs, and paid one-half the amount of the note in money, in agreed satisfaction of the whole, would have no effect upon the defendant Clark. He is entitled to show that the note was paid before sued, or that the judgment was for other reasons fraudulent to him. *Atkinson v. Allen*, 12 Vt. 619. This compromise of the note by Clark was just as effective a bar to the claim in law, and just as effective a release of his undertaking to pay it at the time of the conveyance, as if he had paid all the money upon it. It is true, he did undertake or promise to pay off the debts of the grantor, his father; and he has in fact paid them all, except the mortgage, which is not in question; and the judgment against Israel, the father, is either a subsequent debt founded exclusively on his promise to pay what they did not get of Clark, and which in no sense, under the circumstances, can be regarded as forming any part of the debts which Clark was to pay, or else the whole proceeding, so far as it is attempted to give it the appearance of a prior claim, is a fraud upon the compromise and settlement made with Clark, and the consequent surrender of the note; and in either case it will not enable the plaintiff to treat the conveyance as void, and levy upon it as the land of Israel Brooks. Judgment is reversed and the case remanded."

In the case of *Boutwell v. McClure*, the court used this language:

"The judgment upon the plaintiff's claim in this action, whether rendered before or after the claimant's appearance, concludes nothing on the question. In all such cases there is likely to exist the form of a contract of a date early enough to accomplish its purpose, and it is not uncommon that this contract assumes the more solemn form of contracts, such as that of a promissory note, or even a judgment of a court of record; but in either case they are of course only conclusive upon the parties under such contracts. Upon any question arising in regard to the creditor being *bona fide* such at a particular date, and continuing such to the present time, the contract is but *prima facie* evidence of the fact. It is always competent to impeach the debt, either as to its *bona fide* character, its date, or its continuance. For although the debt once existed, and at a date early enough to defeat the alleged fraudulent conveyance, yet, if it has been extinguished by payment on the part of the debtor, it sinks at once into the common mass of his assets, and cannot be subsequently kept on foot as the debt of a *bona fide* creditor."

The case of *Warner v. Percy* was an action in ejectment, and presents the identical question that is involved in the case at bar. Plaintiff claimed title under a warranty deed from Mr. Woodward, executed in February, 1842. The defendant claimed title under a deed from L. E. Pelton, executed February 3, 1847, and Pelton got title by means of a judgment, execution, levy, sale, and sheriff's deed, and secured possession of the premises. The plaintiff, who was grantee in the alleged fraudulent conveyance, brought his action in ejectment. The plaintiff, under objection from defendant, was permitted to give evidence tending to prove that at the time of the conveyance by Woodward, his grantor, to the plaintiff, he, Woodward, had claims to a considerable amount (in the language of the exceptions) against Pelton for property delivered to him, and for services rendered him; "and the question," says the court, "is now presented for our decision, whether such evidence was admissible for the purpose for which it was received by the county court. It was an important point on the part of the defense to show the motive which induced Woodward to execute the deed to the plaintiff. Was it done with the intention to defraud Pelton? We agree with the county court that if Woodward had, or supposed that he had legal claims against Pelton sufficient to meet whatever Pelton had against him, it has a decided tendency to rebut any presumption of a fraudulent intent in Woodward to avoid the rights of Pelton. The reason must be obvious. The mutual claims might be made the subject of a set-off, and by these means be mutually concluded. We also agree with the county court that this was proper evidence on the question whether Woodward was really indebted to Pelton at the time when the plaintiff received her deed,—that is, in such a sense that Woodward could by a fraudulent conveyance avoid any substantial right of Pelton. The plaintiff is not concluded by the judgment against her grantor, especially as it is subsequent to her deed. As between Pelton and Woodward, the judgment is conclusive so far as relates to Pelton's title under his levy. But so far as the plaintiff is concerned, how far back the indebtedness extends, and what was the relation, the relative state of the mutual claims of the parties to the judgment must be open to inquiry. We see no possible objection to any part of the charge of the court. The charge gives Pelton the right to levy on

this property, provided the conveyance was made to the plaintiff in fraud of any of Woodward's creditors; and we think it is favorable to Pelton as anyone could claim it should have been. The judgment of the court is affirmed." This opinion was delivered by REDFIELD, C. J.

In the case of *Sargent v. Salmon*, it appeared that the plaintiff had taken judgment against his debtor for twice as much as he was entitled to. Upon this fact the court refused to give him any relief as against the alleged fraudulent conveyance of his debtor, on the ground that he who comes into equity must come in with clean hands.

In the case of *Bruggerman v. Hoerr*, it appeared that the judgment was rendered upon a debt which was in fact void as against public policy, and for that reason the court refused to interfere with an alleged fraudulent conveyance.

These various authorities make it clear, not only that the judgment against Samuel H. Thatcher is not conclusive upon the defendant as to the amount of indebtedness, but also that it is the duty of this court sitting as a court of equity to inquire into the circumstances out of which such indebtedness is claimed to have arisen, and if those circumstances do not show that the claim is one which in equity and good conscience ought to be enforced, the court will not inquire into the transaction between the judgment debtor and the defendant, but leave the parties where their legal titles have placed them.

Now, it is a familiar doctrine of courts of equity that where a contract appears extortionate and unconscionable, it will not be enforced; so, where a complainant is seeking to obtain some unfair and unjust advantage, or, having been fully compensated for his time and labor and money, is seeking by technical rules and legal proceedings to grasp more, and wherever generally it would be inequitable so to do, a court of equity will refuse him any relief. See among other cases, *Kelley v. Caplice*, 23 Kan. 474, which by the way was an action at law; also, *Brown v. Hall*, 14 R. I. 249, and cases cited therein; *Butler v. Duncan*, 47 Mich. 94, 10 N. W. Rep. 123; *Sims v. Norris*, 8 Phila. 84; *Earl of Aylesford v. Morris*, L. R. 8 Ch. 484.

Now, in the first place, this land was appropriated to the payment of the Kaucher judgment, which was a prior debt of Samuel H. Thatcher. Whether the lien of that judgment was gone or not, the land was in fact sold upon that judgment, and bid in by defendant. Whatever may have been the motives of the two brothers, or by which one in fact the money to pay for the land was advanced, the land was sold, the money was advanced by one or the other, and the defendant became the purchaser. As the land thus went to pay a prior debt of the judgment debtor, complainant should have a very clear case for equitable interposition before it should be taken from the defendant and applied to the payment of another debt of his brother.

Again, 5 per cent. per month is outrageous interest. It may be legal if the statute places no limitations upon the contracting powers of parties; but is it equitable? Here Zella Glenmore, the borrower, was a woman so situated that she could not go into the money market and

borrow on the same terms as others. Taking advantage of her situation, complainant exacts from her this enormous interest, besides demanding a bonus of \$300 on the ground of services in enabling her to purchase the property, and then, as soon, if not sooner, than the debt matured, sweeps the property off to a public auction-house, where, as every one knows it would be, it was sold at enormous sacrifice; so that this property, which at the time the loan was made is shown to have been worth \$6,000, realizes only one-fourth that sum. Before doing this he has, according to his own testimony, received about one-third of his money back, and according to hers more than one half. Not content with that, he appropriates 320 acres of the debtor's land, and then, by attachment proceedings and sale, and with a singular and suspicious omission in the advertisement, obtains the title to a note fully secured, amounting, with interest, to more than half of the original loan, and, enforcing thereafter the trust deed, is now the owner of most valuable property. Has he not been paid in full, and more than full, for his original loan, and interest reasonable and unreasonable? May not a court of equity now stay his hands, and say, "Enough?" To grant to him the relief he now asks would be putting a court of equity and good conscience in the position of giving to him an unconscionable profit upon an extortionate contract. I do not think that should be done. I have thus far considered this case solely from the standpoint of the complainant's rights, and have not noticed the circumstances of the transaction as between the two brothers; nor is it necessary, in view of the conclusion reached upon the former branch of the case, to comment on the latter.

For the reasons indicated a decree must go dismissing the bill.

STEINES *et al.* v. MANHATTAN LIFE INS. CO.

(*Circuit Court, E. D. Missouri, E. D. March 26, 1883.*)

1. EQUITY—FRAUD—LACHES.

A bill in equity on a life insurance policy issued in 1854, alleging that at the time of the issuance of the policy the company agreed to distribute the surplus every three years in interest-bearing scrip; that in 1857 the company fraudulently sent plaintiff a document which was simply a statement of a permanent addition to the policy, but which she, owing to her imperfect understanding of the English language, supposed to be a statement of the scrip; that she received similar documents in 1860, 1863, and 1866, the true nature of which she has only recently learned; but which fails to set out a copy of the policy, or the alleged documents, or that she remained ignorant of the English language after 1857,—fails to show grounds for equitable interference, after the lapse of so many years, and the consequent changed condition of the parties.

2. SAME—LACHES OF MARRIED WOMAN.

A bill in equity by a married woman against an insurance company, alleging that when the policy was issued the company agreed to distribute to her a portion of its dividends; that she always paid the premiums until 1866, when, on account of her sickness, her husband was sent to pay them; that the agent of the company procured him to sign an application for more in-

surance, which it was agreed should not be binding on her until assented to by her; that instead of being an application for more insurance, it was a waiver of future dividends in consideration of a permanent addition to the policy; that she did not discover this fact until 1874; that she then requested the company not to send her any more premium notes, but the company still sent the notes, which she continued to sign and pay till 1886,—fails to show any ground for equitable relief; the wife being all the time capable, by the law of the place where she resided, of making contracts, and of maintaining an action on them.

In Equity. On demurrer to bill.

F. T. Ledegerber, for complainant.

Given Campbell, for defendant.

BREWER, J. In this case a demurrer to the bill was argued the other day. The facts are these: In 1854, 34 years ago, this complainant insured the life of her husband for \$2,000. The insured is still living. She claims that she has been defrauded by the wrongful conduct of the insurance company in two particulars: *First*. She alleges that prior to the contract she received an annual report from the insurance company, which report stated that every three years the premium surplus would be distributed, seven-eighths to the insured, in scrip bearing an annual interest not exceeding 6 per cent.; that instead of scrip the same might be converted into permanent insurance for life, without any annual premium, or applied to the annual reduction of the future premiums on the policy; that relying upon that representation, she made a contract of insurance by which the company agreed to give her scrip. She does not set out a copy of such contract, saying that it is immaterial, but alleges in terms that it provided for the issue of scrip; that in 1857 a document was sent to her, on the back of which was indorsed these words: "The Manhattan Life Insurance Company, Frederick Steines, bonus, 1857, policy No. 3063, \$124;" and that, inasmuch as she imperfectly understood the English language, she at the time supposed this was a statement of the scrip to which she was entitled under the contract; that in 1860, 1863, 1866, she received similar documents; that she has lately, on consultation with counsel, found that they were not interest-bearing scrip, but simply statements of permanent additions to the policy. She further alleges that the premium which she was called upon to pay was \$99, which she paid by giving one-half cash, and one-half in a note bearing certain interest; that she has annually, from that time on to the commencement of this suit, given a like note, and paid in cash the other half, as well as the interest on the notes. Those notes have accumulated, so that her last payment in cash in the year 1886 was \$148.38.

Now, upon these facts, the first thing to be noticed is this: that this policy, in its inception, and in its earlier history, was one burdensome to the defendant, and likely to be profitable to the complainant. If the insured had died within the first two or three years, the company, having received but two or three hundred dollars, would have been compelled to pay \$2,000. Thirty-four years having run, by the repeated pay-

ment of premiums on her part and the accumulation of interest-bearing notes the policy has become beneficial to the defendant, and burdensome to the complainant. One who, under these circumstances, comes into a court of equity, charging a wrong on the part of the defendant in the early history of the transactions, should make very clear the fact of the wrong, as well as her ignorance thereof. If, when the policy was apparently beneficial to her, she was content to permit many years to elapse before she complained, and the lapse of time has changed its pecuniary benefit, it is simply fair that her claim of wrong, as well as her ignorance of the wrong, should be made perfectly apparent. Now, it may be that when the policy is presented, it will disclose a statement of just the rights she received under it, and on the face of it may contain a stipulation expressed in clear and unmistakable language that she was to have a permanent addition to the policy, instead of the scrip mentioned in the report which she read. If it does not, then she has failed to give a copy of any one of those triennial statements sent to her. She says she received documents indorsed with certain words, and gives the indorsements; but what was on the face of those triennial statements is omitted from the bill. *Non constat* but that upon the very face of each one was the clear and unmistakable affirmation of a permanent addition to the policy, instead of an interest-bearing scrip. She says that at the time she received the first, by reason of an imperfect acquaintance with our language, and relying upon the contract which she had made, she supposed that it was scrip. She does not tell us that that imperfect acquaintance with our language has continued, or that she did not in 1860 have perfect familiarity with it; so that, if she had read this triennial statement, she would have been clearly advised that it proposed not scrip, but a permanent addition to the policy. These omissions are important. They are fatal; because, as I said, she comes after the lapse of these many years, in that changed condition of the policy, to assert a wrong perpetrated 30 years ago.

A further charge is this: She says that she herself paid the premium from year to year, until 1866, 20 years before the commencement of this suit, and that then, being ill, she sent her husband, the insured, to pay it; that the agent asked him to sign what the agent said was an application for more insurance,—a larger policy; that he signed such application, the agent reading over what purported to be an application for such increased insurance, but at the same time said to the agent that he had no authority to bind his wife, and that it was distinctly agreed between them that it should not be binding until she had been informed and expressly assented to it; that, instead of its being an application for increased insurance, it was in fact a surrender of all claims for future dividends, in consideration of a single large dividend of four hundred and odd dollars in the way of a permanent addition to the policy; that she never assented to that, and never knew what had been done, until 1874; that when, in 1869, she failed to get a statement of the expected scrip, she made inquiry and was told by the agent that she would be entitled to no more scrip because her husband was over 68 years of age;

and she knew no better until 1874, when she was informed that she had surrendered all claims to future dividends. When thus informed in 1874, she wrote to the company, requesting it to send no more notes to her. Notwithstanding her request the company continued to send out the notes, and she thereafter, up to 1886, signed the annual notes and paid the premiums. She also copies a statement from the annual report received and examined by her before the policy was issued, which states that "when a policy is taken for life, and the yearly premium amounts to or exceeds forty dollars, one-half of each yearly premium for the first five years may remain as a permanent loan at seven per cent. interest, so long as the premium is regularly paid; the same to be deducted from the amount insured, unless previously paid off or canceled by the policy." I do not see what particular force that has. It was a privilege given by the company to the insured, to pay for five years one-half in cash and one-half in note. It certainly gave the company the right at the end of five years to insist upon full payment in cash. It may be that it gave her also a similar right to make full payment in cash if she had desired; and if thereafter, when the company sent these notes, instead of signing them she had sent the full payment in cash, and the company had refused to receive it, it might well be that she could maintain some action to compel its receipt. But instead of doing anything of the kind, she simply sent her request; and when the company forwarded the notes she signed them, and paid the money, and has been doing that for 12 years. Now, if it be true, just as she says, (and of course, on demurrer it must be taken as true,) that in 1866 the company wrongfully obtained from her husband, the insured, a surrender of her right to future dividends, it is clear that she was soon thereafter, in 1869, by the non-receipt of any dividends, if not informed, at least put in possession of facts which should put one upon inquiry. The information which she says she then received,—that her husband was over 68, and therefore there were no more dividends,—a moment's reading of the policy would have verified or disproved. Be that as it may, in 1874 she knew the facts, and for 12 years was content to go on, leaving the policy in force, paying all that by its terms was called for; and in 1886, 32 years after the policy was issued, and after she had paid the premiums during all these years, for the first time she comes into court, and says, "I have been wronged." Now, under the statutes of Missouri, a married woman was, at the time this policy was issued, authorized to contract for insurance. She alleges not that her husband, but that she, herself, made this contract with the insurance company; that she was the principal in the contract. The statute also provides that she may sue, though when she sues, it is true, her husband must join. It might be that, if a wife was under the full disability of the old common law, so that she had no right to contract, and no right to sue, neither limitation nor laches could be imputed to her, and perhaps no estoppel; but giving the right to contract, and the right, qualified though it be, to sue, I think it must be held that estoppel will bind her, and that limitations and laches will run against her. So, upon a bill filed after a lapse of 32 years, not showing

that she was ignorant of the wrongs, but, on the contrary, by plain implication showing that she must have been familiar with the one wrong nearly 30 years ago, and absolutely showing that she was informed of all the wrongs more than 12 years before she brought the suit, it seems no more than justice to hold that as against her, as against any other contracting party, the doctrine of laches must prevail.

This is one of those cases where the insured has lived a great, perhaps an unexpected, length of time; and the policy, which in the inception was one beneficial to her and prejudicial to the company, has, by the lapse of time, reversed its situation, and now the company has a contract which is beneficial to it, and which is prejudicial to her. Under these circumstances, I think the demurrer should be sustained, and it is so ordered.

BOLTZ v. EAGON.

(Circuit Court, E. D. Missouri, E. D. March 27, 1888.)

1. ATTACHMENT—PROPERTY SUBJECT TO—PROPERTY IN HANDS OF ASSIGNEE FOR BENEFIT OF CREDITORS.

Property in the possession of an assignee for the benefit of creditors under the Missouri statute is not exempt from seizure on a writ of attachment issuing from the federal court in a suit by a non-resident against the assignor.

2. SAME.—RIGHTS OF ASSIGNEE—INTERVENTION.

Where property assigned as provided in the Missouri statute for the benefit of creditors has been seized under a writ of attachment issuing from the federal court, in an action by a non-resident against the assignor, the assignee may intervene in the attachment suit, and have his right to the property determined.

In Equity. On motion to quash a writ of attachment.

Dyer, Lee & Ellis, for plaintiff.

Bond & Mills, for intervenor.

THAYER, J., (*orally*.) In this case a writ of attachment was sued out by the plaintiff on the 13th of March of the present year, and the writ was levied upon a stock of merchandise. On the 16th day of March, the marshal obtained an order of sale *pendente lite*, and the property has been advertised for sale on the 28th of this month. On the 21st of March, G. Lehman filed an intervening petition in the case, representing that on the 8th day of March H. C. Eagon made a general assignment for the benefit of creditors to himself as assignee; that on the 9th day of March he took possession of all the property of Eagon, under such assignment; and was proceeding with his duties as assignee, when all of the property covered by the assignment was taken out of his possession by the marshal, under the writ of attachment against Eagon. In view of these facts, the assignee asks to have the writ of attachment quashed, and the property released to him as assignee for the purpose of administration under the state law concerning assignments.

The application is based upon the ground that the property in his hands was in fact in the custody of the state court having charge of the assignment, and for that reason was not subject to seizure under a writ of attachment. We think the assignee acted properly in filing the intervening petition in this case. The practice of filing such intervening petitions for the protection of the rights of third parties is expressly recognized in the case of *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. Rep. 27; also in the case of *Gumbel v. Pitkin*, 113 U. S. 545, 5 Sup. Ct. Rep. 616; and in the last-named case, (8 Sup. Ct. Rep. 379,) when it came up for final hearing in the supreme court of the United States, the practice was again approved; so that it must be conceded that the assignee has a right to file an intervening petition of any sort deemed necessary for the protection of his interest and the trust he represents. But we think it very clear that the property when levied upon under the writ of attachment issued by this court (although the property was then in the possession of the assignee) was not in the custody of the law, and that the motion to quash the attachment must therefore be overruled. It has never been the rule in this state that property held by an assignee is in the custody of the law in such sense as to exempt it from seizure under a writ of attachment issued against the assignor. One of the recognized methods in this state of testing the validity of a voluntary assignment is to sue out an attachment against the assignor, and levy upon the assigned effects. In the case of *Wise v. Wimer*, 23 Mo. 238; *Pinnco v. Hart*, 30 Mo. 561, and in the case of *State v. Keder*, 49 Mo. 548, and in some other cases which I do not recall, creditors sued out attachments against the assignors and caused the same to be levied upon the assigned effects in the hands of the assignees. In those cases it was held that the title of the assignee would prevail over that of the attaching creditor, unless it was shown that both the assignor and the assignee had participated in a scheme to defraud the creditors of the assignor. Some discussion was had in one of the cases as to the character of the fraud on the part of the assignee that would suffice to destroy his title under the assignment, and it was held, in effect, that the assignee must actively participate in some scheme to defraud, concocted by the assignee, in order to impair his title. But it was not denied in any of the cases that a creditor of the assignor, if he choose to take the risk, might test the validity of the assignment by suing out an attachment, and causing the same to be levied on the assigned effects in the hands of the assignee. Now, as such practice is sanctioned by the state courts, and as property held by an assignee is not there regarded as being in the custody of the court so as to preclude a creditor of the assignor from attaching it if he sees fit, it follows that we must accord to a non-resident creditor suing in this court the same right to test the validity of an assignment by levying on the assigned effects that would be accorded to a creditor suing in the state courts.

It is furthermore suggested as a reason why we should release the attached effects that, inasmuch as the marshal has levied on the property, the assignee is deprived of the right to reclaim the property *in specie* by

a writ of replevin, as he might do if the property had been seized by the sheriff of the city of St. Louis, under process emanating from a state court.

It is furthermore urged that the assignee desires to regain possession of the property for the purposes of the assignment, and that he ought to have the privilege of reclaiming the property by some form of proceeding, and that he should not be left to his remedy by a suit against the marshal for a wrongful levy. We have given attention to this plea, and we must concede that, according to the authorities cited, the property in question cannot be replevied from the marshal under a writ emanating from the state court. It was so held in *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. Rep. 355, and in several other cases; and that is clearly the law. But we conceive that, while it is true that replevin will not lie against the marshal in the courts of the state, yet that the assignee may file an intervening petition in this case, setting up his claim to the property; and that under such a petition an issue may be framed, and tried here, and his right to the property be determined as effectually in this case as by a suit in replevin brought in the state court or in the federal court. In a very late case decided by the supreme court of the United States, (the case before referred to of *Gumbel v. Pitkin*, 8 Sup. Ct. Rep. 379,) we understand that the right to intervene under the circumstances which now exist, is expressly recognized. When the marshal of this court, under an execution or attachment, seizes property which is claimed by a third party, it may often happen that the claimant for some reason desires a return of the property *in specie*, and that his rights will not be fully secured by an action at law against the marshal for an unlawful levy. In all such cases we think he may intervene in the suit in which the attachment or execution issued, and have his right to the property determined by such intervention. Inasmuch as replevin will not lie against the marshal, no remedy is within reach of the claimant to recover the property itself other than the one last suggested, and we think that the remedy by intervening petition filed in the case is suggested and fully approved in the case last referred to of *Gumbel v. Pitkin*.

In the present case, therefore, if the assignee desires for any reason to reclaim the property now in the hands of the marshal, and does not desire to prosecute an action against the marshal for a wrongful levy, we will grant him leave within five days from this date to file an intervening petition, setting up his title to the property; and under such petition we will frame an issue and try his right to the property, and if it is found that he is entitled to it as against the attaching creditor, we will order the marshal to turn the property over to him *in specie*, but in the mean time, as the sale of the property is advertised for the 28th instant, we will direct the marshal to postpone the sale. The motion to quash the attachment, however, is overruled.

BREWER, J., concurs.

LONGDALE IRON CO. v. POMEROY IRON CO. *et al.*

(Circuit Court, S. D. Ohio, W. D. March 80, 1888.)

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—CORPORATIONS—STOCKHOLDERS.

Where stock is entered on the company's books by authority of a director in the name of his wife, he afterwards voting and representing the stock, and it does not appear that she authorized or subsequently ratified his acts, or received any dividends from, or claimed any interest in, the stock, it is error to charge her separate estate with the debts of the company to the amount of stock thus standing in her name.

In Equity. Exceptions to report of special master.

Alfred Yaple and E. A. Guthrie, for complainant.

Lawrence Maxwell, Jr., for defendants.

JACKSON, J. On exceptions by Lawrence Maxwell, administrator of the estate of Julia A. Pomeroy, deceased, to the report of the special master, filed herein April 8, 1887, in and by which Mrs. Julia A. Pomeroy is found to be a stockholder in said Pomeroy Iron Company, and her estate charged accordingly. It appears from the record and report of the master that the Pomeroy Iron Company, a manufacturing corporation, incorporated under the laws of Ohio, became insolvent in 1878, and suspended business, leaving large debts outstanding and unsatisfied. This indebtedness having been generally reduced to judgments, and the creditors' remedies at law against the corporation being exhausted, the present bill was filed by the complainant on behalf of itself and all other creditors of the company seeking to hold the stockholders individually liable on their respective holdings of stock to the extent necessary to pay off the debts of the corporation, (stockholders being personally liable, by the laws of Ohio, in such cases, for the amount of their stock, if needed to discharge the debts of the company.) A reference was directed to a special master to report the indebtedness of the company, the names of its stockholders, and the several amounts of stock held and owned by them respectively, etc. The special master found and reported that Mrs. Julia A. Pomeroy was a stockholder in the company at the date of its failure to the amount of \$8,300, which, with interest to April 1, 1887, made her estate liable for the sum of \$12,443.07. To this finding and report of the special master the administrator of Mrs. Pomeroy's estate files exception, the general ground of his exception being that the proof does not establish the fact, which was disputed and controverted, that Mrs. Pomeroy was a stockholder as reported.

The evidence and report of the master disclose the following state of facts. On the stock ledger and transfer book of the company there is an entry under date of June 27, 1866, which purports to be a transfer by the company to Mrs. J. A. Pomeroy of 50 shares of its stock,—par value, \$5,000. In January, 1867, a stock dividend of 115 per cent. was declared by the company, making an increase of 57½ shares, of the non-

inal value of \$5,750, to be placed upon the stock-books of the company to the credit of Mrs. J. A. Pomeroy. The capital stock of the company having been increased, there was entered up upon the stock-book of the company, under date of March 8, 1867, to Mrs. J. A. Pomeroy, as additional stock due her on said dividend and subscribed for by her, 125 shares, (\$12,500.) In July, 1867, an additional stock dividend of 5 per cent. was declared, and eight shares (\$800) of stock were then entered to the credit of Mrs. Pomeroy on the books of the company, making a total of 183 shares to her credit upon the books of the company on the 12th July, 1867. Under date of September 10, 1870, there is an entry on said books showing that 100 shares of the stock standing to Mrs. Pomeroy's credit was transferred to Arthur W. Pomeroy. John A. Pomeroy, the husband of Mrs. Julia A. Pomeroy, was a stockholder and director in said company, and it appears from the evidence taken under the reference that the 50 shares of stock placed to the credit of Mrs. J. A. Pomeroy in June, 1866, were transferred under the following circumstances: D. M. Sickler, the holder of said 50 shares, in April, 1866, sold the same to the company. While it held these shares, said J. A. Pomeroy bought them from the company, paid for them at his store, and they were thereupon transferred upon its books to J. A. Pomeroy. Afterwards the word "Mrs." was inserted before the name of "J. A. Pomeroy," so as to make the name stand, "Mrs. J. A. Pomeroy," instead of "J. A. Pomeroy," as originally entered. This was done by direction of John A. Pomeroy, who purchased the stock, and paid for it. It does not appear that Mrs. Pomeroy ever had any notice or knowledge of the transaction. The 115 per cent. on this stock was placed to her credit without her knowledge, or any direction from her, so far as shown by the evidence. This stock dividend, and the new subscription of 67½ shares, making 125 shares, (\$12,500,) were placed to her credit by the direction of her husband, the said J. A. Pomeroy. The 100 shares of the stock standing in Mrs. Pomeroy's name, which was transferred to Arthur W. Pomeroy, was made at the instance and by the direction of said J. A. Pomeroy. This transfer upon the stock transfer book purports to have been made by the secretary of the company, Col. Cyrus Grant, as attorney for Mrs. J. A. Pomeroy. This power of attorney is not produced. Col. Grant does not know that it was in fact executed by Mrs. Pomeroy, or in any way authorized by her. The stock standing in Mrs. Pomeroy's name was always voted, represented, and controlled by her husband, J. A. Pomeroy, who directed the transfer of 100 shares thereof in September, 1870, to his brother, Arthur W. Pomeroy. No proxy or proxies from Mrs. Pomeroy to her husband to vote and to represent the stock standing in her name are produced. Proxies and power of attorney to vote and transfer stock were filed in the vaults of the company, and the secretary thinks that they can be found there. Mrs. Pomeroy's signature was not known to the secretary, and when the husband produced a proxy purporting to be signed by her, (if such proxies were offered,) that was deemed sufficient to authorize him to vote and represent the stock standing in her name. It is not shown that Mrs. Pome-

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roy's husband was her agent in respect to these or other transactions. Nor does it appear that he had the management of her separate estate, or was intrusted with the investment of her private means. It does not appear that he had any authority to take stock of the company in her name, or that she was ever informed that he had done so. In July or August, 1877, the book-keeper of the company called upon her at her home, in the presence of her husband, with a request to indorse notes of the company. This she declined to do, the book-keeper thinks, though he is not certain of it; that he then said to her that her name was on the books for \$8,000 of the stock. She neither admitted nor denied the statement, if it was made, but declined to indorse the notes of the company. It does not appear that she ever accepted any dividends in cash or stock from the company, or exercised any control over the stock, or asserted any right, title, or interest in and to the same. She died since the institution of this suit, before her testimony was taken. Her administrator has found no certificates of stock in the company among her papers. Her husband, J. A. Pomeroy, died insolvent before the institution of the present suit.

Under these circumstances, can Mrs. Pomeroy be held as a stockholder in the company, and her estate be subjected to the liability arising from that relation? In *Turnbull v. Payson*, 95 U. S. 418, it is held by the supreme court, that "when the name of an individual appears on the stock-book of a corporation as a stockholder, the *prima facie* presumption is that he is the owner of the stock, in a case where there is nothing to rebut that presumption; and in an action against him as a stockholder, the burden of proving that he is not a stockholder, or of rebutting that presumption, is cast upon the defendant," citing numerous authorities. In that case it appeared that the defendant had signed a receipt for a dividend on the stock standing in his name, which was of itself sufficient to show acceptance on his part. But aside from that circumstance, under the authority of that decision, if nothing more appeared in the case, then the fact that Mrs. Pomeroy's name stood upon the books of the company as stockholder, she and her estate would be liable as such. But in explanation of how her name came to be placed upon the books of the company, the secretary of the company, as the proper officer having the custody of said books, has disclosed a state of facts which, in the opinion of the court, negative the *prima facie* presumption arising from her name being found upon the books as a stockholder. When it was developed that her husband had placed her name there, then it became necessary to show that she had either authorized his action, or had subsequently ratified and adopted it. The evidence does not establish either of these facts. There is no presumption of law or of fact that J. A. Pomeroy, the husband, was the agent of his wife, invested with authority to take stock in her name; and when it was shown that the stock was taken or placed in her name by his authority or direction, it became necessary, in order to bind her, to assume that he was authorized so to act for and on her behalf. This presumption cannot be indulged. There is nothing in the relationship of the parties to warrant such an in-

ference. In respect to her separate estate now sought to be bound by the husband's acts, the wife must be treated and stand upon the same footing as an entire stranger. It may be that the husband and company would both be estopped from disputing Mrs. Pomeroy's ownership of the stock placed in her name under the circumstances above stated, but until she does some acts signifying her acceptance of the same, she is not to be regarded as the owner of the stock, and subject to the liabilities thence arising in favor of creditors. The decision in *Turnbull v. Payson*, 95 U. S. 418, is distinguishable from, and does not control the present case. It would be an unwarrantable extension of the doctrine there announced to apply it here. The true principle applicable to the facts of this case is stated in *Low. Tr. Stocks*, § 81, note 1, and cases cited, as follows:

"Although the books of the corporation are not conclusive evidence of title, yet they declare that the persons whose names appear in them do in fact own the stock as therein stated. Any one, therefore, who makes such statement, by causing a record to be made in the books of the corporation, may be estopped to deny that the statement is true, if the denial would injure a person who has been misled by the record in the books. A false representation of this kind is made by any one who allows his name to be entered on the books for stock that does not belong to him, or by one who causes another person to be recorded as the owner of stock which belongs in fact to himself. In those cases the entry on the books has no effect in the actual passing of the legal title, but on account of the misconduct of the person who makes the false record, an estoppel arises in favor of the injured party, who may avail himself of it or not, at his option. The party injured is not bound by the statement in the books, but he has a right to insist that the person who caused the entries to be made shall not be heard to say that they are wrong. It is, of course, essential that the false entry should have been made with the consent of the person against whom estoppel avails; for it is clear that an entry in the books can create no right against a person who never knew that the entry was made."

Taken as a whole, the evidence in this case is not sufficient to sustain the finding that Mrs. Julia A. Pomeroy was a stockholder in the Pomeroy Iron Company, as reported by the special master. The exception of her administrator to the report is sustained, and a decree may be entered discharging her estate from liability on that account, and dismissing the bill as to her administrator with costs. In all other respects the report of the special master is confirmed, and proper decree will be made in the case for collection of the amounts reported as due from the several stockholders, and for distribution of the same among the creditors of the company, whose claims have been allowed. The counsel for complainant will be allowed a reasonable and proper fee for representing the interests and asserting the rights of the parties entitled to the funds to be collected, and a reference is directed to the special master to ascertain and report upon such allowance.

BOLTZ *et al.* v. EAGON.

(Circuit Court, E. D. Missouri, E. D. April 9, 1888.)

ATTACHMENT—INTERVENTION—PLEADING—JUDGMENT BY DEFAULT.

Where property in the possession of an assignee under the Missouri statutes for the benefit of creditors has been seized on a writ of attachment issuing from the federal court in a suit against the assignor, the petition of intervention, filed by leave of court in the attachment suit, by the assignee claiming the restoration of the property, is not a statutory interplea under the Missouri statutes; and the failure of the plaintiff in the attachment suit to answer the petition, the attaching officer having duly filed his answer, will not entitle defendant to a judgment by default.

In Equity. Intervention in attachment. On motion for judgment by default.

Dyer, Lee & Ellis, for plaintiffs.

Henry W. Bond, for intervenor.

THAYER, J., (*orally.*) In this case it appears that Lehman, assignee of Eagon, intervened in the case, and moved to quash an attachment writ issued against Eagon, which had been levied on the assigned effects, claiming that the goods were in the custody of the law, and not subject to levy under an attachment or execution. This motion was denied some days since, for reasons then given, but the court announced at the time that, if the assignee demanded the goods *in specie* for the purposes of his trust, and was unwilling to resort to his common-law or statutory remedy against the marshal for a wrongful levy, it would entertain an intervening petition in the case, on the authority of *Gumbel v. Pitkin*, 8 Sup. Ct. Rep. 379, (a case recently decided by the supreme court of the United States,) and try the question of the marshal's right to make the levy, and in the mean time would direct him to postpone the sale of the property *pendente lite*, which had then been ordered and advertised. Acting presumptively on this intimation, the assignee asked and obtained leave to file an intervening petition, and at his instance the sale of the property was postponed to await the determination of the marshal's right to make the levy in question. In other words, as the property could not be replevied from the marshal under the rule which obtains in the federal courts, the court aimed to give the assignee the full benefit of a writ of replevin by means of an intervening petition under the authority above cited. This right was accorded in view of the fact that the assignee would have had the right to reclaim the property by a writ of replevin, if the seizure had been made under process emanating from a state court.

It is now insisted that the intervening petition filed in pursuance of the leave so given is a statutory interplea under the Missouri statutes, and a default is asked against the plaintiffs in the attachment, because they have not answered the interplea, although the marshal has duly answered the intervention and asserted that he rightfully levied on the

property. It is, perhaps, sufficient to say that, if the claim interposed by the assignee, Lehman, under the circumstances stated, is a statutory interplea, there was no occasion to ask leave to file it, as the statute confers that right without leave, in this court as well as in the state courts, in attachment cases; and in that view there would have been no occasion for postponing the sale and holding the property at an expense to all parties, as an interplea could have been maintained as well whether the property was sold or not sold. Furthermore, if it is a statutory interplea, it is not regularly triable before the return-term of the main suit, to-wit, in September next, whereas the court, at the instance of the assignee, has already set the intervening petition for a hearing at this term, to the end that the property may be speedily restored to the assignee if the levy was wrongfully made. For the reasons stated, I am compelled to regard the claim now on file not as a statutory interplea, but as an intervention, such as is authorized by the case of *Gumbel v. Pitkin*, before mentioned. The intervening petition suggests, in effect, that the marshal has abused the process of the court by levying on the property of a third person not named in the writ; and, inasmuch as it cannot be taken from him by a writ of replevin, because he holds under color of legal process, and inasmuch as the claimant desires the property itself, the court undertakes to determine the question of the marshal's right to make the seizure under an intervening petition filed in the case, and in the mean time to withhold the property from sale, to the end that it may be restored *in specie* to the true owner. The power of the court to entertain such petition, and order the property to be restored, if the claim is supported by proof, springs from its right to control its own processes, and guard against any abuse of the same, as was held in the case before cited.

It goes without saying that the marshal is the only necessary party to a proceeding such as I have described. The attaching creditors may, if they like, answer and defend the intervention in the marshal's name, if he permits them to do so. It was perhaps unnecessary to require any formal answer to the intervening claim, but it was thought best to allow the marshal to answer the intervention, and justify his action by a pleading, if he saw fit to do so. Inasmuch as the claim is interposed in a suit brought by the attaching creditors, there can be very little doubt, I apprehend, that, whether they file an answer or not, the order finally made will be binding on them; and because it will be binding on them, they have the right, no doubt, to answer in their own behalf, and to be heard in support of the same, if they so elect. But if they do not elect to answer in their own name, the court will not compel them to do so. The marshal has assumed to levy on property in the possession of the assignee. The assignee insists that the levy was wrongfully made, and that the property should be restored. The controversy, therefore, in this proceeding is primarily between the marshal and the assignee.

I have examined all the cases cited bearing on the question of pleading and practice when a statutory interplea is filed, but for reasons which are apparent from what has been before said, I consider them in-

applicable to the case in hand, even if it be conceded that they decide all that is claimed for them by the assignee's counsel. This is a summary proceeding, calculated to restore the property *in specie* to the assignee, and at once, if it has been taken from his possession by an abuse of the process of this court. The motion for a default against the plaintiffs in the attachment is therefore overruled.

I will add that it is suggested by counsel in the case that, inasmuch as the marshal summons jurors in this court, it is erroneous to frame an issue against the marshal for trial before a jury which he has summoned. The attention of counsel is called to the fact that jurors in this court, as in the state court, are drawn by lot, and that, if the assignee had brought a suit of replevin against the sheriff of the city of St. Louis, the case would have been tried before a jury summoned by the sheriff of the city in the same manner that he is compelled in this court to try the issue before a jury summoned by the marshal. There is no merit in that suggestion.

JONES *et al.* v. LAMAR *et al.*

(Circuit Court, S. D. Georgia, W. D. April 20, 1888.)

1. EXECUTORS AND ADMINISTRATORS—ACTIONS AGAINST—BILL FOR RENEWAL OF MORTGAGE—JURISDICTION—PARTIES.

A. sold land to B., having given a prior mortgage to C. B. died. A. and C. filed a bill against the administratrix of B. to "authorize" her to take up the mortgage, and give a new mortgage therefor. The bill and answer were filed, and the verdict and decree granting the prayer rendered on the same day. The children and heirs of B. were not parties or represented. It did not appear that A. was unable to pay off his mortgage. *Held*, that the court had no jurisdiction to authorize such a proceeding, and as to the mortgage in the hands of A., who had become the owner by assignment, it was null and void as to the children.

2. SAME—POWERS OVER REAL ESTATE.

Under the laws of Georgia, realty descends directly to the heirs, subject to be administered by the legal representative for the payment of debts of the estate, and the purposes of distribution only.

3. SAME—CONSTRUCTION OF STATUTES.

Statutes giving administrators power over realty are in derogation of the common law, and must be strictly construed; and the administratrix is not the legal representative of the heirs when acting without the scope of her limited powers.

4. SAME—POWER TO SELL AND INCUMBER REAL ESTATE.

Under the laws of Georgia an administratrix is not authorized to dispose of the real estate of her intestate at private sale, nor to create any incumbrance on the estate by note, mortgage, or otherwise.

5. SAME—EQUITY JURISDICTION.

Under the laws of Georgia, equity cannot interfere with the regular administration of estates, except upon application of the representative for construction and direction; for marshaling the assets; or upon application of any person interested in the estate, where there is danger of loss or other injury to his interest.

6. SAME.

In the absence of statutory authority the equity courts of Georgia have no power to authorize an administratrix to incumber the estate of her intestate by a mortgage, or to change the priority and dignity of debts against the estate.

7. SAME—AUTHORITY TO COMPROMISE.

The authorization of an administrator to compromise contested and doubtful claims against the estate is no warrant for illegal transactions in the process and result of the settlement.

8. SAME—PERSONAL LIABILITY—EXECUTION OF NEGOTIABLE PAPER.

If an administratrix make, indorse, or accept negotiable paper, she is, *prima facie*, liable individually, even if she signed as administratrix, and the estate is not bound, and in this case a *prima facie* case is made against her as to her individual interest which she is called upon to meet.

9. MORTGAGES—PAYMENT—ASSIGNMENT.

When a mortgage debt is paid by one in equity bound to pay it; an assignment of it to him upon payment operates as a discharge, and he will not in a court of equity be allowed to hold it as a subsisting incumbrance, and such court will look through the entire transaction, and fix the duty of payment where it belongs.

(*Syllabus by the Court.*)

In Equity.

Evarts, Choate & Beaman, George A. Mercer, and Henry R. Jackson, for complainants.

Lawton & Cunningham, Chisholm & Erwin, and F. G. Du Bignon, for defendants.

SPEER, J. Harriet Cazenove Jones and Frank Cazenove Jones, citizens of New York, as administrators with the will annexed of Gazaway B. Lamar, have brought their bill against Caroline A. Lamar, Eliza A. Cunningham, Jane C. Cunningham, Caro N. Du Bignon, Georgia G. Lamar, and Mary L. Lamar, citizens of Georgia, and aver as follows: On the 14th of January, 1861, Gazaway B. Lamar gave to the Bank of the Republic of New York his bond and mortgage for \$164,000, payable to himself as president of the Bank of the Republic. The mortgage created a lien upon certain real property then owned by the mortgagor. This realty was situated in the city of Savannah, and was known as "Lamar's Wharves, Press, Warehouse," etc. On the 31st day of December, 1863, Gazaway B. Lamar conveyed to Charles A. L. Lamar certain lands in the city of Savannah, including the property covered by this mortgage to the Bank of the Republic, and it is charged that the purchaser, Charles Lamar, bought with knowledge of the mortgage, and remained in possession of the property until his death, without satisfying the same. Charles Lamar departed this life April 16, 1865, intestate, and his widow, Caroline A. Lamar, was appointed administratrix upon his estate the 6th of November, 1865, and as such administratrix became possessed of the land covered by the mortgage to the Bank of the Republic, and subsequently conveyed by Gazaway B. Lamar to her intestate. On the 10th day of May, 1866, the Bank of the Republic obtained a judgment of foreclosure of the mortgage, and on the 3d day of January, 1867, the *fi. fa.* was issued thereupon and was levied upon the mortgaged premises. On the 10th day of January thereafter, Mrs. Lamar, as administratrix, interposed a claim to the land as the property of her husband's estate. While the claim was pending, the Bank of the Republic, then the National Bank of the Republic of New York, and Gazaway B. Lamar, as parties complainant, brought a bill in equity against Caroline A. Lamar

as administratrix, in the superior court of Chatham county, proposing to compromise with the estate she represented the mortgage indebtedness of Gazaway B. Lamar to the Bank of the Republic, which constituted a lien upon the lands bought by C. A. L. Lamar from Gazaway B. Lamar. This bill was filed March 6, 1868. The bill here on trial alleges that the answer of the administratrix to the bill in Chatham superior court was sworn to March 6, 1868, and was duly filed; that the issues raised were submitted to a jury, and that the jury found that Charles A. L. Lamar received the deeds to the land with full notice of the previous mortgage of Gazaway B. Lamar to the Bank of the Republic; and that the lands were liable upon that mortgage for \$82,000, with interest from January 14, 1861, and costs; and that it would be to the benefit of the estate to compound the indebtedness by the payment of \$80,000, with interest from February 21, 1868, and to secure the same to the National Bank of the Republic of New York by the execution of the mortgage now sought to be enforced. On March 6, 1868, a decree was entered upon the verdict, which provided that Caroline A. Lamar, as administratrix, should execute and deliver a bond and mortgage for \$80,000 to the Bank of the Republic, and upon the delivery of such new bond and mortgage the old bond and mortgage should be delivered up to be canceled. She did this as directed, and on the 17th day of March, 1868, executed and delivered to the National Bank of the Republic of New York a bond and mortgage for \$160,000, conditioned for the payment of \$80,000, with interest from February 21, 1868; the principal to be paid in equal annual installments of \$8,000 each. The mortgage embraced the lots and wharves in the city of Savannah, bounded on the north by the Savannah river, east by the lot of the Hydraulic Cotton-Press, south by a street, and west by Willinik's lot, and also the lots lying south of the same and having eastern boundary, and all those lands lying east and south of the same, containing 75 acres, more or less, except a certain flour-mill, and the lot on which it is erected. A copy of the bond and mortgage is attached. Upon the execution and delivery of the new bond and mortgage, the old bond and mortgage were surrendered by the said Bank of the Republic of New York, and the new bond and mortgage were duly placed upon record in the county of Chatham. The bill does not state to whom the old bond and mortgage were surrendered.

The bill now at issue further alleges that on the 7th day of May, 1874, the new bond and mortgage were, for value received, duly assigned to Gazaway B. Lamar, which assignment is also of record in Chatham county, and a copy of which is attached. Gazaway B. Lamar continued owner, it is alleged in his own right, of the bond and mortgage up to the time of his death, which occurred in the city and state of New York on the 5th day of October, 1874. He died testate, and the complainants were appointed administrators with the will annexed. By virtue of this administration they acquired possession of the bond and mortgage, and became charged with the duty of collecting the same. On the 7th day of September, 1881, Caroline A. Lamar, as administratrix, sold 13.77 acres of the land covered by the mortgage, and received therefor the price of \$13,770, and

on the 17th of September thereafter, sold three acres and a fraction, and received \$5,000, making the sum of \$18,770. This was done by authority of the Ordinary of Chatham county. The administratrix has never paid or accounted for any portion of the proceeds of these sales. On the 5th day of July, 1882, Caroline A. Lamar, as administratrix, petitioned the ordinary of Chatham county for a discharge from her trust, upon the ground that she had fully and faithfully administered said estate up to the final settlement; and on the 10th day of January, 1883, was discharged, the bond and mortgage remaining unpaid. Pending the discharge, on the 27th day of July, 1882, the heirs and distributees of the estate of Charles A. L. Lamar, who are the parties defendant to this bill, entered into a family arrangement, and agreed with each other that the estate should be kept together undivided, to be held by them as tenants in common, each heir to own her undivided portion,—that is to say, the widow, Caroline A. Lamar, one undivided one-fifth interest of the whole, and each child one undivided part of the remaining four-fifths, all of which will more fully appear by reference to the agreement, a copy of which is attached.

The complainants aver that they were residents of New York, and had no knowledge of the discharge of the administratrix or the family agreement, and they protest that they should have no effect on complainants' rights, as the representatives of the estate of Gazaway B. Lamar; that Caroline A. Lamar is accountable to them for the proceeds of the mortgaged land that went into her hands; and that, if she distributed the proceeds to the heirs at law, each one is accountable for the proportion of said proceeds so received, and if the lands should fail to produce a sufficient amount to satisfy the demand, attorney's fees, commissions, charges, and costs, that the several parties defendant will be liable and bound to contribute from the assets and property of the estate received by them, outside of the property covered by the mortgage, sufficient sums and amounts to pay off any deficiency, and to make good the entire amount due on the bond and mortgage. That amount is the principal sum of \$64,019.88, besides interest. The prayer is for the foreclosure of the mortgage, and that the lands be subjected to the lien thereof, and that Caroline A. Lamar be held to account for the proceeds of all the lands embraced in said mortgage, and that the other defendants, to-wit, Elizabeth A. Cunningham, Jane C. Cunningham, Caro N. Du Bignon, Georgia G. Lamar, and Mary S. Lamar, may be held to account for any portion of the proceeds paid to or received by them; and that they may be compelled to contribute such sums as may be necessary to supply any deficiency after sale on foreclosure, and to pay the full amount due on the bond and mortgage; that after the sale of the mortgaged premises execution may issue for the collection of any balance, and for general relief. The bill waives discovery. On the ——— day of February, 1888, the cause came on for final hearing. Plaintiff introduced the letters of administration of the complainant, and tendered the bond and mortgage of Caroline A. Lamar, as administratrix, sought to be foreclosed. This was objected to upon the ground that the administratrix

had no authority to create a lien of this character upon the estate in her hands. In reply to this objection the complainants offered a certified copy of the bill filed in the superior court of Chatham county, Ga., and the decree rendered thereon, heretofore referred to. The bill was brought by the National Bank of the Republic and Gazaway B. Lamar against Caroline Lamar, as administratrix of Charles A. L. Lamar. It alleges the facts with reference to the execution by Gazaway B. Lamar of the original mortgage to the Bank of the Republic, substantially as hereinbefore set forth; the foreclosure, attempted sale, and interposition of claim by the administratrix. It further alleged that the lien of the National Bank of the Republic was valid against the property, and that, while Caroline A. Lamar interposed her claim to the mortgaged property under a deed of warranty from Gazaway B. Lamar to her intestate, Charles A. L. Lamar, that Charles A. L. Lamar had distinct notice of the existence of the mortgage, and accepted the conveyance with the incumbrance upon the property. The bill further alleged that "in a spirit of fairness and conciliation they [complainants] have proposed to the said Caroline A. Lamar, administratrix, etc., to discharge said estate and the mortgaged property from any other claim of the National Bank of the Republic, on the payment by the administratrix of the sum of \$80,000, or when such sum should be secured by bond and mortgage on the real estate and improvements hereinbefore described, and on all the lands formerly owned by Gazaway B. Lamar, and by him conveyed to Charles A. L. Lamar" by the deed of warranty aforesaid. And, further, the bill of 1868 continued: "G. B. Lamar has offered, and does now offer, to said administratrix that when said sum of \$80,000 is paid, or secured to be paid, out of the said estate of C. A. L. Lamar, so that said sum of \$80,000 can be credited on the bond of the said G. B. Lamar to the National Bank of the Republic, the estate of C. A. L. Lamar shall be credited with the said sum of \$80,000, on account of any claims of the said G. B. Lamar against said estate of C. A. L. Lamar, which your orator, G. B. Lamar, proposes, that the said mortgaged property hereinbefore described, together with the other lands to be also mortgaged, shall be thenceforth discharged and free from the payment of any claims whatever, present or future, of the said G. B. Lamar, and also from any judgments that may hereafter be obtained by the said G. B. Lamar against said estate." The bill recites that Mrs. Lamar, as administratrix, refused and declined to comply with this "reasonable request and offer," "at times pretending that although the proposition made by your orators to release the property of the said estate of C. A. L. Lamar, on the terms hereinbefore set forth, was fair and beneficial to said estate, yet the said Caroline A. Lamar, as such administratrix, has no authority to accede to the same, and to bind said estate by executing a bond and mortgage as in the manner aforesaid." The bill charges that she did have authority to "compound said claim," and to execute the bond and mortgage. The prayer of the bill is that Mrs. Lamar may full, true, direct, and perfect answers make to all and singular the matters and things stated; that the mortgaged property may be decreed sub-

ject to the debt due to the National Bank of the Republic; and that the said Caroline A. Lamar may be authorized and empowered by the order and decree of this honorable court to execute a bond with a mortgage on the wharves and press and warehouse and appurtenances, which shall bind said estate to the National Bank of the Republic; and that complainants may have such further release in the premises as the nature of the case may require. The bill is signed by the solicitors for the complainants. It does not appear to be sworn to. To this bill Mrs. Lamar, as administratrix, filed an answer in which she "admits the proposition for compromise on the part of the complainants, as set forth in the bill." She does not expressly admit in her answer that Charles A. L. Lamar was indebted to Gazaway B. Lamar.

The verdict of the special jury in the state court finds that Charles A. L. Lamar received the original conveyance from Gazaway B. Lamar with full notice of the previous mortgage; and further finds that the amount for which the said property is liable under the said mortgage is \$82,000, with interest from the 14th day of January, 1861; and the foreclosure of said mortgage; and that it will be for the benefit of the said Charles A. L. Lamar that the said debt be compounded by the payment by said estate of the sum of \$80,000, with interest from the 21st day of February, 1868, or the securing of the same to the said National Bank of the Republic by bond and mortgage, as suggested in the said bill of complaint, and upon the terms and conditions therein set forth. The decree thereupon ordered that Caroline A. Lamar, as administratrix, is authorized to compound the amount due to the said National Bank of the Republic on the mortgage referred to, by making and delivering to the said National Bank of the Republic, as administratrix as aforesaid, the bond for the penal sum of \$160,000, conditioned to be void upon the payment of the sum of \$80,000, with interest from the 21st day of February, 1868, and specified the manner in which the payment should be made; and the said mortgage shall have and constitute a valid lien upon said property. And it is further ordered, adjudged, and decreed that the said National Bank of the Republic shall, upon the making and delivering of the said bond and mortgage, deliver up to the said Caroline A. Lamar, as administratrix as aforesaid, to be canceled, the mortgage of the said Gazaway B. Lamar to the said National Bank of the Republic, mentioned in the said bill of complaint; and she shall also return to the office of the clerk of this court the execution taken out in pursuance of the foreclosure of that mortgage, and there to remain forever inoperative, and of no effect; and shall also give credit to the said Gazaway B. Lamar for the said sum of \$80,000 as paid on the said 21st day of February, 1868, on the execution issued in pursuance of the judgment rendered against him for the debt which was secured by his said mortgage; the said execution to remain of force for the unpaid residue of the said debt. It is further ordered and decreed that the said Gazaway B. Lamar shall give credit to the estate of the said Charles A. L. Lamar for the sum of \$80,000 paid on the said 21st day of February, 1868, upon any and all claims he may have or assert against said estate, and that the said prop-

erty mortgaged by the said Caroline A. Lamar, administratrix as aforesaid, by authority of this decree, shall be henceforth entirely released from all liability for any debt which may hereafter be found due for any cause existing at or before the date of this decree from the said estate to the said Gazaway B. Lamar, and that no judgment which may hereafter be rendered in favour of the said Gazaway B. Lamar against said estate upon any claim set up by him for any cause existing at or before the date of this decree shall bind or have any lien on the said property. This decree was signed by W. B. FLEMING, Judge, March 6, 1868. It will be observed that this verdict and decree make no finding or adjudication that any indebtedness existed from Charles A. L. Lamar to Gazaway B. Lamar prior to the death of Charles A. L. Lamar. It will be observed also that the entire arrangement was consummated on the eleventh day after the bill was filed. It was further offered in evidence that Gazaway B. Lamar, on the ——— day of ———, 1868, gave a credit by an entry in a book of accounts which he kept of his business, to the estate of Charles A. L. Lamar. This credit was for \$80,000, and it stated that it was intended to be in compliance with the decree. It was, however, not given on any account, and while it was admissible *per se*, because offered by the plaintiffs, and because it was against Gazaway B. Lamar's interest to make it, and was therefore an admission, it stands alone, and is not a part of a general account against the estate of C. A. L. Lamar. Certain letters between the parties were put in evidence; also an account for what purported to be a formal account of Gazaway B. Lamar against Caroline A. Lamar, as administratrix of C. A. L. Lamar. The amount and the items of this account are so indefinite that it is impossible to say how much was the demand. The books of Gazaway B. Lamar were tendered in evidence, but they were excluded by the court upon the ground that they were not admissible as books of account under the laws of the state of Georgia upon that subject; not being books of original entry, and otherwise objectionable.

When the evidence for complainants had closed, the defendants demurred to the same, and moved to dismiss the bill, upon the grounds, generally, as follows: That Gazaway B. Lamar had sold the mortgaged premises to Charles A. L. Lamar, with warranty of title, and was therefore bound to protect the land against existing incumbrances. When it was found that an unrecorded mortgage had been executed by Gazaway B. Lamar, prior to the sale to his son, and it was sought to enforce the same by the mortgagee, the National Bank of the Republic, he, Gazaway B. Lamar, was in equity bound to discharge the lien of the mortgage, and free the lands which he had sold, and the title which he had warranted. Mrs. Caroline A. Lamar, as administratrix, was compelled to execute the new mortgage now sought to be enforced, in order to save the premises to the estate. Had Gazaway B. Lamar done his duty towards the estate this would have been unnecessary, for he was primarily bound to pay the debt secured by the mortgage; nevertheless, she was compelled to give the mortgage. Thereafter, when Gazaway B. Lamar bought the mortgage for his own pur-

pose, he did no more than he should have done in the beginning; and he cannot now be heard to enforce this mortgage against the estate of his son, C. A. L. Lamar. The complainants reply to this proposition by stating that Charles A. L. Lamar was largely indebted to Gazaway B. Lamar, and that when Caroline A. Lamar, as administratrix, executed the mortgage upon the property of the estate, she was fully recompensed by the credit of \$80,000 which Gazaway B. Lamar gave upon his accounts against Charles A. L. Lamar, and by the other propositions of the bill. The estate, the complainants insisted, was bound to pay Gazaway B. Lamar a large sum; how much, or for what, does not appear in the evidence. The defendants insist, in effect, that the complainants are bound to make out by proof these demands against the estate, and, having failed to do so, the bill must be dismissed. The fundamental inquiry of the court in the determination of this weighty and interesting controversy has been this: Was the decree of the superior court of Chatham county by which Caroline A. Lamar, administratrix, was authorized to create this incumbrance upon the assets of the estate in her hands, within the jurisdictional power of a court of equity of the state of Georgia? A judgment of a court without jurisdiction of the person or the subject-matter, or void for any other cause, is a nullity, and may be so held in any court when it becomes material to the interest of the parties to consider it. Code Ga. § 3594. It is insisted with great earnestness that the superior court of Chatham county was satisfied by the proofs, and the hearing before it, that this arrangement for the creation of complainant's mortgage was for the best interest of the estate; that the court here is bound to presume a regular trial, on orderly and legitimate hearing and determination. Now, it is perfectly evident from the entire transaction that it was effected *sub silentio*; that no evidence was presented that the estate of C. A. L. Lamar was indebted to Gazaway B. Lamar, and the decree does not mention any liability of the former to the latter. It could not have been a regular or legal hearing where, as it was insisted, the issue was made upon the bill and answer, and submitted with proofs to the jury. The bill was filed on the 6th of March. With astonishing promptitude the answer of Mrs. Lamar was filed on the same day. On the same day the verdict was taken. On the same day the decree was signed. The whole proceeding was had in term, and not at chambers, and thus in 24 hours, by this most unusual and extraordinary proceeding, the lands of this estate were saddled with a debt of \$80,000, and yet, under the law and the practice in equity, the bill must have been brought and pending for more than six months before this decree could have been legally taken. And in addition to these startling facts it appears from the record that the court was not advised that there were children whose interests were being signed away, and no effort was made to protect them, even by the appointment of a guardian *ad litem*. Their names were not mentioned in the proceeding. It was, then, one of those consent proceedings which are sometimes advised by counsel because of their entire confidence in the parties concerned; and, there being nothing in serious dispute suggesting careful

investigation, the law is not so diligently regarded as it should be. But had there been a most earnest and careful controversy and investigation, still if the chancellor who authorized the administratrix to create this huge mortgage upon the estate she represented acted without jurisdiction, it would be the duty of this court, if the interest of the parties required it, so to hold; and this is not only the statute law of Georgia, but it is well settled by the most carefully considered decisions of the most elevated tribunals. In the case of *Williamson v. Berry*, 8 How. 540, a case in some respects very similar to that under consideration, the doctrine was announced by the supreme court of the United States in this language:

"We concur that neither orders nor decrees in chancery can be reviewed as a whole in a collateral way; but it is an equally well settled rule in jurisprudence that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter by a party claiming the benefit of such proceedings. The rule prevails whether the decree or judgment has been in a court of admiralty, chancery, ecclesiastical court, or court of common law; and whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of states."

Many years after this case was decided it was cited with approval; and the precise language here quoted was repeated as a clear and satisfactory enunciation of the law. *Thompson v. Whitman*, 18 Wall. 468. This doctrine has been uniformly adhered to by the courts of the United States since 1794, and its embodiment in the carefully worded statutes of Georgia evinces not only its certainty, but its importance. It is no reply to this proposition to refer to the eminence of the tribunal which has exercised unwarrantable power. In *Williamson v. Berry*, *supra*, it had been the illustrious KENT, then chancellor in the equity courts of New York, who had authorized a trustee to convey real estate for the benefit of the *cestui que trust*, but the supreme court did not hesitate to declare null and void his action. So lofty a body as the congress of the United States assumed jurisdiction by a trial before its bar to interfere with the rights of a person, and the courts (in *Kilbourn v. Thompson*, 103 U. S. 168) declared that in its judgment it exceeded its jurisdiction, and held its representative responsible in damages for his action carrying into effect the wrong. These are extreme cases, but they show the familiarity and the necessity of the rule that, where a tribunal is without jurisdiction, its action is utterly void, and unavailable for any purpose.

Now, did the superior court of Chatham county have jurisdiction to grant the decree upon which the complainants rely? It is well, perhaps, again to analyze this record. The parties to the bill upon which the decree was granted were the National Bank of the Republic and Gazaway B. Lamar, as complainants, and Caroline A. Lamar, the administratrix of Charles A. L. Lamar, as defendant. The statement of the bill was that Gazaway B. Lamar had sold to Charles A. L. Lamar the lands in controversy, and warranted their title, but that Charles A. L. Lamar had bought with notice of an unrecorded mortgage upon the lands, which had been previously executed by Gazaway B. Lamar to the Bank of the Republic

that Mrs. Lamar, administratrix, when this mortgage had been foreclosed and levied upon the lands, after the death of her husband, interposed a claim under the deed of Gazaway B. Lamar; and the bill further stated that it would be better for the estate of Charles A. L. Lamar for the administratrix to assume the debt to the extent of \$80,000, which Gazaway B. Lamar owed to the Bank of the Republic, and which the bill stated was a lien upon the lands, and to give the mortgage therefor, upon which complainants are now asking a decree for foreclosure here. In consideration of this, Gazaway B. Lamar undertook to pay the remainder of his debt, and further, as proposed by the terms of his bill, as follows: "G. B. Lamar has offered, and does now offer, to said administratrix that, when said sum of \$80,000 is paid or secured to be paid out of said estate of C. A. L. Lamar, so that said sum of \$80,000 can be credited on the bond of the said G. B. Lamar to the National Bank of the Republic, the estate of C. A. L. Lamar shall be credited with the said sum of \$80,000 on account of any claims of the said G. B. Lamar against said estate of said C. A. L. Lamar, which claim your orator, G. B. Lamar, avers to be much greater than the said sum of \$80,000." It is proper to observe at this point that this is the only specification of the alleged claims of G. B. Lamar against the estate of C. A. L. Lamar. Neither the amount nor the items are mentioned in the bill or the decree, and the only other reference to them to be found is in the following proposition, also made by Gazaway B. Lamar as a consideration for the execution of the mortgage by the administratrix: "And further, that the said mortgaged property hereinbefore described, together with the other land to be also mortgaged, shall be thenceforth—that is to say, on the execution of the mortgage by Mrs. Lamar, administratrix—discharged and free from the payment of any claim whatever, present or future, of the said G. B. Lamar against the said estate." The charge of the bill is that Mrs. Lamar refused this proposition, notwithstanding the "spirit of conciliation and fairness in which it was made;" one of her pretenses, as the bill said, being that she has no authority to compound the claim. The complainants, insisting that they are without redress at law, pray (1) that the administratrix may answer the bill; (2) that the mortgaged property be decreed to be subject to the debt; and (3) that the administratrix be authorized and empowered to accept the compromise. It is difficult to understand the ground upon which discovery was sought by this bill, or what was the discovery sought. There is literally not an averment in the bill upon which a court of equity would compel discovery, nor is it alleged that discovery is necessary. It is difficult to perceive any legal reason why the bill was filed. It cannot be seriously insisted that such was its object. It does not allege that Gazaway B. Lamar was insolvent, nor that the estate of C. A. L. Lamar was insolvent. In the absence of these allegations, why did not Gazaway B. Lamar pay off the debt to the Bank of the Republic, which he had contracted, and which the bank was seeking to enforce, and thus relieve the land he had sold his son from the lien of the mortgage? If he held claims against the estate of his son, why did he not present those claims in the

manner usual in the administration and settlement of estates? Mrs. Lamar, as administratrix, and Charles A. L. Lamar, her intestate, were neither of them parties to the mortgage which the bill seeks to declare a lien upon the land. It was no debt of the estate. It is true that the bill prayed that the land of the estate be decreed subject to this lien, but that was altogether superfluous, and apparently was an attempt to give jurisdiction in equity, in plain violation of the law of the state. The bill charged that a proceeding to subject the land was already pending in a court of law; that the land has been levied on, and a claim interposed, and the court of law having jurisdiction of that question, the court of equity had no power to interfere with it. The Code of Georgia, which controls this Georgia case, is plain and simple in its mandate upon that topic: "Where law and equity have concurrent jurisdiction, the court first taking it will retain it, unless good reason be shown to the contrary." Code Ga. § 3096. This is the statute law, and repeated decisions of the supreme court of the state enforce its provisions. It is not even pretended that there is any reason to transfer this controversy from a court of law to a court of equity, and the ground of equity jurisdiction is narrowed down to the attempt to have the court authorize Mrs. Lamar, as administratrix, to pay off a large portion of the debt of Gazaway B. Lamar to the Bank of the Republic from the estate of her husband, and to receive in lieu of the property so conveyed the intangible promise of credit upon demands against the estate, which are certainly involved in a degree of uncertainty and obscurity painful to the mind seeking an equitable adjustment of this controversy. It is true that in her answer the administratrix practically consents to the exercise of this jurisdiction, although she neither admits that the estate is indebted to G. B. Lamar, nor that the mortgage is a lien upon its lands. But a party by consent, express or implied, cannot give jurisdiction to the court of the person or subject-matter of the suit, so far as the rights of third persons are concerned. Code, § 3460. Now, the third persons whose interest it is important to consider are the co-defendants of the administratrix here, —the children of herself and Charles A. L. Lamar. They were not parties to these extraordinary proceedings to authorize the administratrix to incur the lands of the estate. It cannot be doubted that they were necessary parties, even had the court jurisdiction of the subject-matter. Now, it was sought to convey the real property of the estate by this mortgage; and realty, in Georgia, descends directly to the heirs, subject, however, to be administered by the legal representative for the payment of the debts or the purposes of distribution. Code, § 2246. The powers granted to an administratrix over the lands are thus carefully guarded. She has title sufficient for purposes of distribution; she has title sufficient for purposes of paying the debts of the estate, but not the debts of other persons. This doctrine is reiterated in section 2483 of the Code, which reads: "Upon the death of the owner of any estate in realty, which estate survives him, the title vests immediately in his heirs at law. The title to all other property owned by him vests in the administrator of the estate for the benefit of his heirs and creditors." Code, § 2483. It follows,

then, that the title to their distributive shares of this land vested in the children of Charles A. L. Lamar *eo instanti* of the death of their father; and, since it cannot be pretended that they are parties, they are in no sense affected by this decree, unless there is merit in the contention of counsel that in this matter they were so far represented by the administratrix that they are bound by her action. As a general rule, it is true, as contended by the complainants' solicitors, that in a suit against the executor or administrator the legatees and heirs are not necessary parties. *Beall v. Blake*, 16 Ga. 136; *Calv. Parties*, 20. It will be found, however, that in every case where the administrator is held to represent the heirs, with the effect of defeating their complaints at his action, or their rights of which he has disposed, it was in some matter, or for some purpose, where he was in discharge of a duty imposed upon him by the law. In the case just cited it was an attempt to recover a residuary legacy; and for the purpose of distribution, as already stated, the title was in the executor. In *Redd v. Davis*, 59 Ga. 822, cited upon the same point, there was simply a proceeding to amend the judgment against the executor as such, and to subject property liable for a debt of the estate, and, as has been said, the title was in the executor to pay debts; but even here the supreme court decides *dubitante*, page 28. In *Barclay v. Kinsey*, 72 Ga. 725,—a case in which the court has unquestionably strained the doctrine to the last extremity of tension,—it was a question of the settlement of accounts, and the payment of debts due by the estate, the purpose for which the title to the land was vested in the administrator. In *Dean v. Cotton-Press Co.*, 64 Ga. 670, the sale was made to pay a debt and to make distribution required by the will. This was a question of distribution, and was so held. In *Anseley v. Pace*, 68 Ga. 402, there was a petition for leave to sell realty to pay debts, and for the support of the *cestuis que trustent*. Besides, a guardian *ad litem* was appointed for the minor children, who accepted the trust, and had full knowledge of all the facts. In *Wilkinson v. Tuggle*, 61 Ga. 381, Chief Justice WARNER, in delivering the decision of the court, held that the land was legally sold by the executor in the due course of administration; and this executor was a party to the bill, and answered it, and admitted that there had been a legal and valid sale of the land by him, as such executor; and that, being so, said the chief justice, "he represented the legatees and devisees under the will of his testator, so far as to legally dispose of his estate in the due course of the administration thereof." This comprises every case on this point cited upon the brief of the learned solicitor for the complainant, and no case has been found where it has been held that the heirs at law are divested of their title by a proceeding to which they were not parties, and where the administrator has acted not only without the sanction of the law, but clearly beyond the powers imposed for his representative duties, unless the rights of *bona fide* purchasers have accrued. Here the persons seeking advantage by the illegal proceeding are parties to it, and are, of course, chargeable with knowledge of all its wrong and illegality. It is safe to say in this case that for every purpose for which title to realty is vested in the administratrix, no matter

how irregular may have been her action, the heirs are bound by it; but as to matters as to which the administratrix had no right in law to act, the heirs are not represented by her, and not parties thereto, and can repudiate her action whenever it becomes necessary to do so.

Now, it is true that administrators have authority to compromise all contested or doubtful claims for or against the estate or wards they represent. Code, § 2882. But the compromise must be effected in a legal manner. An administratrix would have no power to sell the land of the estate at private sale in order to compromise a contested or doubtful claim against it; nor would the administratrix have any power to mortgage the lands of the estate for any such purpose; nor could a court of equity, under the statute law of Georgia, give that power. She has literally no power to create any incumbrance on the estate by note, mortgage, or otherwise. *McFarlin v. Stinson*, 56 Ga. 396; *Gaudy v. Babbitt*, Id. 640; *Harrison v. McClelland*, 57 Ga. 531; 1 Jones, Mortg. § 102. In the first case cited, Chief Justice WARNER declares:

"It is undoubtedly true that the assets of the estate of the deceased testator are liable for the payment of the debts and obligations contracted by him in his life-time, but it would be a novel and dangerous doctrine to hold that the assets of a deceased testator could be liable for the contracts made by his executor after his death; so dangerous to the assets of deceased testators that the law does not allow it to be done. An administrator or executor can only bind himself by his contract,—he cannot bind the estates of the deceased; therefore, if he make, indorse, or accept negotiable paper, he will be held personally liable, even if he adds to his own name the name of his office, signing a note, for example, 'A., as Executor of B.,' for this would be deemed only a part of his description, or will be rejected as surplusage. 1 Pars. Bills & N. 161; *Lovelace v. Smith*, 39 Ga. 130."

What, therefore, the administratrix could not do for herself, as such, she may not legally consent for the court to do for her. The court, like the administratrix, is but the creature of the law.

In *Harrison v. McClelland*, 57 Ga. 531, the administratrix gave a promissory note, signed, "MAHALABLE A. EDWARDS, Administratrix." She was sued upon it as an individual, and not in her representative character, and she pleaded that it was given for a renewal of old notes made by her intestate during his life. The jury found for the defendant. Error was assigned upon this charge of the court:

"If you believe from the evidence that the note sued on was made and signed by the defendant as administratrix upon the estate of John P. Edwards, and for no new consideration, but in lieu of certain other notes due by her intestate during his life-time, and payable before June 1, 1865, then she is liable, if liable at all, on such note, as administratrix, and there can be no recovery against the defendant in her individual capacity."

This was held error. This case seems precisely in point; the attitude of the parties being changed. To make it fit precisely, suppose that Mrs. Lamar was sued individually upon this mortgage, and she pleaded that she signed the mortgage as administratrix, in consideration of a credit of \$80,000 on other notes due by her husband to Gazaway B. Lamar. This case is authority for holding that the plea would be overruled, and

that the estate would be held harmless, while she would be liable as an individual. A reason for this rule would exist in the fact that had the administratrix the power to create mortgages or other debts of high dignity, she could defeat the statute of Georgia which regulates the priority and dignity of debts against an estate. By creating a mortgage upon a debt which was an open account she might often, to defeat all creditors save one, favor one creditor at the expense of another. There are many other obvious reasons which make the vigorous language of Chief Justice WARNER applicable to this clearly illegal exercise of authority. The mortgage which Mrs. Lamar executed was nothing more than a payment by her on the debt of Gazaway B. Lamar,—a payment by the creation of a lien upon property which she had no right to incumber for that purpose, or for any purpose. In order to authorize this, the court of chancery of Chatham county interfered with the regular course of administration, which would have been for Gazaway B. Lamar to present his claim against the estate, if he had a claim, and have it determined upon its merits. To authorize her, then, to create a mortgage to pay off his debt to third persons upon the promise that he would give credit on claims which he did not present or identify, was as distinct an interference with the regular process of administration as could be well imagined. It is in the teeth of the plain provision of the law of Georgia: "Equity will not interfere with the regular administration of estates except upon the application of the representative, either (1) for construction and direction; (2) for marshaling the assets; or (3) upon the application of any person interested in the estate, where there is danger of loss or other injury to his interest." Code, § 3144. Upon what part of this statute does this bill have its footing? In the first place, it is not brought by the representative, but against her. It is not for construction and direction, nor for marshaling the assets; nor is it upon application of any person interested in the estate, where there is danger of loss or other injury to his interest. There is no such allegation, either by Gazaway B. Lamar, or by the Bank of the Republic, who are the complainants. Gazaway B. Lamar, so far from apprehending any loss to his interest, had never presented an account against the estate; and, however great may have been his apprehensions, he said nothing about them in the bill so as to justify the interference of a court of equity; and this was necessary to jurisdiction, if it otherwise had been proper to take it. For what equitable purpose, then, does this bill exist? It is in violation of several important rules of practice and principle in the equity jurisprudence of the courts of the state of Georgia: (1) As we have seen, it attempts to transfer to a court of equity a controversy pending in the court of law; (2) it attempts to convey, by the execution of bond and mortgage, the realty of persons who are not parties to it, and whose interests are not represented by a party; (3) it is an unlawful interference with the regular administration of the estate, in contravention of law, and without excuse; (4) it is an attempt to authorize the administratrix to do that which the law declares she may not do, and which the court had no power to permit or justify. It was conceived for an illegal purpose, and it is like

nothing in the heavens or the earth, or the waters under the earth. Its consideration was in part upon an intangible and vague account against her husband, which to this moment, so far as the proceedings here indicate, has never been ascertained, even to the extent of stating its items or amount; and the further consideration of a release of the administratrix from liability to pay a debt which not she or her husband, but Gazaway B. Lamar, was bound to pay, and which, so far as this proceeding discloses, he was entirely competent to pay. The authorization of an administrator to compromise contested and doubtful claims has no such latitude as will justify such a proceeding; nor has a court of equity a power to traffic with the lands of minor children, and disarrange the whole process of administration to accommodate the necessities of a third person, whose only apparent connection with the estate was an immense liability for his breach of warranty.

The bill served simply to gloss over this illegal transaction,—to give to it the illusive sanction of an alleged decree,—and it had no other possible utility. It was perfectly plain that if Mrs. Lamar, as administratrix, had no right in law to mortgage the lands of the estate, the action of the court could not give her the right. If she had the right to incumber the land, the action of the court could not make that right stronger. The decree, then, may be considered as eliminated from the case. It is, in the language of the law, “a mere nullity.” It is true, however, that had the superior court of Chatham county, upon the averments of this bill, the jurisdiction to grant the decree upon which plaintiff relies, the result of this litigation would not be materially different. The substantial question here is: Has Gazaway B. Lamar the right to recover on the mortgage executed by the administratrix, and upon which this suit is brought? It is certainly a matter of grave consequence that he proposed, in his bill, to relieve the mortgaged premises from all demands of his, present and future, if Mrs. Lamar would execute the mortgage; and that the decree, in pursuance of this proposition, distinctly provided that the land so mortgaged “shall be henceforth entirely released from all liability for any debt which may be hereafter found due for any cause existing at or before the date of the decree from the estate to the said Gazaway B. Lamar.” But this decision is not placed upon that ground. It is insisted that he has the same right to recover on this mortgage that the Bank of the Republic would have had. The court does not so understand the law. When a mortgage debt is paid by one who is bound to pay it, an assignment of it to him upon payment operates as a discharge, and he will not be allowed to hold it as a subsisting incumbrance, as the payment was in pursuance of his agreement and his duty, and may be regarded as made with the mortgagor’s money. 1 Jones, Mortg. § 864; *Brown v. Lapham*, 3 Cush. 554; *Wadsworth v. Williams*, 100 Mass. 126; *Mickles v. Dillaye*, 17 N. Y. 80; *Farwell v. Cotting*, 8 Allen, 211; *Gould v. Day*, 94 U. S. 413; 1 Jones, Mortg. 867; *Mickles v. Townsend*, 18 N. Y. 575; *Collins v. Torry*, 7 Johns. 278; *Ryer v. Gass*, 130 Mass. 227; *Lappen v. Gill*, 129 Mass. 349; 2 Devl. Deeds, §§ 1345, 1346; *Burnham v. Dorr*, 72 Me. 198; 2 Pom. Eq. Jur. p. 253, § 796, and note

to 254. Now, when Gazaway B. Lamar sold these lands to his son, this mortgage, which had previously been made by the vendor, and which had not been recorded, was in the hands of the Bank of the Republic, of which he, Gazaway B. Lamar, was the president. His deed to his son makes no mention of the mortgage, but, on the contrary, as we have seen, was an absolute deed of warranty. It is true that he alleged his son bought with notice of mortgage. Conceding this to be true, it was none the less the duty of Gazaway B. Lamar to pay the amount due upon it. *Clay v. Banks*, 71 Ga. 383; *Brown v. Lapham*, 3 Cush. 554; *Gould v. Day*, 94 U. S. 413. It was his debt and not his son's. *Rawle*, Cov. par. 88; *Dunn v. White*, 1 Ala. 645; *Harlow v. Thomas*, 15 Pick. 70; *Ladd v. Noyes*, 137 Mass. 151; *Redwine v. Brown*, 10 Ga. 311; *Leary v. Durham*, 4 Ga. 597; *Burk v. Burk*, 64 Ga. 632; Code, § 2703; *Refeld v. Woodfolk*, 22 How. 326; *Van Rensselaer v. Kearney*, 11 How. 321; *Drury v. Improvement Co.*, 18 Allen, 171; *Belmont v. Coman*, 22 N. Y. 438; *Strong v. Convers*, 8 Allen, 557; *Elliott v. Sackett*, 108 U. S. 132, 2 Sup. Ct. Rep. 375; *Daves v. Jackson*, 9 Mass. 490. After the death of his son, Charles A. L. Lamar, and when the mortgage was levied upon the land, it was still the duty of Gazaway B. Lamar to pay it, or, if not, to respond upon his covenant of warranty to the estate. Suppose it be conceded, however, that he could not pay it,—and there is no allegation in the bill that would justify this conclusion, and that Mrs. Lamar was compelled to pay it, in order to preserve the *corpus* of the estate,—Gazaway B. Lamar was still bound to recompense her. She did pay a large part of it by the execution of the new mortgage to the Bank of the Republic, and by subsequent payments thereon; and when Gazaway B. Lamar subsequently, had that mortgage assigned by the bank to him, he did nothing more than he ought to have done in the beginning towards the estate of his son; and when, through his administrators, he now seeks to enforce the mortgage against the lands of his son, he is met by the conclusive proposition that as he was bound to pay it in the first instance, when he took an assignment of it to himself, it was discharged. It is insisted that he was no party to the last mortgage sued on, and therefore he had the right to purchase it. The court will, however, look clear through the transaction, and locate the original equity depending upon his liability upon the first mortgage, for which this is merely the substitute. But it is insisted that G. B. Lamar had large claims against the estate of C. A. L. Lamar, which amounted to more than the liability upon his deed of warranty. This may and may not be true; the court has not been informed by any legal evidence upon that subject. It does not appear what was the amount of these claims, what was their consideration, or that they were binding upon the estate. Certainly there was no claim which would authorize a court of equity to direct the administratrix to execute a mortgage for the benefit of Gazaway B. Lamar; and, if his claims against the estate are ever so valid, they must rest upon their merit and their dignity. Were this transaction permissible, the result may be that the open accounts of Gazaway B. Lamar have been transformed into a mortgage upon the lands belonging to the heirs, and thus

the regular process of administration, as we have seen, totally disarranged for his benefit, and in violation of law.

The conclusion of the court is that the Bank of the Republic could not have enforced this mortgage, signed by the administratrix, against the lands of the estate, the property of the heirs of C. A. L. Lamar, other than the administratrix. That the administratrix herself would be personally liable to the bank upon the mortgage is undeniable. A *prima facie* case is made against her when her mortgage with her signature and seal is introduced. This case she is now called upon to meet. When Gazaway B. Lamar bought the mortgage, he was under obligation, so far as the estate and all the heirs, including the administratrix, were concerned, to pay it off, unless he had equities against the estate which would be a sufficient reply, in whole or in part, to this obligation. It does not appear from the evidence now before the court that he had any demand against the heirs not parties to this bill which a court of equity could recognize in the settlement of the controversy. It is true, however, that the administratrix, without authority as such to do so, recognized the existence of indefinite claims against the estate. She did this impliedly in her answer. But this in the opinion of the court was not sufficient in itself. The silence of the answer upon a topic to which the bill by its terms does not seek discovery is insufficient to warrant a decree for a specific amount. . *Young v. Grundy*, 6 Cranch, 51; *Brown v. Pierce*, 7 Wall. 211; Story, Eq. Pl. § 852; *Walker v. Walker*, 3 Kelly, 309; 1 Daniell, Ch. Pr. 837; *Van Rensselaer v. Kurney*, 11 How. 325; 3 Pom. Eq. Jur. § 1418, and note. She did this more explicitly in her subsequent letters, which are in evidence, but not as to amounts. What the claims of Gazaway B. Lamar were,—what was their consideration or amount,—the court is entirely unadvised. That they were not claims which would justify the execution of this mortgage as affecting the children or their interests is undeniable, and the bill must be dismissed as to the heirs, to-wit, Eliza A. Cunningham, Jane C. Cunningham, Caro N. Du Bignon, Georgia G. Lamar, and Mary L. Lamar; but the court is of the opinion that sufficient evidence has been adduced to order a decree against the distributive share of Caroline A. Lamar, or, if she now desires to reply to the plaintiffs' evidence, to require that an account be taken between Caroline A. Lamar and her distributive share in the estate of Charles A. L. Lamar, and the estate of Gazaway B. Lamar, in order that it may be made to appear to the court whether the administrators of Gazaway B. Lamar have such equities against that distributive share as will justify a decree of foreclosure against her interest.

A decree will be framed in accordance with this decision, and the matters indicated as remaining unsettled will, if necessary, be referred to the master to take an account, and to report his finding to the court.

KNOCHE v. CHICAGO, M. & ST. P. RY. CO.

*(Circuit Court, W. D. Missouri, W. D. January 18, 1888.)***ARBITRATION AND AWARD—AGREEMENTS TO SUBMIT—VALIDITY.**

An agreement by an owner of land sought to be taken by a railway company for right of way, to submit to arbitration the amount of compensation to be paid therefor, is valid, and binding upon the parties.

At Law. On motion to strike out portion of defendant's answer.

This is an action brought by John P. Knoche against the Chicago, Milwaukee & St. Paul Railway Company, for damages for the taking of his land by defendant company for right of way purposes, under an alleged verbal agreement to which plaintiff consented to the entry upon defendant's promise to pay the damages sustained. The answer, among other defenses, alleged:

"And for a second and further amended answer to said petition the defendant admits that it is a corporation created and existing under and by virtue of the laws of the state of Wisconsin, and that it is engaged in the construction of a bridge across the Missouri river, and of a railroad, as in said petition alleged. Defendant further says that it has constructed its road across the portion of said plaintiff's land described in said petition, but that it has so constructed the same by and with the full knowledge and consent of plaintiff; that in the summer of 1886, and after said defendant had located its line over plaintiff's land, and set the stakes designating the same, one William B. Chamberlain and one J. W. Nier called upon plaintiff in regard to the right of way for defendant's railway across the said lands of said plaintiff; showed him where said line of defendant's road was located through said land; that the construction of said road over the same would enhance the value of the balance of plaintiff's land not taken for right of way, and would be of advantage and benefit to him; that said plaintiff thereupon agreed with said Chamberlain and said Nier that defendant might proceed with the construction of its railroad across his said lands; and that, if he could not agree in the future with defendant upon the proper and just compensation to be paid for said land taken for right of way, and the damages, if any, to the balance of his land not taken, he would select a person and defendant might select another to fix upon the amount of such compensation and damages, and, in case they failed to agree, that he would then resort to the courts to fix the same; that, relying upon said agreement, defendant proceeded to and did lay down its tracks over and across the land of plaintiff, and took and appropriated a strip of land one hundred feet in width across and through the same for a right of way for its railroad; that said plaintiff, in disregard and violation of his said agreement, never sought to agree with defendant upon the proper compensation and damages to be paid him by reason of the taking of said land for right of way, and has never selected or asked defendant to select an arbitrator to fix said amount, although said defendant has always been ready and willing to endeavor to agree with plaintiff upon the amount to be so paid, or, in case of failure to agree, to select an arbitrator who, together with one to be so selected by said plaintiff, might fix said amount."

The plaintiff, by consent, orally moved to strike out the foregoing portion of the answer.

Brown, Chapman & Brown, for plaintiff.

C. W. Blair and Pratt, McCrary, Ferry & Hagerman, for defendant.

THAYER, J., (*orally*.) A clause in a contract agreeing generally to submit all of the questions that might arise under the contract to arbitration, is void; the same being against public policy, because the effect is to oust the jurisdiction of the courts. Nevertheless, it is competent for parties to stipulate in a contract that the value of property contracted to be sold or delivered shall be ascertained or fixed by arbitrators chosen for such purpose. Such special stipulations in contracts, relating to the manner in which the value of things forming the subject-matter of the contract shall be ascertained, are valid. In the latter class of cases, parties cannot ignore the stipulation and sue on the contract; they must at least make an effort to have the value of the thing ascertained according to the stipulations in the agreement, before suit can be maintained. Motion overruled.

CAHN v. KENSLEK.

(Circuit Court, W. D. Missouri, W. D. March 16, 1898.)

NEW TRIAL—OBJECTIONS TO VERDICT.

Although facts are presented upon the trial which would have induced the court to sustain defendant's demurrer setting up that the contract sued on was contrary to the constitution and laws of the state, the jury having found a question of fact against defendant, which the supreme court might hold sufficient to render him liable, and all the facts being preserved in the record by bill of exceptions, the motion for a new trial will be overruled.

At Law. On motion for new trial.

Graves & Aull and G. G. Vest, for plaintiff.

Warner, Dean & Hagerman, for defendant.

BREWER, J. In overruling defendant's application for a new trial, I feel constrained to make these observations: The petition alleges that plaintiff and defendant jointly paid and delivered to the lottery company the sum of \$10, for which amount the said company then and there duly delivered to defendant two tickets, and further that one of the tickets drew the capital prize, and thereafter the defendant received the money. To that petition the defendant answered, and for a second defense averred that both parties were citizens and residents of Missouri at the time of the transaction, and that the constitution and laws of Missouri prohibited dealing in lottery tickets. To that defense the plaintiff demurred, and, after argument, I sustained the demurrer. While the exact facts as they were afterwards developed on the trial may have been stated by counsel, yet the question was considered by me as though each of the parties had in fact paid one-half of the money,—five dollars,—and the point of my decision was that if each party had paid one-half, they jointly owned the tickets, and whatever might be received on those tickets; and if either got possession of the whole proceeds, the

other could recover his share. On the trial these facts were developed. The plaintiff's testimony was, not that he had paid his five dollars, but that he had agreed to; and up to the time of the drawing, and the receipt of the money by defendant, plaintiff had never paid a cent. It is true, according to his theory of the case,—a theory found by the jury to have been the truth,—he had promised to pay. Now, I am frank to say that, upon these facts, I am very doubtful whether the law is with the plaintiff. Dealing in lottery tickets is prohibited by the laws and constitution of the state. Could an executory contract be enforced? Put the question in this light: Suppose no money had been drawn, could defendant have maintained an action to recover the five dollars which plaintiff had promised to pay? If that promise was void as in contravention of the laws, can it be that his promise, thus void, made him a joint owner? I very much doubt it, and I have been embarrassed as to what course I ought to pursue. I think that if on the argument of the demurrer I had understood the facts as I do now, I should have ruled against the plaintiff; but a long trial has been had, a question of fact has been settled against the defendant, and it may be that the supreme court will hold that this promise to pay was equivalent to payment; if so, the judgment ought to be as it is, and with some hesitation I have concluded to let the judgment stand, and overrule the defendant's application for a new trial; for, the facts all being upon the record, having been duly preserved by bill of exceptions, the defendant can obtain a final opinion from the supreme court. If in his favor, it will end the case, and so it will if it be against him. I felt that this explanation was due to myself. The order will be that the application for a new trial is overruled.

CHAMBERS v. UPTON *et al.*

(Circuit Court, W. D. Michigan, S. D. March 14, 1888.)

1. MALICIOUS PROSECUTION—LIBELING VESSEL—DAMAGES.

The D. and the S., engaged in freight and passenger traffic between the Lake Michigan ports of Manistee and Frankfort, were rivals in business. Certain stockholders in the S., learning that a chattel mortgage on the D. was overdue, entered into a combination with one Z. to get the D. out of the way by buying in the mortgage and foreclosing it, said stockholders to pay, each, his proportion of the purchase money. This was done, and the vessel seized the next night at her dock in Frankfort, by the sheriff and the nominal assignee of the mortgage, and sent with Z. to Milwaukee, to report to M., a proctor there to whom said stockholders claimed to have shown a copy of the mortgage, and who advised them that they might do what they afterwards did. The mortgage, which was made and filed in Michigan, was in the usual form, and contained no provisions as to foreclosure, except that notice thereof was to be given for at least 30 days by publication in a Ludington, Mich., paper, a provision which was not complied with. The day after the D.'s arrival in Milwaukee, Z., by M., libeled her in behalf of his father for a half interest. The D. was thereby detained 80 days, at the end of which time the libel was

dismissed. In the mean time her owner had paid the mortgage, with costs. About nine months before the seizure, Chambers, the owner, had libeled the D. for the purpose of establishing his title as sole owner in the district court in Michigan, and that libel subsequently was sustained, and decree was entered for libellant as prayed. It was admitted by defendants that the object of the removal to Milwaukee was to foreclose there, but the stockholders and assignee of the mortgage, who, with Z., were made defendants, denied any knowledge of Z.'s purpose to libel the vessel there. *Held*, (1) that the removal of the D. was tortious, and that her owner was entitled to recover against all the defendants the value of the use of the vessel during the time she was detained, for his own time and reasonable personal expenses in recovering her, and the expense of putting her in the same state of repair as when she was taken, but not for his costs in prosecuting the libel filed in Michigan; (2) that none of the defendants except Z. were liable for the reasonable costs and expenses of counsel in the Milwaukee suit, unless they authorized or ratified that proceeding; and (3) that exemplary damages could not be recovered, unless the seizure was wanton and malicious.

2. SAME—ADVICE OF COUNSEL.

Advice of counsel is no defense to an action for a tort committed on property, unless the advice was taken and followed in good faith; and not then except as to exemplary damages.¹

3. DAMAGES—ACTION AGAINST SEVERAL DEFENDANTS—JOINT JUDGMENTS.

Where there are several defendants, and the items of damages are distinct, a joint judgment cannot be entered, unless each defendant is liable to the full extent of the verdict.

At Law.

The plaintiff was the owner of a steam-vessel known as the "John D. Dewar," and the boat was engaged in passenger and freight traffic between the Lake Michigan ports of Manistee and Frankfort. On the 13th day of September, 1886, a suit was begun in the United States district court for the Western district of Michigan, Southern division, by Chambers against defendant Zimmerman; Chambers claiming title as sole owner to the vessel, and Zimmerman claiming in behalf of John W. Zimmerman, his father, one-half interest. Final decree in favor of Chambers was made in that case January 4, 1888. All of the defendants except Zimmerman were stockholders in a steam-vessel known as the "George D. Sanford," engaged in the same business, and on the same route; and the boats were rivals in business. In July, 1887, a chattel mortgage existed on the Dewar for about \$3,700, (the same indebtedness being also secured by a real-estate mortgage;) and she was worth from \$7,000 to \$9,000. About \$375 was past due on the chattel mortgage, which was held by Charles G. Wing, as executor of a will. Defendant Zimmerman and the other defendants entered into a combination to get the Dewar out of the way by means of this chattel mortgage. They met together, and each defendant except Zimmerman paid in a proportion of the money necessary to purchase the chattel mortgage, and on the 28th day of June, 1887, they procured Wing to assign the chat-

¹As to how far the defendant, in an action for malicious prosecution, may rely upon the advice of counsel, and as to the necessity of stating to counsel all the facts in the case upon which advice is sought, see *Railroad Co. v. Hunt*, (Vt.) 7 Atl. Rep. 377, and note; *Walker v. Camp*, (Iowa,) 27 N. W. Rep. 800, and note; *Moore v. Railroad Co.*, (Minn.) 88 N. W. Rep. 334; *Fire Ass'n v. Flemming*, (Ga.) 8 S. E. Rep. 420; *Mesher v. Iddings*, (Iowa,) 34 N. W. Rep. 338; *Donnelly v. Daggett*, (Mass.) 14 N. E. Rep. 161; *Glasgow v. Owen*, (Tex.) 6 S. W. Rep. 537; *Manning v. Finn*, (Neb.) 37 N. W. Rep. 314.

tel mortgage to defendant Upton, paying him the face thereof. On the next night, June 29, 1887, the vessel was at her dock in Frankfort, and Upton, with the sheriff and others, seized her, forcible dispossessioning the captain and crew employed by Chambers, claiming to do so by virtue of the chattel mortgage, and sent defendant Zimmerman with her to Milwaukee, to report for orders to G. C. Markham, their proctor. Markham was also Zimmerman's proctor in the litigation about his claim to one-half of the vessel. Defendants claimed to have exhibited to Markham, as their counsel, a copy of this chattel mortgage before they bought it, and that he advised them they could with it seize and take the vessel to Milwaukee, and there foreclose the mortgage; and they claimed this course was taken pursuant to such advice. The vessel arrived at Milwaukee June 30th, and the next day the defendant Zimmerman, by Markham, as proctor, filed a libel in the United States district court at Milwaukee in favor of his father, John W. Zimmerman, making claim for John W. to one-half interest in the vessel, in the same manner as in the suit in the United States court in Michigan, and praying that the vessel be sold and the proceeds divided. Process issued, and the vessel was seized on this claim; and the vessel was thus detained about 30 days at Milwaukee, when the libel was dismissed by the court. In the mean time Chambers paid the chattel mortgage and the costs, and immediately put the vessel back on the route. Chambers claimed to have tendered the full amount of the chattel mortgage the second day after the seizure, and that Upton replied by referring him to Markham, his counsel. The defendants admitted that they intended to foreclose the mortgage, and get title to the boat; but all except Zimmerman disclaimed any knowledge as to the purpose to file the libel in Milwaukee. Plaintiff claimed that the libel was a part of the whole scheme, and was contemplated by all the defendants before the seizure. No proceedings were taken to foreclose the mortgage further than already stated. The chattel mortgage was in the usual form; and as to power of foreclosure nothing was said, except that it was written in it that in case of foreclosure notice of at least 30 days should be given by publication in a newspaper published at Ludington, Mich. The mortgage was made and filed in Michigan. Plaintiff claimed damages for loss of good-will, and injury to trade; for loss of use of vessel for 30 days; for expense of keeping crew employed 30 days waiting the recovery of the boat; for damage to the vessel by want of care and exposure while away; for expenses in procuring the restoration of the vessel; for attorneys' fees paid in the matter; for loss of time; and for exemplary damages.

Godwin, Adsit & Dunham, for plaintiff.

Fletcher & Wanty, for defendants.

SEVERENS, J., (*charging jury*.) The verdict in this case must be for the plaintiff. The question for you is, what amount of damages should the plaintiff recover. He is entitled to recover—*First*. For the value of the use of the vessel during the time she was detained from him. *Second*. For his own time and personal expenses in recovering the posses-

sion of the vessel. *Third.* The expense of putting the vessel in the same state of repair as when she was taken. *Fourth.* The costs and expenses of the employment of counsel in the suit at Milwaukee in maintaining his right to the vessel. This would include the services of counsel in Michigan, so far as such services were involved in the Milwaukee case; but it would not include the costs or expenses of counsel in the suit then pending in the admiralty court of this district. The costs and expenses mentioned in all the foregoing points must have been reasonable.

But the right of the plaintiff to recover for the items stated in this last head is qualified by the condition that that suit was authorized or ratified by the defendants; so that the proposition with the qualification is this: the plaintiff is entitled to recover for his counsel fees and expenses of the suit in Milwaukee, incurred by him necessarily in his defense there; provided you find that the defendants, all of them, either authorized the proceeding taken in that suit, expressly, or by such general delegation of authority to Markham as would justify him in instituting it; or, if they did not do this, that, after such proceeding was taken, they approved it; for such subsequent ratification is in law equivalent to a previous authorization to do what was done. The defendants must each be shown to be liable to the extent of the verdict in order that a joint judgment should be rendered against them. The items of damages already mentioned are those recoverable on general grounds. And these are the only damages that should be included, unless you also find that the seizure was wanton and malicious. But such an element does not exist where the defendant does what he does in a *bona fide* belief that he has a legal right to do what he does. The defendants had a right to buy this mortgage, and to take rightful steps to foreclose it. It would not, in such case, matter that they expected to buy in the boat, or that some other person would, and so take the boat out of competition with the other boat. They had legal right to do this. But they had no right to seize the vessel for the purpose of taking her to Milwaukee, and there foreclosing the mortgage. This was unlawful, and they are liable for the consequences already stated. If they took the boat to Milwaukee believing they might lawfully do so, they are not liable beyond such consequences. But if you find that they did not found their action upon such belief, but, with indifference to the legal right, they acted with a wanton and malicious purpose to get the boat out of the way, by any available means, whether right or wrong, then you may also add to the actual damages such sum as you think fit to impose by way of example, upon your own impression of the circumstances of aggravation. Upon this question of the good faith of the defendants, it is pertinent to know whether they acted upon the advice of counsel. When a man lays his business before a reputable attorney, gives him the facts, and then proceeds in good faith in accordance with the advice he gets, malice cannot be charged against him; and while he may be liable to actual damages, if the advice was bad, he is not liable to exemplary damages. The question on this head turns on this point: Did the defendants commit

the acts complained of in the actual belief that they could lawfully do so? or did they act in wanton disregard of the lawful rights of the plaintiff?

There was a verdict for plaintiff for \$2,000.

OLSON v. FLAVEL.

(District Court, D. Oregon. March 31, 1888.)

SHIPPING—LIABILITY OF OWNER OR VESSEL FOR TORT—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

Contributory negligence is not a bar to a suit in admiralty for damages on account of a personal injury; and, where the fault which caused the same is concurrent or mutual, the court will apportion the damages according to the equity and justice of the case.

Syllabus by the Court.

In Admiralty. Libel for damages.

John H. Woodward, for libellant.

C. E. S. Wood, for defendant.

DEADY, J. This suit is brought to recover damages for a personal injury suffered by the libellant while employed as mate on the steam-tug *Columbia*.

It appears from the pleadings and evidence that on January 8, 1887, the defendant was part owner of the tug *Columbia*, then engaged in towing vessels in and out of the *Columbia* river, when and for some time before the libellant was employed thereon as mate; that on said date, the *Columbia* came into Astoria from a cruise on the outside, and laid up at her wharf, when the master went ashore, and left the libellant with the aid of the two deckhands, to put a few tons of coal aboard, as usual, preparatory to the next trip.

In doing this, a gang plank about 18 inches wide was placed one end on the dock and the other in a sling over the deck of the tug, which was several feet below the dock, and stayed so as to keep it from swaying to either side. The coal was carried out on the plank in iron wheel-barrows and then dropped down the hatchway into the bunkers.

The libellant wheeled one of the barrows, the handles of which would work up and down three or four inches and cause the barrow to tip from side to side, and on one occasion the libellant thereby lost his balance and fell to the deck of the tug and broke his leg, in consequence of which he was laid up in the hospital, and rendered unable to work for a considerable period.

It was customary to coal this tug in this way, and the master, who was fully aware of the fact, did not interfere to prevent it, or make objection to it. There was also an iron chute on the dock, by means of which the coal could have been sent down into the hold through a man-hole in the deck, but that involved the further labor of moving it from where it fell, into the bunkers.

The defense is contributory negligence. In support of it there was an attempt to prove that the libelant was intoxicated at the time of the injury, which failed.

It was also contended that the libelant was not engaged in the performance of his duty as mate, when wheeling coal, and therefore the defendant is not liable for the injury thus sustained.

But in my judgment this proposition cannot be maintained. It may be that he might have stood by and seen the two men put the coal aboard without his help. But certainly he was not to blame for "lending a hand," if he was mate. In rendering physical aid in so simple a matter as this, he need not have failed in his special duty, which was the oversight of the business.

And this, I think, is particularly so in the case of a small vessel like the Columbia, with a crew, outside of the engine-room and pilot-house, of only three persons,—the libelant and two deckhands; the former of whom had come up from the latter position while in the same employ.

The third point made in support of this defense is that the mate had the choice of methods in putting the coal on board, and that, having adopted the dangerous one, he was guilty of negligence, and must bear the consequence. In other words, he might have used the chute, or constructed a gangway of greater width out of the plank at his service; on the wharf; and, if the barrows were out of order, he might have informed the master of the fact, so that others could have been obtained.

Some barrows were exhibited in court, such as the evidence on the part of the defendant tended to prove were used on the occasion, and it was claimed that they were in good condition. They were not broken in any way, and did not appear to be out of order, but on taking hold of them and pressing the handles in an opposite direction, they moved up and down about four inches, owing apparently to the large diameter of the loop at the end of them, in which the axles turned.

I do not think there was any negligence on the part of the libelant in the use of these barrows, so far as their condition is concerned. But I do think it was dangerous to use them on this narrow plank at so great a distance above the deck. It is true, it was a much more expeditious way of getting the coal into place, than by the chute, as it saved one handling of it, besides the wear and tear of the deck. And although, a wider way might have been made by the use of another plank, it would have been inconvenient to wheel a barrow on such a surface, with one plank rising and the other sinking under the foot of the wheeler and the wheel catching in the opening and closing gap between them. Perhaps this difficulty might have been partially avoided by laying down a third plank over the joint between the first two.

On the whole, my judgment is that the libelant is not blameless in this matter. He should have put the coal on with the chute or constructed a safer gangway to wheel on.

But the defendant is not without fault in the premises. This was the usual method of coaling the Columbia. The chute was used for special reasons in coaling other tugs belonging to the same management. The

master of the Columbia knew that she was usually coaled by means of these barrows and this plank; and that it was being so done on this occasion. He made no objection to the practice, or uttered any warning against it. In this, I think he was quite as culpable as the libellant.

The limbs and lives of seamen are to some extent, in the care and keeping of the superior skill and intelligence of the master, and he ought not to allow them to use unnecessarily dangerous or risky appliances or methods in the performance of their duties, without objection or warning.

Contributory negligence is considered a bar to an action for damages at common law. 2 Thomp. Neg. 1146. But a better rule is recognized in the admiralty. Where the negligence is concurrent, or both parties are in fault, courts of admiralty will apportion the damages or give or withhold them, in the exercise of a sound discretion, according to principles of equity and justice, considering all the circumstances of the case. *The Marianna Flora*, 11 Wheat. 54; *The Explorer*, 20 Fed. Rep. 135; *The Wanderer*, Id. 140; *The Max Morris*, 28 Fed. Rep. 881; *Ailes v. Packet Co.*, 21 Wall. 389.

It is true, that in *The Chandos*, 6 Sawy. 544, 4 Fed. Rep. 649, and *Holmes v. Railway Co.*, 6 Sawy. 262, 5 Fed. Rep. 523, it is assumed that in the case of personal injury, contributory negligence on the part of the libellant is a defense to a suit in admiralty for damages. But this question was not raised in these cases. It was not argued by counsel, or considered by the court. Neither was it material, as the court did not find there was any contributory negligence in the latter case on the part of the libellant's testate, and only decided, that if there was, it could not be taken advantage of, unless it was pleaded. In the former case it was found that the negligence of the libellant was the substantial cause of the injury, and therefore he could not recover damages for it.

This is the first time the question has been made in this court, and I feel justified, in the light of the authorities cited, to follow the leading of my own judgment, and hold that contributory negligence is not a bar to a suit in admiralty, for damages arising from a personal injury. For whatever may be said by the sages of the common law, about the difficulty in such cases of determining "whose wrong-doing weighed most in the compound that occasioned the mischief," it is not just to leave a seaman to suffer, without redress, all the consequences of an injury caused by the fault of his employers as well as his own.

In apportioning the damages, the fault of the seaman must not be overlooked; and the effect that should be given to it is suggested by the saying of Mr. Justice STORY in *The Marianna Flora*, *supra*: "A party who is *in delicto* ought to make a strong case to entitle himself to general relief." But for the allowance of special or partial relief the circumstances of the case are the only guide.

The libellant claims \$1,200 damages for the injury, and damages in the nature of wages from February 1st to the date of decree, at the rate of \$50 a month. The libellant was receiving \$50 a month on board when he was hurt, and was paid wages in full for January. The nature of the

injury sustained does not appear further than that his leg was fractured. There is no evidence as to the expense incurred in his cure, and it is understood that he was cared for in the Marine hospital without charge.

My judgment is that the libelant ought to be compensated for the loss of his time caused by the injury, and nothing more. The wages he was receiving, with board and lodging, indicate that his time was worth \$75 per month.

The libelant alleges that he was not yet able to work when he filed his libel, April 22, 1887, while it is averred in the answer that by the middle of April he was as able to work as before the injury. There is no other evidence on the subject.

I find that the time lost after January was two and two-thirds months. This, at the rate of \$75 a month, makes \$200, for which sum, and costs and disbursements, the libelant is entitled to a decree.

THE FRANK P. LEE.¹

INSURANCE CO. OF NORTH AMERICA v. THE FRANK P. LEE.

(Circuit Court, E. D. Pennsylvania. March 10, 1888.)

1. COLLISION—SCHEONERS.

The schooners A. and B. were sailing off Cape Cod, between 9 and 10 o'clock at night. Both vessels were heading W. by N., on their starboard tack, B. being a quarter to a half mile in the rear of A. The wind was coming from the N. N. W. There was from five to seven miles of navigable water between the vessels and the shore. B. changed her course about two points southward, and ran under A.'s stern. Soon after B. again changed her course to go about across A.'s bows, missed stays, and before getting off was struck, and sunk. No light was displayed from B.'s stern after passing A. *Held*, that B. was guilty of negligence, and that there could be no recovery against A.

2. SAME—LIGHTS AND SIGNALS—ABSENCE OF TORCH.

Failure to display a light or torch, required by the statutes, is negligence, if there is a possibility that a collision would have been avoided had the requirements of the statutes been observed.

Affirming 30 Fed. Rep. 277.

In Admiralty. On appeal from district court. 30 Fed. Rep. 277.

Charles Gibbons, Jr., and Morton P. Henry, for Insurance Company of North America.

Henry R. Edmunds, for Frank P. Lee.

MCKENNAN, J. The only real controversy here is in the collision case. The facts involved are so few, and they are so fully stated in the opinion of the learned judge of the district court, and that opinion deals so satisfactorily with the case, that both are adopted as the finding of facts and opinion of the court. Both libels are therefore dismissed, with costs.

¹Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

CHICAGO, B. & Q. RY. CO. v. BURLINGTON, C. R. & N. RY. CO. *et al.*

(Circuit Court, S. D. Iowa. March 23, 1888.

1. CARRIERS—COMMON CARRIERS—DUTY TO CONNECTING LINE—BOYCOTTS AND STRIKES—COURTS—FEDERAL JURISDICTION.

The duty imposed upon railroad companies in Iowa by the laws of that state and by the "interstate commerce act," (Act Cong. Feb. 4, 1887; St. at Large 1885-87, p. 379,) of receiving from connecting roads freight and passengers, is one which the federal courts sitting in that state will enforce by mandatory injunction where the injury resulting from its non-performance is continuing; and it is no defense to such relief that a strike of locomotive engineers and firemen has been ordered on plaintiff's road, and that if defendant's road should accept cars from the "boycotted" road its own men would be called out.

2. INJUNCTION—MANDATORY—GRANTING—NOTICE.

As to defendants to a bill who have not been served with notice, and who have not appeared, a mandatory injunction will not issue on motion, but "if there appears to be danger of irreparable injury from delay," within the meaning of Rev. St. U. S. § 718, a restraining order, to be served upon said defendants with notice of the time and place of hearing, will be granted.

In Equity. On motion for injunction.

Anderson & Davis, (Thomas Hedge, Jr., and Joseph G. Anderson, of counsel,) for complainants.

S. K. Tracy, for defendants.

LOVE, J. Whoever, in my opinion, in a legal proceeding considers a railway company as a corporation for mere pecuniary profit to the owners of the property, without taking into account their character as *quasi* public corporations having public duties to perform, takes a view of the subject altogether narrow and misleading.

It is one of the duties of government to provide and regulate public roads and highways. It is a duty of government because roads and highways are indispensable to society, and because individuals are incompetent to establish and control them. No government can rightfully delegate to individuals or corporations its high duties so far as to place them beyond its own power, supervision, and control. The collection of the public revenue is a duty of government. It has been sometimes delegated to individuals as farmers of the revenue, but no government could rightfully place the collection of the public revenue beyond its own supervision and control. It would be absurd to treat the collection of the public money by farmers of the revenue as a mere private business. They would, on the contrary, have committed to them a public business—a duty of the government, in which the whole people would have a vast interest. So it is with the railway service. It is a *quasi* public business. The building, equipping, and management of a railway is not strictly a private enterprise. It would not be authorized by the government solely for private profit. That could not be done within the law of eminent domain. The railway company, and all who are engaged in the building, equipping, repairing, and keeping open a railroad as a public highway are performing one of the great duties of the government. The govern-

ment for the time being commits to them for the benefit of the whole people a business—a public duty—in the performance of which the people have an interest which is simply incalculable. It is clearly the duty of the government in all its departments, within their respective spheres, to enforce, upon all persons engaged in a business which thus concerns the public welfare, the strict performance of their duty to the public. The stoppage of the running of a system of railways for weeks and months at a time must inevitably inflict enormous injury upon the great public, for whose convenience and use railways are authorized. By the non-operation of a railroad travel may be suspended; the merchant and manufacturer ruined for want of transportation; property of incalculable value laid up to perish by the way; whole communities deprived of their supplies of fuel and the other necessities of life,—in a word, mischiefs and sufferings may be inflicted upon the people which no words are adequate to express. Who may arbitrarily, in consideration of their own private wrongs or interests, inflict such enormous evils upon the very public by whose license and for whose benefit railways have been authorized and established? Certain classes of men for their own profit engage in a *quasi* public service. They conceive themselves to be wronged, and they proceed to redress their own private wrongs by inflicting incalculable injuries and sufferings upon whole communities of people. This they claim a right to do, not only by quitting the service in which they are employed, but by giving to their leaders the power to order off all other men in the same line of employment from the similar service in which they are engaged. They thus claim the power, by the arbitrary and uncontrollable will of a few leaders, to suspend the operation of a whole system of railways covering vast regions of country! In their view apparently no one is concerned in such a transaction but themselves and the railway company! The great public—the millions and tens of millions of people who may be injuriously affected by such irresponsible proceedings—are left out of view and wholly ignored. To redress the small wrongs of a few they inflict irreparable injuries upon the many.

It would seem that the government ought in some way to protect the public against the evils growing out of such a suspension of railroad transportation. But the remedy for the intolerable injuries which threaten the public, as well as the complainant, in that direction, must rest mainly with the legislative department. The power of the courts is extremely limited. The action at law for damages is clearly no remedy at all, and the power of a court of equity is mainly preventive. The power of a court of chancery to enforce the performance of positive duties is circumscribed within very narrow limits. Thus it cannot prevent the employees of a railway company from abandoning its service. However grievous may be the injury inflicted upon the railway company and the public by the sudden suspension of railway service over an entire system of railways, I see no remedy for it in the restraining power of equity. The court cannot prevent the railway employees from leaving their places, and it cannot compel them to return to work. But here a line must be drawn which the employees may not pass. If, having left the service of the

company, the men attempt in any way by threats, or force, or violence, or intimidation, or unlawful combinations, to interfere with the free will of other men who may be inclined to take their places, or with the property of the company, or with those who are in the management of its affairs, for the purpose of preventing the company from doing its duty to the public as common carriers, the court may undoubtedly interpose its power of granting injunctions to prevent intolerable mischief. Such injuries would be clearly irreparable. There would be no adequate remedy at law. Actions at law would, in such cases, be simply futile, and, even if effectual in particular cases, they would be so multitudinous that the remedy would be as bad as the injuries to be remedied. The employes may quit the service of the company, and give place to other men. But it is a service that must be performed, and it must not be obstructed; and so long as the employes remain in the service, they are, like other men, bound by their contracts. They have assumed by contract to assist in the performance of a *quasi* public service,—a service the non-performance of which may be ruinous to the public,—and it is a serious question whether they may not be compelled while remaining in the *quasi* public service of operating a railway to perform their duty. But, since the company has the power of discharge, equity would not interfere by injunction, except in a clear case of special necessity. I wish to be understood as giving at present no opinion upon this point.

In the next place, what disposition shall be made of the complainant's application for a mandatory injunction against the defendant company and its managing officers compelling them to perform their duty as required by the law of both congress and the state of Iowa? These defendants have appeared by counsel, and admitted the truth of the allegations of the bill, and they do not deny that they are required by law to receive and move the complainant's cars. They admit that they have refused to perform this duty, and they give as a reason for their refusal that, if they receive and haul the complainant's cars, their firemen and locomotive engineers will abandon their service, and leave the company without the means of operating their lines. There can, of course, be no doubt about the law of both the general and state governments requiring the defendant corporation to receive and move the complainant's cars, whether empty or loaded. The law of Iowa provides that it shall be the duty of any railway corporation to receive and transport the empty or loaded cars furnished by any connecting road to be delivered at any station or stations on the line of its road to be loaded or discharged, or reloaded and returned to the road so connecting. 1 McClain's Ann. St. p. 367, § 10.

The United States interstate commerce act¹ provides that every common carrier shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivery of property and passengers to and from their several lines, and those con-

¹Act Cong. Feb. 4, 1887; (St. at Large, 1885-87, p. 379.)

necting therewith, and shall not discriminate in their rates and charges between such connecting lines, but shall not be construed as requiring any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Now, the question is, what shall be obeyed,—the law of the land, or the order of the chiefs of the locomotive engineers? Shall a railway company refuse obedience to the express provisions of the statutory law because some of its employes threaten to quit its service, and thus stop the running of its trains? Shall the court presume that they will carry out such threats, and deny relief to the complainant upon that presumption? No temporary inconveniences to the defendant company, or the public whom it serves are, in my judgment, for one moment to be compared with the fatal consequences which must ensue from a precedent by which it would be established that a railway company may, in violation of the law of the land, refuse to receive and haul the cars of a connecting line, at the command of any irresponsible persons, or from its own belief and apprehension that its employes will leave its service, and stop the operation of its lines. Such an excuse as this is wholly inadmissible, and it must be set aside. If, in this case, the refusal of the defendant corporation to move the cars of the complainant be sustained, it will follow that, whenever in the future the locomotive engineers and firemen shall enter upon a struggle with any one road, all other corporations having connecting lines will, in violation of law, be warned not to interchange cars with the offending road, and compelled to obey the behests of their employes. Thus may the transportation of vast regions of country covered by connecting lines be controlled and paralyzed at the arbitrary will and pleasure of the Brotherhood of Locomotive Engineers. Indeed, it seems to-day to be by the grace of the leaders of this association that the various corporations owning the vast network of railways west of Chicago are permitted to operate their lines. The people of this vast region may at any moment be deprived, by the arbitrary fiat of the association in question, of all railroad facilities. Is this a power fit to be assumed and wielded by any set of irresponsible men under the sun?

There is another matter worthy of consideration by the defendant company. If it refuses to receive and move cars laden with goods or merchandise, will the company not be liable for any damages which may accrue to the owners and consignees of such shipments? Is it not the right of the citizen and owner of goods shipped to have their property received and transported by the defendant as a common carrier, and does not this right belong to the shipper, by both the common and statute law? Suppose the goods, being perishable, should go to destruction by the way; suppose they be ordered for a special purpose, and fail to reach the consignee in time; suppose by reason of the delay caused by the act of the defendant there should be a heavy decline in the market, would not the defendant company be liable to the owner and consignee in damages?

The injury complained of is clearly irreparable, except by the remedy now prayed for by the complainant. It is a continuing injury. I

may occur every day, and many times a day. This complainant is a common carrier, and cannot refuse to receive and carry goods destined to persons living or doing business upon the defendant's line. Yet the complainant must either refuse to receive such goods, and abandon all its business connected with the defendant's line, or receive them and allow them to accumulate upon its own tracks, or in warehouses at the place of connection between the two roads.

The mandatory injunction against the defendant company and its chief officers as prayed for will be granted, to continue in force till the next session of the court to be held at Keokuk on the 24th day of the present month, upon the complainant giving bond in the sum of \$5,000, to be approved by the clerk of the court. The clerk will approve the bond, and issue the writ. No temporary injunction can now be granted against the defendants who have not been served with notices, and who have not appeared, but the order is that the application for the same be set down for hearing on the same day, (March 24th,) at Keokuk, at 9 o'clock A. M., and that in the mean time a restraining order in accordance with the provisions of section 718, Rev. St. U. S., be issued and served upon said defendants, with notice of the time and place designated for the hearing. The clerk will issue the same in accordance with the order signed and filed herewith.

HAZARD *et al.* v. DILLON *et al.*

(*Obroult Court, S. D. New York. March 28, 1898.*)

1. TRUSTS—DUTY OF TRUSTEES—BILLS FOR ACCOUNTING—MISJOINDER OF CAUSES.

In a bill by the stockholders to compel the trustees of a company to account for the unpaid profits on their respective shares upon the completion of the trust, it is improper to join a complaint against the trustees to compel them to account for and pay over to one of the complainants certain dividends wrongfully paid by them to a third party upon his nominal and fraudulent ownership of stock, in which dividends the other complainants have no interest.

2. SAME—PARTIES—OF CORPORATIONS—STOCKHOLDERS.

To a bill by the stockholders against the trustees of a company to compel an accounting and distribution of the dividends and profits upon the completion of the trust, the real owner of shares obtained by fraud from the trustees by a nominal owner, is a proper party complainant, although such real owner has not complied with the trust agreement; the compliance by the nominal owner inuring to the benefit of such real owner.

3. SAME—ESTOPPEL OF TRUSTEE TO ALLEGE FRAUD.

A contract for the construction of a railroad was assigned in trust for a company, the trustees of which were also the directors of the railroad. *Held* that, in an action by the stockholders of the construction company to compel the trustees to account for the profits from such contract, the trustees could not assert that the contract was in fraud of the railroad, nor that the stockholders had paid no consideration for the contract, and that the railroad was not a necessary party.

4. SAME—LACHES OR LIMITATIONS—DEMURRER.

A bill by stockholders to compel the trustees of a corporation to account for the dividends and undistributed profits derived from the construction of a

railroad is not demurrable on the ground of laches or limitation where the bill fails to show on its face when the road was completed or when the right to final accounting accrued.

In Equity. On demurrer to bill.

Joseph H. Choate, for plaintiffs.

John F. Dillon and Artemas H. Holmes, for defendants.

SHIPMAN, J. This is a demurrer to a bill in equity. The complainants are Rowland Hazard and sundry other stockholders in the Credit Mobilier of America, a corporation which was created under the laws of the state of Pennsylvania, who bring the bill in behalf of themselves and all others who were stockholders in said corporation on October 15, 1867, and July 3, 1868, and who may elect to unite in the cause as complainants, and the said Credit Mobilier. The defendants are Sidney Dillon and divers others, who were either the trustees named in the hereinafter recited agreement, or the successors of said trustees, or their administrators or executors.

The averments of the bill are as follows: On August 16, 1867, a contract for the construction of certain portions of the railroad and telegraph line of the Union Pacific Railroad Company was entered into between that corporation and Oakes Ames. On October 15, 1867, a written agreement was made between said Ames of the first part, Thomas C. Durant, Oliver Ames, John B. Alley, Sidney Dillon, Cornelius S. Bushnell, Henry S. McComb, and Benjamin E. Bates of the second part, and the said Credit Mobilier of the third part, by which the said contract was assigned to the parties of the second part, upon, *inter alia*, the following conditions and trusts, viz.: That the parties of the second part should perform all the terms and conditions of the said contract so assigned, which were to have been performed by the said Ames, and that the avails and proceeds of said contract, after certain deductions for expenses, should be held by the parties of the second part for the use and benefit of the several persons holding and owning shares in the capital stock of the said Credit Mobilier of America on the day of the date of the contract, or their assigns, and for the use and benefit of the assignees of such holders who might comply with the provisions of the said contract. Said Bushnell and Durant were two of the three members of the executive committee of said railroad company, who had, on behalf of said company, executed the construction contract with Oakes Ames. On July 3, 1868, the agreement of October 15, 1867, was, by an agreement in writing, executed by all the parties to said first agreement, and by the then stockholders of the said Credit Mobilier, so far changed and modified that all the trusts in favor of the stockholders of the Credit Mobilier of America, and the assignee of stockholders thereof, were thereby transferred to and vested in the persons named in said last agreement, in the shares and proportions annexed to their respective names, said persons being all the stockholders of the Credit Mobilier. The individual complainants were then stockholders thereof, and now are beneficiaries un-

der said contract. At the date of each of said agreements, said Durant was the nominal owner of 5,658 shares of the capital stock of said Credit Mobilier Company, but in fact the same had been fraudulently acquired by him with the funds of said company, and said shares equitably belonged to the other stockholders of said company in proportion to their respective shares in its stock. Said trustees proceeded to act as such, and received large amounts of money and securities. The complainants and said Durant complied with the provisions of the agreement of October, 1867. All the work undertaken by said trustees to be performed has been completed, and the trustees have received, or ought to have received, from the railroad company all the sums payable for said work; and it is alleged that "nothing remains for said trustees to do but to account for and to pay over to the complainants and their co-beneficiaries under said agreements the dividends, profits, and sums to which they are equitably entitled." It is not alleged when the railroad was completed. No account of the proceeds and avails of said contracts has been rendered by said trustees, although they have been often requested to render such an account. Of the cash and other property which were received by the said trustees under and by virtue of the aforesaid agreement of October 15, 1867, some portions have been divided and distributed among the beneficiaries under said agreement, but of the exact amount of such distribution, the complainants are not advised. The residue of said property has not been distributed or otherwise accounted for, but the exact amount thereof the complainants are ignorant of; nor have the complainants knowledge of the amounts of, in cash or things of value, which were in all received by the said trustees under said contracts. They know that the amounts thus received were large, amounting to many millions of dollars. Demands have been made in behalf of the said beneficiaries upon some of the said trustees for an inspection of their books, but the demands have been refused. No account of the sums of money and of the earnings has been filed, nor have they rendered to the *cestuis que trustent* any statement of the said earnings, although requested so to do.

The bill further alleges that, although it was the duty of the trustees to execute the trust faithfully, they neglected to give proper attention to it, appointed improper and unsuitable agents, and that the losses by reason of their breaches of trust amount to \$10,000,000. The particular wrongful acts and neglects which are specified are the intrusting the supervision of the work to said Durant, who they knew was reckless, dishonest, and unfit to have the control of important financial interests. It is alleged that he actually conducted the business extravagantly and fraudulently; and thus through the negligence of the trustees, said Durant defrauded the complainants out of large sums.

On or about January 7, 1869, and February 1, 1870, the trustees transferred to said Durant, as dividends and profits upon the 5,658 shares of Credit Mobilier stock nominally standing in his name, 25,316 shares of the stock of the Union Pacific Railroad Company, and its income bonds to the amount of \$700,000, although they knew and had

notice that said dividends did not equitably belong to said Durant, and should not have been paid to him. In 1868, a bill in equity was filed in the supreme court of the state of Rhode Island by Isaac P. Hazard and others against said Durant and other trustees, praying that Durant should be enjoined from receiving or disposing of, and that the trustees should be enjoined from paying or delivering to him, any dividends or earnings which should be thereafter declared or paid upon said contract. The Credit Mobilier, the Union Pacific Railroad Company, Oliver Ames, John Duff, and said Durant appeared in said suit, and in August, 1868, an injunction *pendente lite* was granted and served upon them in accordance with the prayer of said bill. In December, 1882, a final decree was made in said suit that the said 5,658 shares of stock of the Credit Mobilier Company (and also 49 45-100 additional shares, making in all 5,707 45-100 shares) had been purchased by said Durant with the funds of said corporation, and were, in fact, its property, together with any dividends and profits which had accrued to him as the holder of said shares, and he was directed to deliver said shares and dividends to commissioners appointed to receive the same. No decree was rendered against the other defendants, because the only trustees who had been served with process had died during the pendency of the suit, without leaving any estate, or any executor or administrator, within the state of Rhode Island. Said Durant did not comply with said decree, but was, and continued to be until his death, insolvent. The bill then alleges sundry facts for the purpose of repelling any charge of laches in not having previously instituted a suit for the recovery of the dividends upon said 5,658 shares. The bill prays, *inter alia*, for an account of all the moneys or other things of value received under the aforesaid contracts, for a discovery of the manner in which said amounts of moneys or other things were disposed of, and of the residue which remains in the hands of any of the defendants; that the defendants may be charged with all the profits which they received or ought to have received under said contracts, and with the amount of all losses or damages sustained by the beneficiaries by reason of the negligence and improper conduct of the defendants and of their agents in said trust; for the payment to the complainants of the just proportion of the said avails and profits due upon the same stock of which said Durant was the nominal owner; and for the payment of the value of said 25,316 shares of Union Pacific Railroad Stock, and of said income bonds; and for the payment of such moneys, and the delivery of such stocks and bonds, as may be found to be due to the complainants.

The defendant Dillon has demurred to the bill: (1) For misjoinder of parties, in that the Credit Mobilier is improperly joined with the individual complainants. (2) For misjoinder of causes. (3) For want of equity in each and all of the complainants, and non-joinder of the Union Pacific Railroad Company. (a) The complainants show no consideration for, and no interest in, and no equity to enforce the contract of 1867 and 1868. (b) The contract itself is fraudulent, illegal, and void, and the complainants are *participes criminis*, not coming with clean hands,

or to enforce any meritorious equity. (4) Because the claim sought to be enforced is stale, and is barred by limitation and laches.

For the sake of convenience, I shall consider the questions raised by the demurrer in a different order.

1. The alleged misjoinder of causes of action. It plainly appears that the bill has two objects—*First*, to compel the defendants to pay to the Credit Mobilier, one of the complainants, the particular dividends which were wrongfully paid in 1869 and 1870 to Mr. Durant, upon his nominal and fraudulent ownership of 5,658 shares of the stock of said company, the title to which was in litigation in Rhode Island, from 1868 to 1882; *second*, to compel the defendants to account to the said Credit Mobilier, as the owner of said 5,658 shares, and to the other stockholders in said company for the unpaid dividends or profits, if any there be, upon their respective shares in the said Credit Mobilier Company, which ought to have been divided among said stockholders at the completion of the construction contract. The propriety of this joinder is attacked upon the ground that the matter of the repayment to the Credit Mobilier of the dividends upon the Durant stock is a matter with which the individual stockholders have no interest, and that thus two distinct and independent matters are linked together in one suit. The complainants, assenting to the proposition that there is a union of independent matters of account, with one of which the Credit Mobilier is solely concerned, defend the bill upon the principle that in a bill for accounting against trustees all of the *cestuis que trustent* must be before the court with their claims, especially where there has been a breach of trust, and misapplications of funds, and where an accounting is necessary to ascertain the amount of the funds. This general rule is a correct one, and when the ascertainment of the amount which properly belongs to a trust fund, and the division of such amount among the *cestuis que trustent*, are the only subjects of the bill, the rule is to be observed. But it does not follow because the defendants are trustees, and all the complainants have different claims as *cestuis que trustent* against them, that therefore all possible claims which arise upon different sets of facts, and in which the complainants have no common interest, are to be grouped together in one suit, if the question of the payment of some of their claims has no bearing upon the ascertainment of the amount which properly belongs to the trust fund. Diverse subjects in which the complainants have no common interest, and the decision of one of which does not affect the amount of the trust fund to be divided, should not be joined together, even in a bill for accounting by *cestuis que trustent* against trustees, solely on the grounds that each subject relates to the management of the same trust. Again, the fact that the different causes of action relate in some way, but not in the same way, to the management of the trust fund, is not sufficient to justify a combination, in one suit, of all the various causes of complaint against the trustees, if the causes of action are of so different character that it would be inconvenient or unjust to unite them in one suit. In *Campbell v. Mackay*, 1 Mylne & C. 603, the court, after asserting what has been declared elsewhere, that “to lay down any rule, applicable univers-

ally, or to say what constitutes multifariousness as an abstract proposition, is, upon the authorities utterly impossible," also says:

"Frequently the objection raised, though termed 'multifariousness,' is in fact more properly misjoinder; that is to say, the cases or claims united in the bill are of so different a character that the court will not permit them to be litigated in one record. It may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit, and nevertheless those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records."

The question then resolves itself into this: Is the repayment of that portion of the declared dividend, which was wrongfully paid to Durant—being a matter in which the Credit Mobilier solely is interested—a subject which, by reason of its separate character, ought not to be joined with an accounting for the benefit of all the stockholders for the purpose of ascertaining the amount of the fund which has not been divided? The specific claim to the dividend wrongfully paid to Durant does not arise out of the same transactions which create the second cause of action. It arises out of Durant's fraud, and the trustees wrongful complicity with it by the payment to him of a properly declared dividend, which should have been paid to another person. The first cause of action is the payment of ascertained profits to a person who had fraudulently represented himself as a stockholder, and is to be paid to the Credit Mobilier, not as a part of the trust fund which is to be divided, but because the defendants wrongfully paid that dividend to the wrong person; the second cause of action is the ascertainment of the amount of the undistributed portion of the fund. The first is not strictly a matter of accounting; the second is a proper matter of account. The two subjects are distinct, and are governed by different principles, and have very little in common with each other. They seem to be linked together, not because they have a natural relationship to each other, but in the expectation that strength may be derived from the union. The second cause of demurrer is sustained.

2. The misjoinder of parties. If the Credit Mobilier Company is the owner of the shares which stood in Durant's name, it is properly a party with the named stockholders of record in a bill for an account from the trustees, and is entitled to participate with the other stockholders in any benefits which may result therefrom. It was not named in the deed of trust, and, as a matter of course, not being a stockholder of record, it could not itself comply with the fifth article of the contract in regard to furnishing a proxy to the trustees; but the person in whose name the stock fraudulently stood complied with all the provisions of the contract. The Credit Mobilier, being the real owner of the stock of which Durant was the nominal owner, his compliance with the contract provisions must inure to its benefit. If it is once admitted that the corporation is the real owner of the stock, and that the nominal owner has performed all the requirements of the contract, there is no technical reason which should prevent the real owner's securing the benefits which legally belong to the ownership of the shares.

3. The alleged want of equity in each of the complainants. The defendant next contends that, inasmuch as the assignment of the Oakes Ames contract to trustees, who were also directors in the railroad company, was fraudulent, the complainants, who neither paid anything nor parted with anything of value in pursuance of it, cannot be permitted in a court of equity to seek for or to obtain any of the pecuniary fruits which have arisen from the fraud. I do not deem it important to discuss the principles which underlie this proposition, or the cases in which the principles have been presented in different phases; but one marked difference between this case and many of its predecessors is to be noticed. This contract was not illegal by reason of a statutory prohibition of it, whether presumably or actually fraudulent. It was not absolutely void, but was voidable at the election of the defrauded party. The railroad company has made no effort to declare or have it declared void, and has affirmed it, so far as was possible, by its long silence. If the trustees have in their hands any of the profits of the contract which they received as trustees for the complainants, it is not permitted to them to assert what the defrauded party has declined to assert, and to claim adversely to those for whom they acquired and ought to hold the property, or to refuse to pay over the results of the executed contract, or to claim that their *cestuis que trustent*, having paid nothing under the contracts, have no equitable rights in its fruits. *Railroad Co. v. Durant*, 95 U. S. 576; *Brooks v. Martin*, 2 Wall. 70. For this reason it is not necessary to make the railroad company a party. It has now no interest in the controversy.

4. The defense of the statute of limitations, of laches, and of the staleness of the claims. In regard to the claim of the Credit Mobilier for the dividend wrongfully paid to Durant, the pleader recognized the duty of alleging adequate excuses for the delay in bringing suit upon causes of action which arose in 1869 and 1870, and has stated reasons which, uncontradicted and unexplained, are apparently sufficient. In 1868, and before the payment of these profits, and in anticipation thereof, the Rhode Island suit was commenced, to which the Credit Mobilier and Durant were parties, and which was not decided until 1882. Meantime it was not the duty of the corporation to commence in its own name an independent suit for the recovery of these dividends. The defendants also insist that the claims of the complainants for the payment of undistributed profits, and the reimbursement of losses, is, upon its face, a stale claim, which has been well known since the road was completed, but which was sued upon after five of the seven trustees were dead, by parties who had for a long time slept upon their alleged rights, and therefore was not properly the subject of an equity suit in May, 1886, when the bill was filed, and that no apology for the laches is presented in behalf of any party other than the Credit Mobilier. The bill does not state when the road was completed, or when the right to a final accounting commenced, but it is said by the defendants that the date of the completion of the road was, in the case of *U. S. v. Railroad Co.*, 99 U. S. 492, judicially ascertained to be in 1869, for the purposes which were at issue.

in that litigation, and that the date is a matter of public history. "Courts will take notice of whatever is generally known within the limits of their jurisdiction; and if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper." *Brown v. Piper*, 91 U. S. 37. Courts also take judicial notice of matters of public history which affect the whole people. *Bank v. Earle*, 13 Pet. 519, 590; 1 Greenl. Ev. § 5. It is true that the building and completion of the Union Pacific Railroad were facts of great public importance. It was undertaken at a critical period in the history of our country, as a military necessity for the preservation of its territory, and as a most important instrumentality for the common benefit of widely separated states. "It was a national work, originating in national necessities, and requiring national assistance." *U. S. v. Railroad Co.*, 91 U. S. 72. But I have serious doubts whether the date of the completion of a railroad is within the class of events of public history of which courts are permitted to take judicial notice in the decision of a question of the character which is here presented. I have more serious doubts whether, without evidence, it can be judicially assumed that, although the road was completed for certain purposes in 1869, and was completed to the satisfaction of the commissioners appointed by the government in 1874, either of those dates can be taken as the date when expenditure by the contractors ceased, and they were discharged from their obligations by the company, and the duty of accounting only remained. It is not improbable that the road was in running order for trains before the necessary depots, complete equipment, rolling stock and side tracking had been finished; and it would be imprudent to infer that because trains habitually ran over the road, and it had been accepted by the government, therefore the contract had been completely performed. I am therefore of opinion that the question of the effect of the statute of limitations or of laches or of staleness does not arise upon the face of the bill.

The second cause of demurrer is sustained.

MERCHANTS' NAT. BANK OF CHICAGO *et al.* v. SABIN *et al.*

(*Circuit Court, D. Minnesota. April 4, 1888.*)

CREDITOR'S BILL — FAILURE TO SHOW THAT LEGAL REMEDY HAS BEEN EXHAUSTED.

A bill by a judgment creditor for discovery showing that, when the execution was returned unsatisfied, and when the bill was filed, there was property, within the knowledge of the creditor, subject to levy on execution, fails to show that the legal remedy has been exhausted, and is demurrable.

In Equity. On demurrer to bill.

The plaintiffs, the Merchants' National Bank, of Chicago, and First National Bank, of Ithaca, are judgment creditors of the firm of J. H. Towns-

hend & Co., composed of the defendants James H. Townshend, D. M. Sabin, and George M. Brush. Their judgments were recovered and docketed in this court January 6, 1886, in suits on promissory notes made by the firm of J. H. Townshend & Co. to the order of the Northwestern Manufacturing & Car Company, and by that company indorsed. This bill is exhibited against the partners in the firm, against Maria Louise Brush, wife of the defendant George M. Brush, and against R. B. Langdon, the Minnesota Thresher Company, a corporation, and J. C. O'Gorman. The bill alleges that on March 16, 1887, execution on each judgment was issued against the property of J. H. Townshend & Co., and of each partner, and that on March 23, 1887, the marshal made return thereof; "that said defendants, nor either of them, had any goods, chattels, lands, tenements, or real estate within said district whereupon to levy and satisfy the said executions, or any part thereof;" and that said executions are wholly unsatisfied. In respect to the defendant Sabin, for whom this brief is filed, the bill further alleges, as follows: That Mr. Sabin is or claims to be a creditor of the Northwestern Manufacturing & Car Company, (a corporation, which is insolvent, and whose property is in the hands of a receiver appointed May 10, 1884, by the district court for Washington county, Minn.,) upon claims of \$128,893.33 and \$736,000, and \$3,500 respectively, amounting in all to \$868,393.33; that these claims have been duly filed with the receiver, but are contested and undetermined; that the stock, property, and assets of the car company are "very nearly adequate to pay and discharge all of the just debts and liabilities," and that the claims of Mr. Sabin, if sustained, are worth at least \$60,000. And the plaintiffs say that if this court will appoint a receiver of Mr. Sabin's property, and order such receiver to sell these claims, the plaintiffs will procure a bid therefor in excess of \$2,000. The bill further alleges that the defendant thresher company is a corporation organized for the purpose (among others) of buying the property, assets, indebtedness, and stock of the car company, and for manufacturing of steam-engines, etc., with an authorized capital divided into \$4,000,000 of preferred stock, and \$3,000,000 of common stock; that its plan is to issue its preferred stock in exchange for claims against the car company, and its common stock in exchange for preferred stock of the car company, share for share. The bill further states that on May 10, 1884, Mr. Sabin was a man of large means, and, among other things, was the owner of or equitably interested in a majority of the \$4,000,000 capital stock of the car company; was a partner in J. H. Townshend & Co., and was also beneficially interested in many other enterprises unknown to the plaintiffs; that defendants Townshend, Sabin, and Brush have property and other equitable interests and *things in action* of the value of more than \$2,000, exclusive of all prior claims thereon, but which the plaintiffs have been unable to reach by execution on their judgments. The bill further states that the defendant Sabin has recently become the owner of, or equitably and beneficially interested in, a large amount of the stock of the thresher company, which stock is of great value, and has not been transferred to Mr. Sabin on the books of the company, and

plaintiffs have no means of determining accurately the amount of stock so owned by Mr. Sabin, or in which he is so interested; that Mr. Sabin, unless restrained by injunction, will convert his claims against the car company into preferred stock of the threshing company, and will sell or dispose of such stock so as to hinder and delay plaintiffs in collecting their judgments. The bill further alleges that the firm of J. H. Townshend & Co., being a debtor to the First National Bank, of Stillwater, in more than \$15,000, that bank recovered judgment in Dakota territory, and levied upon elevators in that territory belonging to the firm, sold them on execution, and became the purchaser; and that afterwards the bank sold and conveyed the elevators to the defendant Maria Brush, wife of defendant George M., for a large consideration, all of which was paid by defendants Sabin and George M. Brush, for whom she now holds the title in trust, all for the purpose of defrauding the plaintiff and other creditors. The bill further alleges that defendant Sabin was indorser of the car company's paper to the amount of over \$1,000,000, and was rendered insolvent by the company's failure. That defendant O'Gorman, then a man of moderate means, has since acquired and now holds property, (whether real or personal is not stated) worth over \$50,000; but that all of it has been bought and paid for by Mr. Sabin and is held upon a secret trust for him by Mr. O'Gorman, who is his confidential friend, adviser, and employee. The bill further alleges that Mr. Sabin has, without consideration, transferred a large amount of real or personal property, or both, owned by him or in which he had a beneficial interest, to the defendant R. B. Langdon, with intent to defraud his creditors. No attempt is made to identify the property. The bill also alleges (page 13) that the defendants Townshend, Sabin, and George M. Brush, or some of them, are owners of or in some way interested in some real estate or some chattels, or some contracts for real estate, or in the rents, etc., of some real estate, or in the stock of some corporation; and that some of them have in possession some money in coin or bank bills, and have some money or securities for payment of money held by some other person or persons in trust for them, or some of them; and that if they, or either of them, have made any transfer of any part of their property or effects, the plaintiffs believe that such transfer is merely colorable, and made to defraud creditors. To this bill the defendant D. M. Sabin has demurred for want of equity, so also the other defendants.

Clapp & Macartney, for complainants.

George B. Young, Searles, Ewing & Gail, Fayette Marsh, and Woods, Hahn & Kingman, for defendants.

NELSON, J., (*after stating the facts as above.*) A court of equity will give relief in favor of the judgment creditor only when the remedy at law is inadequate and not effectual to reach property by execution, or when there is some obstruction to the enforcement of the legal remedy. The right to relief in the present suit is claimed upon the ground that the legal remedy has been pursued and exhausted, and that the debtor has property interests not subject to an execution at law, but such as can be

reached in equity. The complainant obtained judgments, and executions were issued and returned by the officer. The debt is not paid, or any part of it, and relief can only be obtained, if at all, by the issuance of an *alias* execution, or in equity, by a creditor's bill. The latter course is pursued, and to entitle the complainant to pursue this remedy it must appear in the bill that a judgment was obtained, and that execution issued and was returned by the officer to whom it was directed unsatisfied. The allegations in the bill definitely describe the judgments and executions, and the return upon each of the latter is in the following words:

"That said defendants, nor either of them, had any goods, chattels, lands, tenements, or real estate, within said district whereupon to levy and satisfy the said executions, or any part thereof."

It is necessary to have the execution returned before any relief can be given, and it must be alleged in the bill that the legal remedy has been exhausted by the creditors without being able to obtain satisfaction of the debt. If the return of the officer upon the execution, set forth in the bill of complaint shows the remedy afforded is ineffectual it is sufficient. The court does not inquire how diligent the officer is in his effort to find property subject to levy, and his return is conclusive; but it must appear, however, by the allegations in the bill, that the legal remedy is not effective. A party who seeks a court of equity, in a case like this one, is required to show in his bill distinctly all the facts which entitle him to such aid, for the court will not grant the relief claimed, or interfere if there is a plain and adequate remedy at law. The bill must charge that the judgment creditor cannot discover and reach the debtor's property interests at law.

In this bill of complaint it appears that the assets of the debtor sought to be appropriated to the satisfaction of the debt are subject to levy on execution under the statute of the state of Minnesota, and that the creditor had knowledge of them at the time the officer made his return. The legal remedy, for ought that appears to the contrary, is full and adequate, and has not been exhausted. It is essential to the jurisdiction of this court in a suit for discovery and relief, on the ground that the legal remedy of the creditor is exhausted, that the bill must charge that the judgment debtor has no property subject to execution at law, and if the complainants charge and show in their bill that property of the debtor subject to execution existed at the time he filed his bill, he does not require a discovery and relief in a court of equity. Such is the complainant's condition, and the demurrer must be sustained, and it is so ordered.

The demurrers interposed by the other defendants are also sustained, and the bill dismissed.

NEAL v. FOSTER *et al.*

(Circuit Court, D. Oregon. April 5, 1888.)

1. EQUITY—PLEADING—CROSS-BILL—RIGHT TO FILE—DEMURRER.

A cross-bill is a mode of obtaining relief or making a defense to which a defendant may resort as against the plaintiff or a co-defendant in the original bill, without leave of the court, and the question of his right to file the same when and as it may be done, may be made and determined on demurrer.

2. SAME—TIME TO FILE—AFTER PUBLICATION OF TESTIMONY.

Where a cross-bill does not seek to introduce new or further testimony on the matters in issue in the original suit, it may be filed after publication has passed, or the testimony thereabout is taken.

3. SAME.

As the testimony in equity cases is no longer taken secretly or kept from the inspection of the parties until what was called publication, the mere fact of publication having passed or the testimony being closed in the original suit, ought not to prevent a defendant from filing and maintaining a cross-bill even touching matters in issue in said suit.

(Syllabus by the Court.)

In Equity. On demurrer to cross-bill. Action to set aside conveyances.

Earl C. Bronaugh, for plaintiffs.

James K. Weatherford, for defendant.

DEADY, J. The original bill in this case was filed on July 1, 1886, against James H. Foster, John A. Crawford, William Crawford, Ashby Pearce, John R. Baltimore, J. L. Tiles, E. Walden, and W. H. Goltra, and the object of it was to have certain conveyances of real property situate in Albany, Linn county, theretofore made by Foster to the Crawfords and Ashby Pearce, set aside as fraudulent.

The other parties, including Goltra, were made defendants in the bill, because they were, or claimed to be, judgment creditors of Foster's, and in their answers they set up their claims accordingly. The Crawfords and Foster answered the bill, denying that the conveyances were fraudulent. The plaintiff replied, and on October 7, 1886, the case was referred by the circuit judge to a master, who on August 29, 1887, filed his report of the evidence taken by him, and also his conclusion of fact and law thereon, as directed by the order of reference.

In his answer Goltra states that in February, 1886, he obtained judgment in the state circuit court for the county of Linn against Foster on divers claims for the sum of \$16,118.84, for which he claims a lien on the property in question.

On November 14, 1887, the defendants Foster and John A. and William Crawford, had leave to file what is styled therein, "a supplemental cross-bill," in which it is alleged as a bar to Goltra's claim to enforce his judgment against the property in question; that on February 10, 1886, he commenced a suit in the state circuit court aforesaid against the plaintiffs in the cross-bill to enforce the lien of his judgment against the property in question, on the ground that the conveyances thereof by Foster

to the Crawfords were fraudulent, because made with intent to defraud Goltra and other creditors of Foster; that the defendants in said suit answered the complaint, denying the allegations of fraud, and averring that the conveyances were made in good faith, and for an adequate consideration; that Goltra filed a reply to this answer, and upon the issue thus raised the cause was, on July 9, 1886, heard by said court, which found that the conveyances in question were made to the Crawfords in good faith, and for an adequate consideration, and decreed that the bill be dismissed, and the defendants recover their costs; that Goltra appealed from said decree to the supreme court of the state, where, on April 11, 1887, said appeal was, by the order of said supreme court, dismissed at the cost of the appellant, whereby the decree of said circuit court of July 9, 1886, remains in full force and effect, and is now binding between the parties thereto.

On December 31, 1887, Goltra demurred to the cross-bill. On the argument the objections made to the filing of the bill when the application was made therefor were restated, and insisted upon. The point was also made that the cross-bill does not state the facts of the original bill.

The bill states the commencement of the original suit, giving the date thereof, and the names of the parties thereto, and adds, "the object and purpose of said original bill being as therein stated and prayed."

The proceedings on the original bill are then stated as above, down to the filing of the master's report, to which is added the allegation that Goltra was made a defendant in the original bill, as one of the creditors of Foster, while his interest was that of a plaintiff; and by said bill and the report of the master, Goltra is represented as being entitled to share in the proceeds that may accrue to the creditors of Foster by virtue of any decree of this court in the original suit.

It is said that the cross-bill should state the original bill, or the parties, prayer, and object of it, the proceedings thereon, and the right of the plaintiff therein, which is sought to be made the subject of the cross-litigation. Story, Eq. Pl. § 401; Adams, Eq. 403. In England, where this rule had its origin, a cross-bill might have been filed in another court than that in which the original was pending. Story, Eq. Pl. § 400. In such case it would be necessary to set forth the matters in the original bill, and its prayer and object, together with the proceedings thereon, if any, so that the court might be possessed of the whole case, of which the cross-bill is only a part. But this practice never obtained in this country. In the national courts, at least, the cross-bill must, from the necessity of the case, be filed in the circuit court where the original bill is depending.

In such case there is no necessity of bringing the facts of the original bill or its object or prayer to the attention or knowledge of the court by repeating them in the cross-bill, and a mere reference to the bill, which is already before the court; and a part of the case is sufficient for all practical purposes. Of course, it is necessary to set forth in the cross-bill so much of the matter in the original bill, and the subsequent plead-

ings and proceedings thereon, as may be necessary to show what right or defense is sought to be brought before the court for adjudication, and to make a proper case therefor.

This has been done in this case. Goltra, a defendant in the original bill, but whose interest in the suit is that of a plaintiff, seeks by his answer, in case the court should find that the conveyances by Foster to the Crawfords are void as to the creditors of the former, and order a sale thereof, to have his judgment against his co-defendant Foster satisfied out of the proceeds of the property. And now his co-defendants in the original bill, Foster and the Crawfords, seek by the cross-bill to set up as against him the defense of a prior adjudication by the state court, as between them, of the question of the validity of the conveyances.

It is admitted that the defense as stated is a bar to the demand of Goltra to have his claim satisfied out of the proceeds of this property; that, having litigated the question of the validity of the conveyances of the same as against the creditors of the grantor in the state court with him and his grantees, the Crawfords, he is estopped to allege or claim anything to the contrary of the decree in that suit.

A cross-bill is generally considered and used as a matter of defense, and may answer the purpose of a plea *puis darrein* continuance, where the matter of the defense arises after answer. A cross-bill is either brought against the plaintiff in the original bill or one or more of the defendants therein, and the original and cross-bill are considered one cause. 1 Smith, Ch. Pr. 459; Story, Eq. Pl. §§ 389, 393; Adams, Eq. 402; *Field v. Schieffelin*, 7 Johns. Ch. 252; *Cross v. De Valle*, 1 Wall. 14.

It is also maintained that the cross-bill is filed too late, and that nothing has arisen since the commencement of the suit which would justify its filing. This point was made and argued on the application for leave to file the cross-bill, and it is contended that the question cannot now be raised again on the demurrer. But the rule is otherwise. It was not necessary to give notice of the application for leave to file a cross-bill; nor, so far as I am advised, to obtain leave before doing so. The only case I have found on the subject is *Bronson v. Railroad Co.*, 2 Wall. 283. There a cross-bill filed without leave of the court was set aside as irregular. But it was filed by a person not a party to the suit, who petitioned the court for leave to answer for a defendant corporation, then in default, of which he was a stockholder, and also to file a cross-bill. Leave was given to file the answer, but as to the cross-bill the order of the court was silent. The party filed the answer for the corporation, and also a cross-bill, which was subsequently set aside because filed without leave, by a stranger to the suit.

A cross-bill is a regular and legitimate proceeding in a court of equity, to which any party defendant may resort in a proper case, without any special leave of the court. But in doing so he must conform to the law or rule which governs the case, or take the consequence. Story says, (Eq. Pl. § 632:) "A cross-bill will be open to a demurrer if it is filed contrary to the practice of the court, and under circumstances in which a pure cross-bill is not allowed." And as an illustration he cites the case

of a cross-bill filed after publication of the testimony in the original suit, which seeks to introduce new testimony as to matters already in issue therein.

It is generally stated in the books that a cross-bill must be filed before publication,—that is before the taking of testimony in the original case is closed, and the same opened to the inspection of the parties or published,—unless where some new matter, as a release, arises afterwards, or the case appears at the hearing too imperfect to reach and settle the rights of all the parties.

As an illustration of the reason of this restriction, Chancellor KENT, in *Field v. Schieffelin*, 7 Johns. Ch. 253, says: "It is too late, after publication, to introduce new and further testimony to the matter in issue by the contrivance of a cross-bill. It would be doing, in an indirect way, *per obliquum*, what is forbidden to be done directly,"—referring to *Hammersly v. Lambert*, 2 Johns. Ch. 432.

The reason given for this is that, if after the publication of the testimony, and the defendant has found out wherein it is defective, he was allowed to supply the same by supplementary proof taken on a cross-bill, there would be great danger of perjury and fraud. *Field v. Schieffelin*, 7 Johns. Ch. 254; Story, Eq. Pl. § 395.

But the fact on which this artificial superstructure of caution and prevention is raised has long since ceased to exist in the courts of the United States. At one time all testimony taken in a suit in equity was taken by examiners or commissioners on written interrogatories, and neither the parties nor their attorneys were allowed to be present at the examination, while the persons before whom the testimony was taken were sworn to secrecy. 1 Smith, Ch. Pr. 40, 356-359, 361-374. The testimony was then returned into court sealed up, and remained so until the taking of testimony in the case was closed, when an order of publication was passed, and the depositions were opened.

Now, however, under equity rule 67, the testimony may be taken orally before an examiner in the presence of the parties and their attorneys, who propound the interrogatories, and, when taken on commission and written interrogatories, the depositions may be and usually are opened and inspected as soon as returned to the clerk's office. In other words, there is no longer any secrecy in the premises, and there is now no reason why the period or fact of publication should be arbitrarily prescribed as the point of time beyond which a cross-bill cannot be filed. The court may, *sua sponte*, direct the filing of a cross-bill when it appears necessary to a complete determination of the case, at any time before final decree; and, in my judgment, there ought to be no fixed rule against a defendant's filing a cross-bill in a proper case before the final hearing; the objection of laches being disposed of in each case on the particular circumstances thereof, or by rule of court or the supreme court.

But even under the old state of things the objection to filing a cross-bill after publication had passed was really confined to cases, or at least the reason given for it would so confine it, where the cross-bill sought to

introduce new or further testimony concerning the matters already in issue. *Forum Romanum*, 46. But this bill seeks nothing of the kind. It sets up a prior determination between the plaintiffs therein and the defendant Goltra of the question of the validity of the conveyances to the Crawfords, a matter which is not mentioned in the original bill, or the answers thereto, and about which no testimony could have been taken, and concerning which there can be no danger of perjury, for it must be proved, if at all, by the record.

The application for leave to file the cross-bill was placed on the ground that the defense did not arise until April 11, 1887, when the suit of Goltra against Foster and the Crawfords was finally determined in the supreme court by the dismissal of the appeal, and therefore it was in the nature of a plea *pvis darrein* continuance. This conclusion was based on the theory that the decree of the state circuit court in *Goltra v. Foster et al.* was suspended during the appeal, and could not be used as an estoppel while the appeal was pending, according to the ruling in California under a similar statute, which declares that "an action or suit is deemed to be pending from the commencement thereof until its final determination upon appeal, or until the expiration of the period allowed to take an appeal." Code Civil Proc. Or. § 505. See *Sharon v. Hill*, 11 Sawy. 302, 26 Fed. Rep. 337. But the supreme court of the state, in *Day v. Holland*, 15 Pac. Rep. 855, have since held otherwise, and said, in effect, that the decree of the lower court was operative for all purposes during the appeal as well as the period allowed for taking it. And so, in the light of this decision, the right to file the cross-bill cannot be rested on this ground.

It may be taken for granted that the plaintiffs in the cross-bill could not have the relief prayed for therein as against their co-defendant Goltra, by answer, or otherwise than by cross-bill.

The filing of the bill took place before the cause was submitted for final hearing. It sets up a simple, distinct defense against Goltra's right to have his judgment satisfied out of this property. As it rests on an alleged record, the determination of its truth or sufficiency cannot materially delay or prejudice the final disposition of the case. Under the circumstances, I do not think the demurrer to the bill ought to be sustained on the ground of delay in filing the same. Some other causes of demurrer are assigned, but as they were not noticed in the argument, and do not appear to be material, they need not be considered.

The demurrer is overruled.

GUNTHER *et al.* v. LIVERPOOL & LONDON & GLOBE INS. CO.

(Circuit Court, E. D. New York. March 17, 1888.)

INSURANCE—CONDITIONS OF POLICY—WHAT CONSTITUTES BREACH.

A policy of insurance containing a clause that kerosene shall not be stored on the premises insured, excepting to use for lights, if the same be drawn and the lamps filled by daylight, to which is attached two riders, bestowing the privilege of keeping not exceeding five barrels of such kerosene, and using it for lights on such premises, provided the lamps are trimmed and filled by daylight, is avoided by drawing kerosene by lamplight to loan to a neighbor, causing an explosion by which the entire building was burned.

At Law. On motion for new trial.

Action by Amelia A. Gunther, executrix, etc., and others against the Liverpool & London & Globe Insurance Company on a policy of insurance issued by such company.

C. Bainbridge Smith, for plaintiffs.

William Allen Butler, for defendant.

LACOMBE, J. When the testimony in this case was closed, defendant moved for the direction of a verdict. The court was inclined to grant such motion on the ground that it appeared by uncontradicted evidence that the cause of the fire was the drawing of kerosene by lamplight. Inasmuch, however, as much testimony had been introduced bearing on another defense, viz., the presence or use of gasoline or benzine on the premises, the motion was denied, with leave to renew after verdict as a motion for direction of judgment. All question as to the drawing of kerosene by lamplight was withdrawn from the jury, and upon plaintiffs' case, and the other defense, their verdict was for the plaintiffs. The defendant now moves for a new trial on the same ground as that urged when the case was closed; not making the motion reserved to it, for the reason that such motion is "not in consonance with federal practice," because a compulsory nonsuit is not permitted here, and its practical equivalent—the power to direct a verdict—does not exist after verdict rendered. Under the authorities it is no doubt true that the very same process by which a state judge nonsuits a plaintiff on the whole case on grounds of law, is called the "directing a verdict," when practiced by a federal judge. *Oscanyan v. Arms Co.*, 103 U. S. 261. It would be matter of regret, however, if the federal courts should by sticking in the bark of mere verbal dialectics be unable, despite section 914, Rev. St., to avail themselves of a state practice so simple, sensible, and efficient as that of directing judgment of nonsuit upon reserved points of law after verdict. *Shepherd v. Bishop*, 6 Bing. 435; *Downing v. Mann*, 3 E. D. Smith, 36; *Insurance Co. v. Minard*, 2 N. Y. 98; *Shellington v. Howland*, 53 N. Y. 371. By the refusal of the court, however, to charge his last five requests, and by the denial of his motion to direct a verdict in his favor, counsel for the defendant is entitled to apply for the relief he now asks.

Neither the plaintiffs' extended argument, nor a careful examination of the authorities cited in his brief, has altered the opinion expressed on

the trial. The circumstances under which the fire originated were these: On August 15, 1879, two servants belonging to the Bath Park Hotel, situated about a mile distant, came to Walker, the proprietor and occupant of the insured premises, to borrow some kerosene oil. [There was considerable conflict of testimony as to whether it was kerosene or gasoline which they came to get; but the jury has found that there was no gasoline on the premises, and this motion will therefore be determined upon the assumption that the oil on the insured premises was kerosene.] Their request was acceded to, and they were referred by Walker to one of his employes, who was directed to supply their need. With two common open wooden pails, which they had brought to carry the oil in, and accompanied by Schuchart, Walker's employe, carrying a lighted lantern, the Bath Park employes went to the "oil-room." In this room, which was generally under Schuchart's charge, there was a barrel of kerosene, a can, some old rubbish, and a stand on which lamps could be filled. It was under what was known as the "pavilion," its floor a foot or so below the level of the ground, apparently without a window, and entered by a narrow door. Schuchart first set his light—an ordinary stable lantern, with holes in the top—upon the door-sill, and began to draw into the pails. The first of these leaked; considerable oil was spilled, and its contents were then poured into the second pail. About this time the lamp was brought from the door-sill nearer to the barrel, and shortly afterwards—only a few minutes after the party entered the oil-room—there ensued an explosion and conflagration by which the premises were totally destroyed. There was some conflict as to the precise time of explosion, but all the testimony showed that it was about dusk, darker in the oil-room than it was outside, and there is no dispute but that the oil was not being drawn by daylight only.

Is a loss so caused covered by the policy? It is undoubtedly true that written clauses and riders will prevail over the ordinary printed forms of insurance contracts, and that, as the contract is an instrument prepared by the insurer, all doubts or ambiguities are to be resolved against him. But the two essential rules of interpretation, which are the headlights under which all written instruments should be construed, are just as applicable to contracts of insurance as to any other agreements,—the whole document must be considered, and it must be construed so as to give effect to the intent of the parties as indicated by the language employed. The contract in suit, which covered a summer hotel, used as a dwelling-house in the winter season, was on one of the ordinary printed forms of policy used by the defendant. It contained, as such policies usually do, many carefully drawn provisions, paragraphed and numbered, restricting the operation of the contract, and saving the company from claims for loss arising under circumstances which exposed them to some unusual hazard which they were not willing to accept. One of these paragraphs is as follows:

"11. * * * Petroleum, rock, earth, coal, kerosene, or carbon oils of any description, whether crude or refined, benzine, benzole, naphtha, * * * or any other inflammable liquid are not to be stored, used, kept, or allowed on

the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on this policy, excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn, and the lamps filled, by daylight. Otherwise this policy shall be null and void."

This paragraph declares its meaning with no uncertain sound. First, it absolutely prohibits, except upon written permit, the "storing, using, keeping, or allowing" of kerosene and certain other oils on the premises, temporarily or permanently, and for any purpose whatever, ("for sale or otherwise.") It next makes an exception in favor of kerosene, but with clearly expressed restrictions: (a) The kerosene so kept is to be used for lights. It is not to be kept "for sale," or kept or used "otherwise," except for lights; and manifestly for lights on the insured premises. (b) The kerosene which might thus be kept "for lights" is to be drawn by daylight. (c) The lamps in which the kerosene kept "for lights" is burned must be filled by daylight. (d) As to any other manipulation of kerosene which is necessary to its use "for lights," the paragraph above quoted is silent. The next inquiry is whether elsewhere in the contract there is anything so inconsistent with the terms of this paragraph as to make the meaning of the contract doubtful even; for doubts will be resolved against the insurer. The general description of the property, viz.: "The two-story frame hotel building, with one-story frame kitchen and two-story pavilion adjoining and communicating, situate on Gravesend Bay at Bath, Kings Co., L. I., [it is understood the above property is to be occupied by a family when not in use as an hotel]"—is certainly not inconsistent with a provision restricting the keeping and use of kerosene to the single purpose of lighting the premises. In that respect the case at bar differs from the *Harper Cases* and the others cited, where the ordinary use of such premises, as the policy described or the survey disclosed, was inconsistent with the restrictions of the printed form. Nor does the provision as to special means of lighting, which was written in with the description of the premises, present any such inconsistency. The "privilege to use gasoline gas, gasometer, blower, and generator being under ground about sixty feet from main building, in vault; no heat employed in process,"—does not import that the insured may not also use kerosene for lighting the premises under the conditions of the policy, nor imply that he may keep or use it for any other purpose or in any other way.

It further appears that at the time of issuing the policy there was attached to it a rider containing a customary privilege attached generally to policies, and expressed as follows: "Privileged to use kerosene oil for lights; lamps to be filled and trimmed by daylight only." What effect has this upon the provisions of paragraph 11, above quoted? In the first place it imposes an additional restriction upon the insured, for it forbids the "trimming" of lamps except by daylight. Paragraph 11, by its silence, permitted trimming—an operation not wholly free from danger when conducted by artificial light—at any time. The rider is thus susceptible of intelligent interpretation, without finding its sole meaning in the endeavor to dispense altogether with the kerosene clause

of the policy. In view of the rule of construction which requires us to consider the whole contract, the meaning of this rider is to be determined only after its terms are collated with those of paragraph 11, above quoted. When this is done, it will be at once seen that there is nothing in it which will warrant the contention that kerosene may be kept "for sale," or kept or used "otherwise" than for lighting the premises. These buildings certainly could not be used as a store-house from which might be obtained the oil necessary to light some other premises, even if those other premises were used by the assured. The lights in which the kerosene,—which the assured was thus authorized to keep,—was to be burned, were to be filled with that kerosene by daylight only. The rider is silent as to drawing. The sounder interpretation would seem to be that, as to drawing, the original form, being unmodified by any inconsistency in the rider, should control; but even if the effect of silence in the rider on that subject is to make the whole contract silent as to the time of drawing kerosene under the privilege, then the utmost that can be claimed for the privilege given to the assured under the rider and contract is this: "You shall not," says the insurer, "keep or use kerosene oil for sale, or for any other purpose except that of lighting the premises. As to the oil which you thus use for lighting, you must not pour it into your lamps except by daylight; but we do not care when you draw the kerosene which we thus allow you to fill your lamps with." In view of the testimony in this case, such a clause would probably have afforded abundant protection to the insurer. If the lamps were not to be filled except by daylight, no one would be likely after dark to draw oil, which could not be poured into them till the next morning. And no one who was drawing oil with which to fill the lamps of that hotel would be likely to draw it in an open wooden pail, or otherwise than into a can such as might be thereafter conveniently used as an instrument for filling the lamps. The expert testimony shows that such a mode of drawing would be quite safe, and that it is only the agitation and exposure of a broad surface of the liquid which renders the presence of a light dangerous. The kerosene oil which took fire in this case, however, was being drawn for no such purpose; and the language of the rider cannot be stretched so far as to cover a loss caused as this was, by operations not allowed by the policy.

Finally, plaintiffs sought to sustain their case on the terms of another rider, written on the margin of the policy, at the close of the season of 1878, when the assured decided to give up lighting any part of the premises with gasoline. It reads as follows: "Privileged to keep not exceeding five barrels of kerosene oil on said premises." There is nothing in this clause, however, at all inconsistent with the restrictions as to drawing which the policy contains. Nor does it at all import a keeping for any purpose other than that already provided for, viz., the lighting of the premises. It merely provides how much kerosene may be kept under the general license to keep, implied in the kerosene clause and the rider. It is not concerned either with the uses or manipulation of the oil so kept. The clause and both riders stand perfectly together.

The motion should be granted; and if, under the federal practice, a judgment cannot now be directed for the defendant on the point reserved, a new trial will be ordered.

BROOKS v. CARTER *et al.*

(Circuit Court, S. D. Georgia. March 21, 1888.)

ASSAULT AND BATTERY—CIVIL ACTION—PLEA IN MITIGATION OF DAMAGES.

In an action of assault and battery defendant pleaded in mitigation of damages that plaintiff had promulgated a slander upon defendant's sister, and that after getting plaintiff in his power, and giving him ample opportunity to clear himself by naming the originator of the slander, which plaintiff failed to do, defendant thereupon horsewhipped him. *Held*, that such a plea is not good upon demurrer, the facts alleged not amounting to a justification.

At Law. Damages for assault and battery. Demurrer to plea.
S. A. Ried, Casey J. Thornton, and Hardeman & Davis, for plaintiff.
Dupont Guerry, for defendants.

SPEER, J. This action was brought against the defendants for assault and battery. The allegations of the plaintiff were that the defendant Barnum induced the plaintiff to call with him on one Searles. Complainant consented to go, and, when the carriage-shop of Searles was reached, the plaintiff was surrounded by the four defendants, three of whom threatened him with weapons, Barnum compelled him to pull off his coat, and cruelly whipped him with a buggy whip. The plea of Barnum averred that on the day of the assault he, Barnum, came to town, and received a note from one Everett stating that the plaintiff had promulgated a slander upon his (Barnum's) sister. Barnum went immediately to see the plaintiff, and requested him to go with him to Searles' shop, whereupon the plaintiff went. When Searles and the plaintiff were confronted at the shop, the plaintiff charged that Searles had made the defamatory remarks. Searles denied it, and asserted that the plaintiff had made them. The plea states that the plaintiff thereupon admitted that he had in fact made the statement. The defendant then demanded of the plaintiff his "author," and plaintiff failed to give any author. By this the pleader meant, the author or originator of the slander. Defendant then told plaintiff that he would give him five minutes in which to give the author, but in fact he gave him a quarter of an hour, and then told him he would give him five minutes more, if he desired it, and plaintiff replied, "it was not any use, if he was going to whip him, to whip,"—upon which the punishment was then inflicted. The defendant also states that he offered to go with plaintiff anywhere he desired to go, and to allow him to bring any friends he desired, when plaintiff declined both offers. By this it is presumed that the pleader meant that the defendant offered to go out

and fight a pitched battle with the plaintiff or with the plaintiff's friends. These facts were set up in mitigation of damages. The plea was demurred to.

It is difficult to perceive any principle of those laws which are made for the preservation of social order upon which this plea can be sustained, and the court cannot sanction a plea of this character, however much it may sympathize with the alleged indignation of the defendant. The facts would not amount to complete justification, and where facts offered to be used for mitigation of damages as establishing a less aggravated case against the defendant do not amount to a justification, and merely tend to palliate the character of the offense, and mitigate the wrong, they are admissible in evidence in reduction of damages under the general issue. *Avery v. Ray*, 1 Mass. 12; 2 Add. Torts, 1392. It is true, however, that the defendant cannot give in evidence in reduction of damages the acts and declarations of plaintiff at a different time, or any antecedent facts which are not fairly to be considered as part of one and the same transaction with the assault though they may have been ever so irritating or provoking. Sedg. Dam. 555. The provocation, to entitle it to be given in evidence in mitigation of damages must be so recent and immediate as to induce a presumption that the violence done was committed under the immediate influence of the feelings and passions excited by it. *Id.*; *Mitchell v. State*, 41 Ga. 527. Here the defendant sought the plaintiff, and demanded an explanation. Time was taken for deliberation and for consultation. Searles was interviewed, and then the defendant gave the plaintiff 25 or 30 minutes in which to make a declaration by which he could avoid the cowhiding with which the defendant threatened him. The plaintiff finally stated that it was no use to wait any longer, and the defendant proceeded to lay on the cowhide. No court which respects social order can permit a deliberate avowal of this character by a defendant to be regarded as a plea. He assumed to judge the wrong, he imagined had been done a member of his family. This was not his province, but the province of the courts of the country. He became the executioner of his own sentence. He did it with the utmost deliberation. It is this disposition to ignore the law that produces so many cases of mob violence; so many of flagrant and dangerous social disorder. If courts give even a partial sanction to this rude and unjustifiable method of redressing real or imaginary wrongs, it would be to license crime, and uproot the settled principles of public justice. *Mitchell v. State*, 41 Ga. 536. It is competent for the defendant to have the benefit of any mitigating circumstance which is a part of the transaction complained of, and which would tend to excuse or justify the act; but if the facts recited here could be held to mitigate so cruel and deliberate an assault, it would be difficult to conceive of a case where a party could be punished for usurping the prerogatives of the courts and taking the law into his own hand. The plea nowhere asserts that the plaintiff originated the slander; but if he did, the defendant had no authority to deliberately try him, and then deliberately beat him.

The demurrer is sustained.

ROBOSTELLI v. NEW YORK, N. H. & H. R. Co.

(Circuit Court, S. D. New York. March 27, 1888.)

JUDGMENT—RENDITION AND ENTRY—POWER OF CLERK.

The clerk of a United States circuit court has no authority to enter judgment for any other sum than the verdict and statute call for.

At Law. On motion to set aside judgment.

The action was for damages for personal injuries causing death of intestate. The state statute provides that in entering judgment upon verdict in such causes the clerk shall add to the amount of the verdict interest from the date of the death. Plaintiff having filed a waiver with the clerk, that officer entered judgment for the amount of verdict without interest.

Chas. H. Noxon, for complainant.

Wm. E. Barnett, for defendant.

LACOMBE, J. The clerk should not have entered judgment for any sum other than what the verdict and statute called for, and his action in that respect must be set aside. The court undoubtedly possesses the power to regulate the amount of its own judgments, even though by so doing the recovery is reduced below the amount to which appellate jurisdiction attaches, (*Bank v. Redick*, 110 U. S. 224, 3 Sup. Ct. Rep. 640, and cases cited;) but that function is to be exercised by the court, not by the clerk. The judgment entered upon the verdict is set aside, with leave to plaintiff to move before the judge who tried the case for permission to enter judgment without interest or costs.

BUSTER v. HUMPHREYS *et al.**(Circuit Court, W. D. Missouri, W. D. March 29, 1888.)*

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—UNAVOIDABLE ACCIDENT.

Where a freight train breaks in two, and the engineer's signal of "down breaks" frightens plaintiff's team, which runs between the two sections, and is killed, but there is no evidence that the train broke by fault of defendant, or that there was negligence in discovering the break, or stopping the rear section, there is negligence on neither side, and no recovery can be had.

At Law.

Action by plaintiff, C. W. Buster, against defendants, Solon Humphreys and Thomas E. Tutt, receivers of the Wabash, St. Louis & Pacific Railroad, to recover damages for stock killed.

C. W. Freeman, for complainant.

George S. Grover and *John W. Henry*, for defendants.

THAYER, J. Compensation is sought in this proceeding in the sum of \$570 for a two-horse team, a wagon, and set of double harness, which were run over by one of defendants' freight trains at a railroad crossing from one-eighth to one-fourth mile east of Arnold Station, in Clay county, Mo., under the following circumstances, and on December 4, 1886: Plaintiff's hired man was driving the team and wagon in question eastwardly from said station along a country road, which runs parallel with and very near to defendants' railroad track, for a short distance east of the station, and then crosses the track at right angles. As he approached the crossing, a freight train also approached the crossing from the east. As the engine passed the team, or shortly after, the engineer discovered, or was made aware that the train (consisting of 21 cars) had broken into two parts. The usual signal (three short sharp whistles, once repeated) was immediately given for "down brakes" on that portion of the train which had become detached from the engine. According to the driver's testimony the horses took fright at the unusual noise made by the engine, broke from his control, and attempted to cross the railroad track through the opening between the two sections of the train. They were caught, however, on the crossing by the rear section of the train, and killed.

My first impression, gathered from the oral testimony, was that neither party concerned in the accident was guilty of negligence. The further testimony which has been submitted in the shape of the depositions of the train-men has tended to confirm that impression. The signal given for "down brakes," at which the horses took fright, which was the immediate cause of the disaster, appears to have been the usual signal which, under the circumstances, it was the duty of the engineer to give to prevent a collision between the front and rear sections of the train. Plaintiff's counsel insists, however, (and in that view I concur,) that it is proper to go back a step in the line of causation and inquire—*First*, if the train broke without fault on the part of the defendants, their servants, or agents; and, *second*, if the train-men exercised ordinary diligence in discovering the break, and in arresting the motion of the rear section after the break was discovered. As to the first question, there is little room for doubt. The train separated eight car-lengths back from the engine by the breaking of a coupling pin. The pin in question was made by a reputable manufacturer; it was of approved size and strength, and such as are ordinarily used on first-class roads, and when found after the accident showed no outward evidence of being defective. Furthermore, there is no evidence that on the occasion in question it had been subjected to any unusual strain by the negligence of the engineer in handling the engine. It appears that the speed of the train was checked somewhat as it neared Arnold Station, and then accelerated when the station was found to be clear. Such action on the part of the engineer, while it may have produced a strain on the coupling pin, cannot be esteemed a negligent act, because it was necessary to check the motion of the train as it approached the station, and because the evidence fails to show that in this instance he either arrested or increased the motion of

the train suddenly, so as to impose an extraordinary strain on the couplings. The evidence, in my opinion, is also insufficient to prove that the train-men failed to exercise ordinary care in discovering the break, and in stopping the rear section of the train. From all the circumstances of the case, it is apparent that the break was discovered within a few moments after it occurred. As the track at the point where the break occurred was straight, a short time would necessarily elapse before it could be observed by persons stationed at the front or rear end of the train. According to the testimony, the brakeman at the forward end of the train was at his post, and acted with ordinary diligence. The conductor and other brakemen appear to have been in the caboose. The conductor says that he was in the cupola of the caboose, and on watch, but could not see the break, and was not advised of it until he heard the signal for "down breaks," and that he and the rear brakeman immediately set the brakes when the signal was given, and stopped the rear section as soon as possible. No regulation was shown from which it would appear that it was either the conductor's duty, or that of the rear brakemen, to remain on the top of the cars at all times, or to be there when they passed the point where the accident occurred. Furthermore, there is no necessary conflict between the testimony of the conductor and the witness Cooper, who was the only witness for plaintiff who gave any testimony tending to show negligence. Cooper's testimony does not show that the conductor was not on watch in the cupola, and it does not show that either he or the rear brakeman failed to set the brakes as soon as they heard the signal, or that they might have discovered the break earlier. It is obvious, that from their position it was impossible to see the break until a considerable space intervened between the two sections of the train. There is no doubt in my mind that they acted with due diligence as soon as they were advised that the train had parted. Self-preservation would naturally induce such conduct, and the presumption is that they so acted. In the absence of any proof that the train-men were not at their several posts of duty when the break occurred, it appears to me that there is no fair pretense for saying the break ought to have been discovered earlier, and that the rear section should have been stopped before it reached the crossing. Upon the whole I conclude that the collision was wholly fortuitous. The loss which plaintiff sustained is attributable solely to accident, and there can be no recovery. The intervening petition is accordingly dismissed.

HULBERT v. CITY OF TOPEKA.

(Circuit Court, D. Kansas. April 9, 1888.)

1. DEATH BY WRONGFUL ACT—RIGHT TO MAINTAIN ACTION—PERSONAL REPRESENTATIVE.

Comp. Laws Kan. 1879, § 420, provides that "in addition to the causes of action which survive at common law, causes of action * * * for an injury to the person * * * shall also survive;" and by section 422 it is enacted that the personal representatives of one whose death has been caused by wrongful act may maintain an action therefor, the damages recovered therein to "inure to the exclusive benefit of the widow and children, if any, or next of kin." *Held*, that the right of action in favor of the personal representatives, under section 422, was exclusive, and that such representatives had no right of action under section 420 for injuries to the person where the injuries were such as to cause death.

2. SAME—CONFLICT OF LAWS.

The right of action for injuries resulting in death being vested under 1 Rev. St. Mo. 1879, §§ 2121 and 96, solely in the surviving consort, children, etc., an administrator of that state has no standing in the federal courts sitting in Kansas, under Comp. Laws Kan. 1879, § 422, vesting such right of action in the personal representative to recover damages for the death of his intestate caused there by wrongful act. Following *Limekiller v. Railroad Co.*, 83 Kan. 88, 5 Pac. Rep. 401.¹

3. SAME—PLEADING—AMENDMENT.

A petition against a city in Kansas, to recover damages for personal injuries resulting to plaintiff's intestate from defendant's failure to keep its streets in repair, set up the fact of the injury; that said intestate had been seriously hurt and put to considerable expense for medical attendance, etc., that she remained disabled and enfeebled up to the time of her death, and that her death was the result of the accident. The administrator was appointed in Missouri, and a demurrer to the petition was sustained on the ground, among others, that, under the laws of that state, such an action could not be maintained by the personal representatives, but should be brought by the distributees, as provided by 1 Rev. St. Mo. 1879, § 2121. Leave having been given, an amended petition was filed, but the only additional matter set out was that the deceased had left a husband and son, naming them, and that they were her next of kin. *Held*, on demurrer, that the additional matter did not change the question, and that the petition should be dismissed.

At Law. On demurrer to complaint.

This was an action by A. G. Hulbert, the Missouri administrator of one Frances G. Hulbert, to recover damages from the city of Topeka, on the ground that her death had been caused by the negligent manner in which that city kept its streets. The accident occurred in August, 1879, and Mrs. Hulbert died in St. Louis, Mo., in March, 1886. The laws of that state as to this class of actions are found in 1 Rev. St. Mo. 1879, and are as follows:

"Sec. 94. Executors and administrators shall collect all money and debts of every kind due to the deceased, and give receipts and discharges therefor; and shall commence and prosecute all actions which may be maintained and

¹Although, at common law, actions *ex delicto* for injury to the person abate upon the death of the person injured, yet where the statute in the state in which the injury is inflicted gives a right of action to the personal representative in such case, that right may be enforced in another state having a similar statute, in a court having jurisdiction of the defendant. *Burns v. Railroad Co.*, (Ind.) 15 N. E. Rep. 280. It must appear from the record that the right of action could be maintained by the plaintiff in the state where the injury occurred. *Hamilton v. Railway Co.*, (Kan.) 18 Pac. Rep. 57.

are necessary in the course of his administration, and defend all such as are brought against him.

"Sec. 95. They shall prosecute and defend all actions commenced by or against the deceased at the time of his death, and which might have been prosecuted or maintained by or against such executor or administrator.

"Sec. 96. For all wrongs done to the property, rights or interest of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrong-doer; and, after his death, against his executor or administrator, in the same manner, and with the like effect, in all respects, as actions founded upon contract.

"Sec. 97. The preceding section shall not extend to actions for slander, libel, assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator."

"Sec. 2121. Whenever any person shall die from any injury, resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employe while running, conducting or managing any locomotive, car, or train of cars; or of any master, pilot, engineer, agent, or employe while running, conducting, or managing any steam-boat, or any of the machinery thereof; or of any driver of any stage-coach, or other public conveyance, while in charge of the same as a driver; and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad, or any part thereof; or in any locomotive or car; or in any steam-boat, or the machinery thereof; or in any stage-coach, or other public conveyance,—the corporation, individual, or individuals in whose employ any such officer, agent, servant, employe, master, pilot, engineer, or driver shall be at the time such injury is committed, or who owns any such railroad, locomotive, car, stage-coach or other public conveyance at the time any injury is received, resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying the sum of five thousand dollars, which may be sued for and recovered—*First*, by the husband or wife of the deceased; or, *second*, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or, *third*, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor. In suits instituted under this section it shall be competent for the defendant, for his defense, to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency.

"Sec. 2122. Whenever the death of a person shall be caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

"Sec. 2123. All damages accruing under the last preceding section shall be sued for and recovered by the same parties, and in the same manner as provided in section two thousand one hundred and twenty-one, and in every such action the jury may give such damages, not exceeding five thousand dollars, as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default."

The laws of Kansas referred to in the opinion are found in Dassler's Comp. Laws Kan. 1879, and are as follows:

"Sec. 420. In addition to the causes of action which survive at common law, causes of action for mesne profit, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, shall also survive; and the action may be brought notwithstanding the death of the person entitled or liable to the same."

"Sec. 422. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

G. N. Elliott, for plaintiff.

W. A. S. Bird, for defendant.

BREWER, J. This case is now submitted on a demurrer to a second amended petition. The facts are these: On August 21, 1879, Frances G. Hulbert, the plaintiff's intestate, while on one of the streets of the city of Topeka, was injured; and it was claimed that the injury was caused by the negligence of the defendant in failing to keep that street in good repair. On the 3d of March, 1880, she filed her petition in the state court. The case remained there for some four years and over, during which time it was tried, but the trial resulted in a hung jury. Thereafter it was removed to this court, and another trial had, with like result. On the 20th of March, 1886, she died, being then a resident of St. Louis, and the present plaintiff was duly appointed her administrator by the probate court of St. Louis. The first amended petition set up the fact of the injury; that by it the deceased was seriously injured, and was put to considerable expense for medical attendance, etc.; and that she remained disabled and in feeble up to the time of her death, and that those injuries caused her death. To this petition a demurrer was filed, which was sustained by my Brother FOSTER, and leave given to file a second amended petition. The only additional matter set forth in this petition is that the deceased left surviving a husband and son, naming them, who are her next of kin. I do not see that this changes the question in the slightest degree; so that this demurrer simply brings up for a second hearing the matter once determined by the district judge. Upon the question thus presented, although I might content myself with saying that the matter has once been settled in this court, I make these observations:

The federal courts sitting in this state administer the laws of the state as prescribed by its legislature, and expounded by its supreme court. Whatever limitations there may be to this general rule do not apply in a case of this kind, which depends simply upon the construction to be given to the statutes of the state. At common law no action for personal injuries survived, and if there be a survival in this state, and to

the extent that there is a survival, must be determined by the state statutes. Now, that an administrator appointed in Missouri cannot maintain an action under section 422 for a wrongful act causing death to the intestate, is settled in the case of *Limekiller v. Railroad Co.*, 33 Kan. 83, 5. Pac. Rep. 401. The supreme court of Missouri, construing the statutes of that state, also rules that an administrator cannot maintain such an action in her courts. *Vauter v. Railway Co.*, 84 Mo. 679. The only action which can be maintained in Kansas when the wrongful act of the defendant causes the death of the intestate is that provided for by section 422. This was affirmed by the supreme court in *McCarthy v. Railroad Co.*, 18 Kan. 46, in which the court uses this language: "Section 420,"—which section provides for a survival of actions for personal injuries,—“as construed with section 422, only causes an action to survive for injuries to the person when death does not result from such injuries, but does occur from other circumstances. The right of action under section 422 is exclusive, and an administrator could not maintain an action under sections 420 and 422 for the same injury. When death results from wrongful acts, section 422 is intended solely to apply. *Read v. Railway Co.*, L. R. 3 Q. B. 555; *Andrews v. Railroad Co.*, 34 Conn. 57.” I was a member of the supreme bench of Kansas at the time this opinion was filed and concurred in it. I feel constrained to follow that decision; and yet I may be permitted to say that my examination of this case has led me to doubt the correctness of that conclusion, for the measure of damages and the basis of recovery under the two sections are entirely distinct. Section 422 gives a new right of action,—one not existing before; an action which is not founded on survivorship; an action which takes no account of the wrong done to the decedent, but one which gives to the widow or next of kin damages which have been sustained by reason of the wrongful taking away of the life of the decedent. It makes no difference whether the injured party was killed instantly, or lived months; whether he suffered lingering pain or not; whether or not he was put to any expense for medical attendance and nursing. None of these matters are to be considered in an action under section 422; and the single question is, how much has the wrongful taking away of his life injured his widow or next of kin? It is an action to recover damages for the death, and in no sense a survival of an action which accrued to the decedent before his death; whereas, on the other hand, section 420 provides for the survival of an action which the decedent himself had in his life-time. Suppose, as in this case, the decedent lived a long time after injury; was put to great expense for medical attendance and nursing,—for these matters which work a loss to the estate, she had a right of action in her life-time. That action, it is which, by section 420, survives. The distinction between the two sections is pointed out by the supreme court of Vermont in *Needham v. Railroad Co.*, 38 Vt. 294, as follows:

“The principles on which the intestate’s cause of action rested at common law are the same, irrespective of the cause of his death. He had a right of action for the injury, and that right existed till his death. At common law
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his right of action died with his person, but is revived by the statute in favor of his administrator. The action by the administrator, founded on the claim of his intestate under the provisions of section 12, could include nothing more than his intestate's cause of action. That section simply revives, but does not enlarge, the common-law right of the intestate. Under the provisions of that section it is evident that no damages could be assessed by reason of his death, nor resulting from his death. The sum recovered by the administrator in an action founded exclusively upon the claim of his intestate, under the provisions of the twelfth section, would be treated as assets in the hands of the administrator for distribution among the creditors and heirs of the intestate, agreeably to the general provisions of our statute. The intent of the fifteenth, sixteenth, and seventeenth sections was to make the damage, or pecuniary injury resulting from such death to the widow and next of kin, the subject of a new cause of action and right of recovery wholly distinct from the consequences of the wrong to the injured party, and wholly distinct from his claim for damages resulting from such injury. The provisions of the last-mentioned sections have introduced principles wholly unknown to the common law, or to any previous statute of this state, namely, that the value of a man's life to his wife and next of kin constitutes a part of his estate to be administered by his personal representative, and that the whole proceeds of the recovery for such loss shall go to his widow or surviving relatives. Notwithstanding the action in such case is to be prosecuted in point of form by the executor or administrator, he is only a trustee of the sum recovered, for the use of the widow and next of kin; and the sum so recovered cannot be treated as assets in his hands for distribution among the creditors. No right of action under the provisions of section 15 exists during the life time of the injured party. When death occurs from the injury, the right of action given under the provisions of that section arises after and at the moment of his decease. The damages resulting from his death are then prospective. Such damages to the widow and next of kin begin where the damages of the intestate ended, viz., with his death."

So, also, in *Blake v. Railway Co.*, 10 Eng. Law & Eq. 443, COLDRIDGE, J., commenting on the British statutes, says:

"It will be evident that this act does not transfer this right of action [for loss and suffering of the deceased] to his representatives, but gives to the representatives a totally new right of action upon different principles." "The measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to the family."

It is obvious that both of these causes of action may exist against two different parties, and why may they not exist against the same party? Suppose A. commits an assault and battery upon B., a cause of action exists in favor of B. against A. for those injuries which survives by section 420. Suppose, after such action is instituted by B., he should be killed by the wrongful acts of C. There certainly would be an action under section 422 against C. for such wrongful death. Would that defeat the first action, or would not that survive, as provided under section 420? If that be true where there are two wrong-doers, why should it not also be true where there is but one wrong-doer? Still, although I am much impressed with the force of this reasoning, I feel constrained to follow the decisions of the supreme court of the state; for, as I said heretofore, this court is bound to administer the laws of the state as in-

terpreted by her supreme court. The demurrer will be sustained. As the amount in controversy is over \$5,000, of course, the plaintiff can take the opinion of the supreme court.

AURORA HILL CON. MIN. CO. v. 85 MINING CO. *et al.*

(Circuit Court, D. Nevada. April 18, 1888.)

1. MINES AND MINING—ACQUISITION—ANNUAL EXPENDITURE.

An applicant for a patent to a mining claim, who has made final entry, paid the purchase money for the land embraced in the survey of the claim, and has obtained his certificate of purchase therefor, is not obliged to continue the annual expenditure upon the claim required by section 2824, Rev. St., pending final decision upon his application, and issuance of patent.

2. SAME—CERTIFICATE OF PURCHASE.

An entry and certificate of purchase, so long as they remain uncanceled, are equivalent to a patent, so far as the rights of third parties are concerned.

3. SAME—LOCATION WITHOUT PRIOR ENTRY.

A mining location made without prior right of entry upon the ground is void. There can be no valid location made without prior right of entry. Location confers no right of entry where such right did not previously exist.

4. SAME—GENERAL LAND-OFFICE—COLLATERAL ATTACK OF DECISION.

The decisions of department officers upon questions of law or fact are not subject to collateral attack. Upon questions of fact their decisions are conclusive upon all parties; upon questions of law their decisions can only be reviewed in a proper case made in a direct proceeding for that purpose. Evidence is not admissible, in an action at law, to show error in the decision of an officer of the land department upon any matter submitted to such officer for his decision.

5. SAME—EJECTMENT—TITLE TO MAINTAIN.

Generally, any person vested with immediate right of possession can maintain ejectment. As against a trespasser, prior possession will support the action. As to mining claims, possessory title is sufficient. Rev. St. § 910.

6. SAME—CONVERSION OF ORE—MEASURE OF DAMAGES.

Rule adopted in this case.

(Syllabus by the Court.)

At Law.

R. M. Clarke, for plaintiff.

A. C. Ellis, for defendants.

Before SABIN, District Judge.

SABIN, J. This is an action of ejectment, brought to recover possession of a certain mining claim, known as the "Prospectus" claim or mine, containing 1,500 feet along the lode or vein, by 200 feet in width, situated in Esmeralda mining district, Esmeralda county, Nev., together with damages in the sum of \$10,000 for ores alleged to have been removed therefrom, and converted by defendants to their own use. The mining claim is particularly described in the complaint by metes and bounds, according to the United States official survey thereof. The plaintiff is a corporation, organized under the laws of the state of California, and engaged in mining in said Esmeralda mining district. The defendants are

citizens and residents of the state of Nevada. The case was tried before the court, a jury having been waived, in writing, by the respective parties. The undisputed facts in the case are simple. On March 12, 1877, Edward T. Greeley duly located the mining grounds in controversy, and entered into possession of the same. Prior to 1880, he conveyed the same to his brother, James L. Greeley, who took possession thereof, and continued to work and develop the mine. In June, 1880, James L. Greeley bonded the mine to H. G. Blasdel, who then took possession thereof, and continued the work thereon. August 19, 1880, Greeley made application in due form at the local land-office, in the proper land district, for a patent to the mine. The usual and necessary proceedings were had under this application for patent by Greeley, and on November 20, 1880, he made final proof of entry, and paid the purchase money for the land embraced in the survey of said claim, and received from the officers of said land-office the usual certificate of purchase issued in such cases; which entry and certificate are now in full force and effect, uncanceled, and unrevoked. No adverse claim or protest was filed in the land-office to the issue of a patent for any part of the claim for which patent was sought. The proceedings in the local land-office being regular in all respects, and those officers being satisfied with the proofs submitted, they, on November 20, 1880, forwarded the papers in the case to the commissioner of the general land-office, at Washington, for final action. The papers transmitted, as appears from the records of the local land-office, were: (1) Application for patent; (2) plat of survey; (3) field-notes; (4) proof of posting notice and diagram on claim; (5) certified copy of notice of location; (6) affidavit of citizenship; (7) certified copy of district mining laws; (8) agreement of publisher; (9) register's certificate of posting in office; (10) proof that plat and notice remained on claim during 60 days of publication; (11) clerk's certificate of no suit pending; (12) proof of publication; (13) affidavit of \$500 improvements; (14) statement of fees and charges; (15) register's final certificate of entry; (16) receiver's receipt. From subsequent correspondence it would seem that these papers were duly received at the general land-office, at Washington. On February 1, 1882, the commissioner of the general land-office, by letter of that date, notified the register and receiver of the district land-office that he required further proof of the posting of the notice and plat on the claim during the 60-days period of publication. This proof was not furnished, and in 1885, and again in 1886, the commissioner again called upon the register for this additional proof. In response thereto, in January 1887, H. G. Blasdel submitted his affidavit, as agent for said Greeley, showing the posting of said notice and plat on the claim for the requisite time, which affidavit was duly forwarded to the commissioner. In 1886, and after the commencement of this action, defendants filed in the office of the commissioner a protest against the issue of a patent to Greeley, or his successors in interest, for said claim, alleging that the plat and notice were not posted on said claim for the period by law required. Thereafter the commissioner fixed a day for hearing further proof as to the posting of said plat and notice, before the officers

of the local land-office, which hearing has not yet been had. After Blasdel's entry upon the claim in June, 1880, he continued work and improvements thereon, and on about October 20, 1880, he paid to Greeley the purchase money for the claim; and received from him a deed of conveyance of the same. As Greeley had made application for patent for the claim, it was understood between him and Blasdel that proceedings thereunder should continue for the benefit of Blasdel or his successors in interest. By meane conveyances the title to the claim passed to plaintiff in August, 1881, when it took possession thereof, and continued work thereon, expending several hundreds of dollars in developing and improving the mine, and extracting ore therefrom. Plaintiff continued in possession of the mine during the years 1881, 1882, and 1883, working upon and improving the same. Little, if any, work was done on the mine in the year 1884 by plaintiff, and none in the year 1885. During the year 1884, and until the mine was taken possession of by defendants, plaintiff maintained upon the claim its tracks, cars, shops, etc., and the survey posts set by the United States surveyor when surveyed by him for patent. At no time had or has it abandoned said claim or mine, or ceased in its efforts to obtain patent therefor. It is not questioned that plaintiff's grantors had expended more than \$500 in work and improvements on the claim prior to application for patent, or that plaintiff during the years 1881, 1882, and 1883, annually expended upon said claim at least \$100, if not more. It is admitted by plaintiff that he did no work thereon in the year 1884. On the 1st of January, 1885, the grantors of defendants, together with some of the defendants in person, relocated said mine, referring to it by name in their notice of location, and renamed it the "85 Mine." Their notice of relocation of the mine was duly recorded, and under it they entered upon the same, and commenced work thereon. They have retained possession of the same to the present time, and, until the commencement of this action, had annually expended more than \$100 in work upon the mine, and have extracted and removed from it more than 500 tons of ore, of the net value of \$2.50 per ton.

Defendants contend that the mine became and was subject to relocation at the date of their attempted relocation thereof, by reason of the failure of plaintiff to do the annual work thereon required by section 2324, Rev. St. U. S. It is conceded that more than one year had elapsed from the date of the last work done on the mine by plaintiff, in 1883, to the date of defendants' relocation thereof. It is upon this contention of defendants that the rights of the parties in this action depend. I am not aware that this question of plaintiff's obligation to continue the annual expenditure of \$100 upon the claim pending his application for a patent has ever been judicially decided. If such is the case, I have not found, nor have I been cited to, such decision. It has, however, been ruled upon, and decided adversely to defendants, both by the commissioner of the general land-office, and by the secretary of the interior department; and by each of them in a manner so able, strong, and just as to require but little to be further said in support of their conclusions and decisions.

Both of these officers hold that after entry and payment of purchase money for the mine, the applicant is not required to expend any further sum of money upon the mine, pending the final decision upon his application, and the issue of patent. I fully concur in the opinions by these officers expressed upon this question, and, without quoting from them *in extenso*, refer to them as the true and correct construction of the law applicable thereto. The commissioner's decision will be found in Sickels, Min. Dec. (1881,) pp. 384-392, rendered Sept. 26, 1878; that of the secretary of the interior, Id. pp. 377-388, rendered March 4, 1879. The same conclusion is intimated by Acting Commissioner Armstrong, at page 373, Id. In the opinion of the secretary above referred to (page 383) he says:

"The true rule of law governing entries of the public land, to which mineral land forms no exception, is that, when the contract of purchase is completed by the payment of the purchase money and the issuance of the patent certificate by the authorized agents of the government, the purchaser at once acquires a vested right in the land, of which he cannot be subsequently deprived if he has complied with the requirements of the law prior to entry, and the land thereupon ceases to be a part of the public domain, and is no longer subject to the operation of the laws governing the disposition of the public lands. In such cases there is part performance of a contract of sale, which entitles the purchaser to a specific performance of the whole contract, without further action on his part. When the proofs are made, and the purchase money paid, the equitable title of the purchaser is complete; and the patent, when issued, is evidence of the regularity of the previous acts, and relates to the date of entry, to the exclusion of all intervening claims. In short, an entry made is in all respects equivalent to a patent issued, in so far as third parties are concerned. In support of these views, I cite the following adjudicated cases: *Carroll v. Safford*, 3 How. 441; *Landes v. Brant*, 10 How. 348; *Lessees of French v. Spencer*, 21 How. 240; *Witherspoon v. Duncan*, 4 Wall. 218; *Frisbie v. Whitney*, 9 Wall. 187; *Irvine v. Irvine*, Id. 617; *Barney v. Dolph*, 97 U. S. 652; 5 Cruise, Dig. 510, 511. As the doctrine is firmly established that, where several concurrent acts are necessary to make a conveyance, the original act shall be preferred, and all subsequent acts shall have relation to it, it is held that an entry made is equivalent to a patent issued, within the meaning and intent of section 2324, Rev. St."

In addition to the above authorities we cite: *Wirth v. Branson*, 98 U. S. 118; *Deffebach v. Hawke*, 115 U. S. 392, 6 Sup. Ct. Rep. 95; *Mining Co. v. Dangberg*, 2 Sawy. 451-455; *Milling Co. v. Spargo*, 8 Sawy. 645, 16 Fed. Rep. 348. We need not discuss this proposition further. If any proposition of law can be deemed settled we think this is. The decisions of the commissioner and secretary have stood unchallenged as to their correctness by the courts or legislative action for nearly 10 years. They may properly be said to have become rules of property, regulations under and by which property and the rights thereto are secured and protected.

The mining interests of the country are of great moment and value. The mode of acquiring title thereto should be by fixed and certain procedure, not subject to capricious change. Sections 2324-2326, Rev. St., were enacted in 1872. They were amended in certain particulars in 1880, and again in 1882. It can hardly be supposed that congress

was not aware of the construction placed upon sections 2324 and 2325 by the department especially charged with their execution; and if such construction had not been agreeable to legislative will and sanction, those sections would have been amended so as to correct, for the future, any erroneous construction thereof theretofore made. We are therefore justified in concluding that this construction has the legislative sanction. Section 2324 provides solely for maintaining a possessory title by the annual expenditure of work or improvements on the claim. Section 2325 has an entirely different purpose—that of investing title absolute in the applicant for patent. When he has complied with the requirements of this section, made his entry, and obtained his certificate of purchase, his obligations cease, and nothing more by way of consideration is required of him. He may be required to make further proof upon any matter not satisfactorily established, but these things are matters of detail, not of consideration. There is no ambiguity in section 2325, unless we annex to it the conditions prescribed in section 2324 for maintaining an entirely different title, which we have no authority to do. It was suggested, upon the argument of this case, that possibly this court had ruled upon this question in the case of *Mining Co. v. Brown*, 10 Sawy. 243, 21 Fed. Rep. 167, and adversely to the present opinion of the court. We think not. In that case the court said: "A claimant of mining ground, until he has secured patent therefor, must be an actor, and must annually perform the work required thereon; and in establishing his right thereto must show compliance with the law in this respect." This, we think, is wholly correct, and not in conflict with our judgment in this case. This language was used, and is to be understood, as applied to the facts in that case. That was an action brought upon a protest filed to an application for a patent, upon an adverse claim. In that action neither party claimed anything under section 2325, but each sought to establish its and his right to certain mining ground by showing compliance with the provisions of section 2324; and the action was dismissed solely upon the ground that neither party had shown any compliance with the provisions of that section. Neither party had secured a patent, or anything equivalent thereto, nor did they claim so to have done. In the case at bar, plaintiff, through its grantors, has surely "secured a patent," or its equivalent, so long as the entry and certificate of purchase are uncanceled.

At the trial of this case, defendants offered evidence to show that the plat and notice were not posted on the claim during the time by law required. This was objected to by plaintiff's counsel as wholly inadmissible. As the case was heard without a jury, the court admitted the evidence, subject to be stricken out, if upon deliberation it should be deemed inadmissible. The evidence offered on this point was in nowise satisfactory, but it was wholly rejected from consideration. It was in nowise admissible for any purpose in the case, and could not be considered. By law the officers of the land department are charged with the whole business of transferring the government title to public land, and they are exclusively charged with that duty. Within the sphere of their duty

their decisions upon questions of fact are conclusive upon all parties. They may, like other officers, err in regard to matters of law, and the correct interpretation thereof. In such cases, upon proper proceedings had for that purpose, their judgments or decisions may be reviewed by the courts, and corrected, if erroneous. This can only be done by a direct proceeding for that purpose, upon proper allegations disclosing the fraud, mistake, or other matter complained of, but in no case can their decisions upon questions of fact submitted to them for decision be collaterally attacked in an action at law. It would be a strange anomaly were it otherwise, and productive of endless confusion in public affairs. If the courts could interfere with the action of the land department in cases before it for decision there would be an end to the orderly conduct of business in that department. And there might be presented the strange spectacle of two tribunals, at the same time, hearing and deciding the same case, arriving at opposite conclusions,—one tribunal, created especially for the purpose, and given jurisdiction and power to hear and decide the case; the other exercising an assumed jurisdiction, with no power or authority to control the action or judgment of the former. *Johnson v. Towseley*, 13 Wall. 72; *Marquez v. Frisbie*, 101 U. S. 473; *Quinby v. Conlan*, 104 U. S. 420; *Steel v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. Rep. 389; *Smelting Co. v. Kemp*, 104 U. S. 636; *Baldwin v. Stark*, 107 U. S. 463, 2 Sup. Ct. Rep. 473; *Shepley v. Cwanan*, 91 U. S. 330.

It was further urged that this being an action at law, recovery could be had only upon the legal title. This position cannot be maintained. Section 910, Rev. St., provides for this class of cases:

"No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damage to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession."

As a general rule, any person vested with the right of immediate possession to realty may maintain ejectment. As against a trespasser without color of title, prior possession will support the action. In *Christy v. Scott*, 14 How. 292, the court say:

"But a mere intruder cannot enter on a person actually seized, and eject him, and then question his title, or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser who entered without any title. He may do so by writ of entry, where that remedy is still practiced, (*Jackson v. Railroad Corp.*, 1 Cush. 575;) or by an ejectment, (*Allen v. Rivington*, 2 Saund. 111; *Doe v. Reads*, 8 East, 356; *Doe v. Dyeball*, 1 Moody & M. 346; *Jackson v. Hazen*, 2 Johns. 438; *Whitney v. Wright*, 15 Wend. 171;) or he may maintain trespass, (*Catteris v. Cowper*, 4 Taunt. 548; *Graham v. Peat*, 1 East, 246.)"

See, also, *Campbell v. Rankin*, 99 U. S. 261; *Sedg. & W. Tr. Title Land*, §§ 185, 718 *et seq.* Defendants were trespassers—mere intruders—upon plaintiff's lawful possession when they attempted to relocate this mine.

Having no right to enter upon that possession, they could initiate no right in themselves by their attempted relocation of the mine. The right to locate, or relocate, a mining claim depends upon the right to enter upon the land where the mine is situated at the time the location is made. Without such right of entry the location is void. Location confers no right of entry unless such right of entry existed at the date of location. *Belk v. Meagher*, 104 U. S. 279. The testimony of the defendants shows that while in the possession of this mine they extracted and removed therefrom 553 tons of ore, which they converted to their own use. The same testimony shows the net value of this ore to have been about \$2.50 per ton in the mine, allowing for extracting and reduction. There is evidence in the case which might bring the measure of damages within the severer rule laid down in *Wooden-Ware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. Rep. 398. It is in evidence, undisputed, that plaintiff, by its well-known agent, remonstrated with defendants and denied their right to locate the mine or work upon the same, or remove ore therefrom, and constantly asserted plaintiff's rights. And finally, plaintiff was compelled to bring this action to dispossess defendants. I have, however, adopted the measure above indicated, allowing the defendants the cost of extraction and reduction, *non constat*, however, but that plaintiff could have extracted and reduced this ore at less expense than it was done by defendants.

There must be judgment for plaintiff for possession of the mining ground described in the complaint, together with the sum of \$1,382.50 damages for ores removed and converted, and for costs of this action, and it is so ordered.

BOLTZ et al. v. EAGON.

(Circuit Court, E. D. Missouri, E. D. April 25, 1893.)

ATTACHMENT—PROPERTY SUBJECT TO—PURCHASE PRICE.

Rev. St. Mo. § 2858, providing that personal property shall in all cases be subject to execution on a judgment obtained for the purchase price, unless found in the hands of a purchaser for value without notice, does not authorize the seizure of personalty which has passed to an assignee for benefit of creditors, under an assignment valid as far as he is concerned, on an attachment against the assignor.

At Law. Intervening petition of Gus. Lehman, assignee of H. C. Eagon against John W. Emerson, United States marshal.

Plaintiffs, John H. Boltz et al., brought suit by attachment against defendant H. C. Eagon, and caused it to be levied on property which had been conveyed by the defendant by a deed of general assignment to Gus. Lehman, as assignee for the benefit of creditors. The assignment having been sustained by the verdict of a jury, plaintiffs claimed that they were at least entitled to hold under the attachment certain portions

of the attached property originally sold by them to the defendant, which had not been paid for at the date of the assignment and at the date of the attachment. Such claim was based on section 2353, Rev. St. Mo., which is stated in substance in the opinion of the court.

Dyer, Lee & Ellis, for plaintiffs.

H. W. Bond and James I. Lindley, for intervenor.

THAYER, J., (*orally*.) In the matter of the intervening claim of Gus Lehman, assignee, in the case of *Boltz and others* against *Eagon*, (the jury having found that the assignment was not fraudulent, so far, at least, as the assignee is concerned,) the question arises whether the attaching creditors can hold as against the assignee that part of the assigned property that was purchased from themselves, on the ground that the attachment suit was brought to recover the purchase price of such property. The claim is based solely on section 2353, Rev. St. Mo., which provides, in substance, that personal property shall in all cases be subject to execution on a judgment obtained for the purchase price, and shall not be exempt from such execution unless the property is found in the hands of a purchaser for value, who had no notice at the date of his purchase of an outstanding claim for the purchase money.

The question to be determined is whether property can be taken from an assignee, by virtue of this section, under a writ of attachment or execution issued against the assignor for the purchase price of the property, that has passed to the assignee by virtue of a general assignment. There are only three reported cases in this state which appear to me to have any bearing on the question, and neither of them can be said to be an authoritative determination of the point at issue. I refer, of course, to the cases of *Parker v. Rodes*, 79 Mo. 88; *Mill Co. v. Turner*, 23 Mo. App. 103; and *State v. Orahoad*, 27 Mo. App. 496. My own convictions, after considering the matter, are very strong that section 2353 was not intended to interfere with the general policy of the act concerning voluntary assignments, and that it should not be so construed as to interfere with the policy of that act. The state courts will, in all probability, so hold, when the precise question confronts them that is raised in this case. An assignment is a trust created for the common benefit of creditors. The law favors the creation of such trusts, and carefully regulates their administration. It also prohibits preferences, and provides for a *pro rata* distribution among creditors of all funds realized from the sale of the assigned effects. Whatever property passes to an assignee under an assignment (that is not incumbered with a lien) by virtue of the assignment act is held by the assignee for the common benefit of creditors. Section 2353 certainly does not create a lien in favor of the vendor of personal property for the purchase price of goods sold and delivered. It simply provides that they cannot be claimed as exempt by the vendee or by any transferee who buys with notice that the purchase price is unpaid. All the cases cited are in accord on this proposition. If it should be held that personal property in the hands of an assignee may be seized for the purchase price in a suit brought against the assignor, a

species of preference would be created, which, as it appears to me, would be at variance with the policy of the assignment act. In some cases such rule, if adopted, would practically defeat the assignment; creditors instead of participating ratably in the distribution of the assigned effects, would take that portion of the trust-estate *in specie*, which they could identify as having been originally purchased from themselves, and had not been paid for. In this manner a new method of distribution would be inaugurated, which is at variance with the provisions of the assignment law; and in many cases such practice would lead to great confusion in the administration of assigned estates. I am of the opinion that section 2353 was not intended to have such effect. It should be construed, according to my view, in conformity with, and in subordination to, the policy of the assignment law, so as not to defeat its provisions; that is to say, it should be held that, when personal property has passed to an assignee under an assignment that is valid so far as the assignee is concerned, such property cannot be seized under an execution or attachment against the assignor merely by virtue of the provisions of sections 2353. I shall so hold, and accordingly overrule the claim of the attaching creditors to a portion of the property based upon that section. Judgment will therefore be entered on the verdict of the jury to the effect that the assignee is entitled to all and singular the property levied upon by the United States marshal that was covered by the assignment, and was found in his hands; and an order will be made on the marshal directing him to turn the property over to the assignee. An order will also be made requiring the receiver appointed in the case to file a final report of the collections he has made on choses in action in his hands, and, after he has filed such report, he will be ordered to turn over what property is in his hands to the assignee.

BOLAND v. NORTHWESTERN FUEL CO.

(Circuit Court, D. Minnesota. May, 1886.)

1. DAMAGES—BREACH OF CONTRACT OF AFFREIGHTMENT.

Where plaintiff had a contract to transport a quantity of coal by water for defendant at an agreed price, the coal to be delivered to him by defendant at a designated point, and defendant failed to deliver it, plaintiff's measure of damages was the difference between the cost of transportation and the contract price.

2. SAME—EVIDENCE—RECOUNPENT.

An offer of evidence by defendant, not for the purpose of showing freight earned by plaintiff in order to recoup, but to show what plaintiff's boat "was said to have earned," was properly rejected.

3. PRINCIPAL AND AGENT—UNDISCLOSED PRINCIPAL—PAROL EVIDENCE.

The right to show by parol evidence that a defendant was an undisclosed principal in a contract made by a third person is not doubtful.

At Law. Motion for new trial.

Lawler & Durment, for plaintiff.

C. D. O'Brien, for defendant.

NELSON, J. The evidence shows that the steamer *Minnie Hermann*, Thomas Boland, owner, entered into a contract with H. Y. Smith to receive from the railroad companies at Running Water, Pierre, or Bismarck, on the Missouri river, and transport and deliver to the agent of Smith on the steam-boat landing of the several posts, coal to be delivered to the government under Smith's contracts,—125 tons, more or less, Fort Randall; 300 tons, more or less, Fort Bennett; 800 tons, more or less, Fort Yates. Smith agreed to pay \$4.20 per ton of 2,000 pounds for transporting coal to Forts Yates and Bennett, and \$4.80 per ton of 2,000 pounds for transporting coal to Fort Randall, and that the plaintiff with his boat went to Running Water. On his arrival at Sioux City, he notified Smith about the day that he would be at Running Water, and wanted the coal ready. Smith answered that the coal had been forwarded. On plaintiff's arrival at Running Water he made a demand for coal of the agent of the railroad company, and was told that he had strict orders not to deliver any coal to him. He also again telegraphed Smith from Running Water, and received answer that the "coal has been delivered. You were notified at Alton that it would be." He also proceeded to St. Paul, and demanded coal from Smith, who refused, saying that it was delivered to other parties.

There was evidence on the part of plaintiff tending to show that the defendant was an undisclosed principal to the contract with the plaintiff. All the direct evidence of the witnesses who testified in reference to the matter, with the exception of the president of the defendant company, tended to prove that the defendant was a party to the contract, whose name was not disclosed; and so did the circumstantial evidence. Coal was shipped by the defendant under the Smith contract, so-called, from Duluth to Bismarck, or river landing, for Fort Yates; and coal was also shipped from Milwaukee to Running Water for Fort Randall. The defendant offered no evidence. The jury was instructed in substance that if the plaintiff had proved that the defendant was an undisclosed principal, and that it was interested as an undisclosed principal in the contract signed by Smith, he could recover if a breach of the contract was also proved. Also that the measure of damages was the loss under the contract for its non-fulfillment on the part of the defendant, to-wit, the difference between the cost of transportation and the price under the contract. Also, the jury was instructed that the plaintiff could only recover for loss of the transportation of coal which he proved had been delivered at either one or the other places mentioned in the contract for shipment to the forts. There was evidence tending to show the cost of transportation, and the number of pounds or tons of coal delivered at Bismarck, or river landing, and Running Water, for Forts Yates and Randall. The jury gave the plaintiff a verdict. The instruction in reference to the measure of damages is correct. If the coal at Bismarck, or river landing, and Running Water, had been turned over to plaintiff, and transported by him to Forts Yates

and Randall, his gain would have been the difference between the contract price of carriage and the cost of transportation. What the plaintiff would have made if the contract had been kept by the defendant is the measure of damages if the contract is broken. This was the rule given to govern the jury. The offer of evidence by defendant which was rejected was not for the purpose of showing freight earned by plaintiff in order to recoup, but what the boat was "said to have earned;" and it was properly excluded. This is not a charter-party, but a contract of affreightment, and the measure of damages for a breach is to be determined by the rules applicable to such contracts. The right to show by parol evidence that the defendant was an undisclosed principal is not doubtful. *Ford v. Williams*, 21 How. 287.

Motion for a new trial is denied.

In re MAHON.

(District Court, D. Kentucky. March 8, 1888.)

1. EXTRADITION—INTERSTATE—ARREST AND BRINGING INTO JURISDICTION BY PRIVATE PARTIES.

On a petition for *habeas corpus*, where it appears that the petitioner, being charged with crime in one state, had fled to another, where he was arrested by a private party without authority, and that the authorities of the latter state had not acted upon a requisition of the executive of the former, the district court will not revise the arrest as being an effort to act under Const. U. S. art. 4, § 2, providing for interstate extradition of persons charged with crime, and laws passed thereunder.

2. SAME—PRIVILEGES OF CITIZENS—FOURTEENTH AMENDMENT.

A lawful arrest, under authority of a state court, of one unlawfully brought into the state by private parties, is not a violation of the fourteenth amendment to Const. U. S., providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

3. SAME—DUE PROCESS OF LAW.

In the fourteenth amendment to Const. U. S., providing that no state shall "deprive any person of life, liberty, or property, without due process of law," the phrase "due process of law" refers to the state's own process, and a lawful arrest under authority of a state court of one unlawfully brought into the state by private parties, is not a violation of the provision.

Petition for writ of *Habeas Corpus*, by Plyant Mahon.

Abner Justice, jailer of Pike county, having made his return to the writ of *habeas corpus* issued herein on the ——— day of February, 1888, and Plyant Mahon having filed his response thereto, and produced evidence, the court certifies the following to be the facts as admitted by the parties or proven to the court's satisfaction, viz.: The petitioner, Mahon, together with 19 other persons, was, at the September term, 1882, of the circuit court of Pike county, Ky., indicted by the grand jury impaneled in and by said court, for willful murder, alleged to have been committed by them in said county. Mahon was at the time, and had

always been, and still is, a citizen of West Virginia, and a resident of Logan county in said state. His excellency, S. B. Buckner, governor of the state of Kentucky, on the 10th day of September, 1887, made upon his excellency, E. W. Wilson, governor of the state of West Virginia, a requisition under the seal of the commonwealth, demanding of him, the governor of West Virginia, the arrest and rendition of the said Plyant Mahon, and the others named in said indictment, to the state of Kentucky, to answer the same, claiming that the said Plyant Mahon and others had fled as fugitives from justice from said state. Said requisition was accompanied by a copy of the indictment therein referred to, which was certified by the governor of Kentucky to be authentic. In said requisition he appointed one Frank Phillips agent of the state of Kentucky, to receive said Mahon and the others, and bring them to the state of Kentucky. This requisition was not acted upon by the governor of West Virginia, because, as he stated, of the want of an affidavit in conformity with the laws of West Virginia. An affidavit was then made by said Frank Phillips in compliance with said request, and on the 13th of October, 1887, was sent by his excellency, Gov. Buckner, to his excellency, Gov. Wilson. There was no further correspondence between the said governors in regard to said requisition, until the 9th of January, 1888. In the mean time, the Hon. Henry J. Walker, secretary of state of West Virginia, by letter dated November 21, 1887, wrote to P. A. Cline, who was deputy-jailer of Pike county, in reply to a letter of inquiry from him, and notified him that the said requisition of the governor of Kentucky would be honored, except as to Elias Hatfield and Andrew Varney, and that warrants would be issued for their arrest upon the receipt of \$54, his fees for issuing the same. The reason given for not issuing warrants for Elias Hatfield and Andrew Varney was because they were not guilty, in the governor's opinion, from the evidence which had been presented to him. Subsequently, by letter dated December 13, 1887, Frank Phillips, the person appointed as agent aforesaid, wrote to his excellency, Gov. Wilson, inclosing \$15 to pay fees of the secretary of state, and requesting he should issue his warrants for the arrest of Anderson Hatfield, Johnson Hatfield, Capt. Hatfield, Daniel Whitt, and Andrew McCoy, and he sent these warrants to him (Phillips) at Pikeville. This money (\$15) was returned to Phillips, and the order for the warrants countermanded by Gov. Wilson, because, as he states, from information subsequently obtained he believed the requisition and expected warrants would be used, not to secure public justice, but to extort money from the accused. His excellency, Gov. Buckner, on the 9th day of January, 1888, wrote to his excellency, Gov. Wilson, a letter of inquiry in regard to his action under the requisition. This letter of inquiry was replied to January 21, 1888, by Gov. Wilson. No warrants had been issued by the governor of West Virginia for the arrest of any person mentioned in the said requisitions on the 9th of January, or before or since that time. Frank Phillips, with 25 or 30 armed men, went from Kentucky across into West Virginia, and with force and arms arrested the petitioner, Plyant Mahon, on January 9, 1888, and against his will and

by force brought him to the town of Pikeville in the state of Kentucky, and on the 11th of January, 1888, placed him in the jail of Pike county in said town, which was then in charge of Abner Justice, jailer of said county; and on the next day, January 12, 1888, while thus confined in said jail in said town, he was served with a bench-warrant, and arrested by the deputy-sheriff of said county. The bench-warrant under which he was arrested was issued from the clerk's office of the criminal court of Pike county, which court then had jurisdiction to issue bench-warrants, and try persons charged under the aforesaid indictments. When he was arrested, Phillips was asked by Mahon by what authority he did so, and he said he was state's agent to arrest him, and take him to "Pike," and that he was authorized by the governor of West Virginia to make the arrest. His excellency, Gov. Wilson, did, under seal of West Virginia, demand of his excellency, Gov. Buckner, the surrender and return to the state of West Virginia of the said Mahon, and the others who had been seized by force and arms and carried away to Pike county by said Phillips and others, which request was declined by his excellency, Gov. Buckner, on the 4th of February, 1888.

U. Gibson and J. H. Sinclair, for petitioner.

P. W. Hardin, Atty. Gen., and *J. Proctor Knott*, for respondent.

BARR, J., (*orally, after stating the facts as above.*) The question presented to the court under this writ of *habeas corpus* is much narrower than the discussion of counsel would indicate. It is now settled that the courts of the United States recognize the treaty obligation between the United States and other nations in regard to the extradition of fugitives from justice. In a recent case, the supreme court recognized the provisions in regard to extradition, in the treaty known as the "Ashburton Treaty" between the United States and Great Britain, and decided that a person extradited under that treaty could only be tried for the crime for which he had been extradited. This was not because of the comity which should exist as between nations, nor because the law of nations would have been violated, but because of the terms of the treaty, and the act of congress made to carry out treaty obligations in the matter of extradition of fugitives from justice. *U. S. v. Rauscher*, 119 U. S. 407, 7 Sup. Ct. Rep. 234. It is also settled that there is not a personal right of asylum in a refugee, who has fled from this country, being charged with crime, to a foreign country. Thus, if there be no treaty authorizing extradition, or if the fugitive from justice is not brought back from a foreign country under and according to the provisions of the treaty, if there be one, then the courts will not allow the fugitive to plead the mode of his capture and return to this country as an answer to his crime or in abatement to the indictment against him. *Ker v. Illinois*, 119 U. S. 437; 7 Sup. Ct. Rep. 225; 110 Ill. 680; *State v. Brewster*, 7 Vt. 118.

As to a person charged with crime in one of the states of this Union, and who has fled to another state, there is some difference in the reasoning of the courts; but I think all of the American authorities concur in the

conclusion, that the refugee, under such circumstances, has not a personal right of asylum in the state to which he has fled. They agree that the refugee, when returned to the state wherein he committed the crime, by whatever means he may have been returned, cannot plead as an answer to his crime the manner of his return, and that he had not been extradited according to and under the law. *State v. Smith*, 1 Bailey, 283; *State v. Ross*, 21 Iowa, 467; *In re Noyes*, 17 Alb. Law J. 407; *Doues' Case*, 18 Pa. St. 37. In *Doues' Case*, a great jurist, Chief Justice GIBSON, made an important statement, though it was not necessary in the discussion of the case, and that was, that although a refugee from justice, who is brought to the state where he is charged to have committed the crime, from the state to which he had fled, has not of himself the right of asylum, if the chief executive of the state from which he has been brought by unlawful means demands his return, he should be discharged under a writ of *habeas corpus*. This is because of the sovereignty which still exists in the states of this Union, and the comity which should exist between them. This court cannot, however, consider what is or should be the law of comity between the states of this Union, because, by the express language of the act under which this *habeas corpus* was issued, this court is confined to the inquiry whether the petitioner is detained in custody by the jailer of Pike county in violation of the constitution or laws of the United States; nor can this court consider any controversy, if there be one, between the state of West Virginia and the state of Kentucky. All such controversies are within the exclusive jurisdiction of the supreme court.

The right to extradite a refugee, who is charged with crime in one state and has fled to another state of this Union, is governed by the second section, art. 4, Const., which provides:

"A person charged in any state with treason, felony, or other crimes, who who shall flee from justice, and be found in another state shall, on demand of the executive authority of the state from which he has fled, be delivered up to be removed to the state having jurisdiction of the crime."

Congress has enacted laws to carry out this provision of the constitution, and it is settled that both state and federal courts may, under a writ of *habeas corpus*, revise the action of the governor of a state upon whom a requisition is made if he acts, and has the refugee arrested, to see that the constitution and the act of congress have been complied with. The courts, however, cannot, by any process known to the law, compel a governor upon such a requisition, to act and have the refugee arrested and delivered over. *Kentucky v. Dennison*, 24 How. 66. It is claimed that the petitioner is detained in violation of the constitution of the United States, and this court should discharge him. And it is argued that the only process by which he could have been extradited was the process provided by the constitution of the United States, and the laws made thereunder, and that in this case this process has been invoked in so far as to give this court jurisdiction to revise the action taken under it. It is quite clear, as will be seen from the statement of facts already read, that there was no action taken by the authorities of West Virginia

under the *requisition* made by the governor of Kentucky. Phillips, though designated by the governor of Kentucky as the agent to receive from the proper authority of West Virginia the petitioner and others, and bring them to Kentucky, never in fact acted as the agent of the state of Kentucky. It is true, he represented himself to the petitioner as having authority from the governor of West Virginia to arrest him, and as being the agent of the state of Kentucky, but that was false. The governor of West Virginia never issued a warrant for the arrest of petitioner, nor had Phillips any authority to do so, either from the governor of West Virginia or the governor of Kentucky, or any one else. The process by which a lawful extradition could be made was never used; nor did Phillips act under color of authority, and hence this court cannot revise his action as being an effort to act under the provisions of the constitution and laws of the United States.

This brings us to consider the other proposition, which is that since the adoption of the fourteenth amendment to the constitution of the United States neither a resident or citizen of one state having been charged with crime in another state, and having fled therefrom, can be extradited from that state, except by the due process of law which is provided in the federal constitution; and the laws made thereunder, and unless he is thus extradited, he is within the protection of that amendment. It is true, I think, that the only legal mode of arresting a refugee from justice under such circumstances is under and according to the constitution of the United States, and the laws made thereunder, and such state laws as may be constitutionally made in aid thereof. This being true, it may be insisted that due process of law, as required by that amendment, when a refugee from justice has fled from the state where he is charged with crime to another state, is—*First*, the mode of extradition as provided by the federal constitution, and the laws thereunder; *second*, after he is returned to the state from which he has fled, his arrest under and in accordance with the regular and lawful process of that state. Hence, as he was not extradited according to or under the process provided by the constitution and laws, but by force and against his will, he is now deprived of his liberty by the state of Kentucky without due process of law within the meaning of this amendment. That amendment declares, among other declarations that “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law.” It will be observed that this is not a grant to the citizen resident, or sojourner, as an individual, of any right which he did not theretofore have, but it is a limitation upon the power of the states, put in the federal constitution. It is not a declaration of what privileges or immunities citizens of the United States are entitled to, but is a declaration that no state of the Union shall abridge them. The previous part of the section which declares: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside,” created a national citizenship, but does

not declare or define the privileges, rights, or immunities of a citizen of the United States. These rights, privileges, and immunities are assumed to exist from the relation of national citizenship, and have not yet been clearly defined by the courts, but whatever they may be, and however they may be extended to rights and privileges which are national in their nature, and beyond what theretofore existed from the relation of state citizenship, I think national citizenship would not confer upon a refugee who has fled from a state in which he is charged with crime to another state, the right of asylum in said state. We have seen that no such individual right of asylum exists because of state citizenship, and if it existed at all, it would be because of the sovereignty which still remains in the states. There is no reason why a national citizenship should confer the right of asylum which could arise and exist in a state of this Union only because of a reserved sovereignty in the state. It is true that a citizen of a state and of the United States both before and since the adoption of the fourteenth amendment to the constitution is entitled to be extradited under and according to the constitution and laws of the United States, and that he was and is entitled to a writ of *habeas corpus*, and to his release, when deprived of his liberty by force, and not in accordance with the provisions of the laws regulating extradition. Before the adoption of this amendment and the act of 1867, the state courts alone could issue a writ of *habeas corpus* in favor of one seized by force, and without any process of law. But since that time the federal courts as well as the state courts would perhaps have jurisdiction in such cases because of the second section of article 4 of the constitution, and laws made thereunder, and the national citizenship of the person forcibly seized and held in custody. The writ of *habeas corpus*, whether issued from a state or federal court would have no extraterritorial force, and neither court could discharge a person, although originally unlawfully seized, who had been legally arrested, and was then held by due process of law, unless a state court should, as Chief Justice GIBSON indicates, release as a matter of comity between the states, the fugitive from justice upon the demand of the governor of the state from which he had been kidnapped. We therefore conclude that Kentucky has not abridged the privileges and immunities of the petitioner as a citizen of the United States by arresting him under a bench-warrant, after he was within the state.

The next inquiry is, has the state of Kentucky deprived him of his liberty without due process of law, within the meaning of this amendment. The petitioner had been indicted by a grand jury for willful murder, and was arrested in this state under and by the usual and regular process which has existed in this state from time immemorial for the arrest of persons indicted for crime by a grand jury. He is held by due process of law, if the inhibition of the fourteenth amendment is to be limited to the process of the state which deprives him of his liberty. If, however, the phrase "due process of law," is to include the means by which others brought him into this state, then it is not due process of law. Clearly, the prohibition is upon "any state," and we think the

"due process of law" which is required to be used by the state is its own process, and not the process of another state or the process of the United States. The supreme court has declined to define or attempt to define the meaning of "due process of law," and has wisely left its meaning to be ascertained by a "gradual process of judicial inclusion and exclusion." This case does not, however, require that we shall attempt to define it, because there can be no doubt the Kentucky process by which the petitioner was arrested after he was brought into the state, was "due process of law," so far as the process of that state is concerned. If, therefore we are correct in construing this part of the fourteenth amendment as meaning that the prohibition is confined to "a state," and that the "due process of law," which is required to be used before any person can be deprived of his life, liberty, or property by a state, is the due process of that state, then the petitioner's arrest and detention in the jail of Pike county is not a violation of this provision of the fourteenth amendment of the constitution of the United States. The fifth amendment to the constitution of the United States declared that "no person shall be * * * deprived of life, liberty, or property without due process of law." The uniform construction of this amendment is that the United States shall not deprive any person of life, liberty, or property without due process of law, and that the process which is meant is a federal process. Indeed, the form and character of the government precludes any other construction. When this question was first presented, I was inclined to the opinion that "due process of law" in the meaning of the fourteenth amendment required the petitioner's extradition from West Virginia by a legal process, as well as his legal arrest after he was in Kentucky; but a more critical examination has satisfied me that this amendment has not been violated by the state of Kentucky in thus arresting and detaining the petitioner in the jail of Pike county. The petitioner must therefore be remanded to the custody of the jailer of Pike county, and it will be so ordered.

In re CHARLESTON.

(*District Court, D. Minnesota. May, 1888*)

1. **EXTRADITION—COMPLAINT—FORGERY.**

A complaint in extradition proceedings for forgery, which minutely sets forth the note alleged to be forged, its amount, the date, and names of the parties, and the bank which discounted the note, is sufficient, both in substance and in form.

2. **SAME—IDENTITY OF PERSON.**

The identity of the prisoner is sufficiently established when, upon being brought before the commissioner, he admits that he is the person named in the complaint, and that he executed the note therein described.

3. **SAME—EVIDENCE—DEPOSITIONS—AUTHENTICATION.**

The act of congress (23 St. at Large, p. 216, § 5) declares that in extradition cases copies of depositions relating to allegations in the complaint shall be

admitted as evidence for all the purposes of the hearing, if they shall be properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused shall have escaped, and the certificate of the principal diplomatic or consulate officer shall be proof that any deposition, warrant, or other paper, or copies thereof, so offered, are duly authenticated. *Held*, that it is not necessary, in addition to the certificate of the consul, to prove that the law of the foreign country would allow "copies of original depositions taken before a magistrate to be received as competent proof against the accused for purposes of commitment."

Habeas Corpus.

James J. McCafferty, for petitioner.

James E. Markham, *contra*.

NELSON, J. A complaint of John Wilson Murray setting forth that he is chief of the provincial detective department of the province of Ontario, in the dominion of Canada, and the duly-authorized agent of the government of said dominion to prosecute an extradition proceeding, was made before William A. Spencer, commissioner of the circuit court of the United States in this district, duly authorized to hear extradition proceedings under the treaty between Great Britain and the United States, charging the petitioner with the crime of forgery, alleged to have been committed at the township of Raleigh, in the county of Kent and province of Ontario. A warrant issued, and he was arrested and held and committed by the commissioner for extradition. He is brought before me on a writ of *habeas corpus* with the proceedings under a writ of *certiorari*. A demurrer is interposed and it is urged by the counsel for the petitioner that the proceedings before the commissioner are irregular, and the evidence insufficient to justify this commitment.

Article 10 of the treaty with Great Britain declares that the persons charged with crime are to be delivered up, "provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed," and the magistrate shall have authority to issue a warrant that the person charged may be brought before such magistrate, "to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining magistrate to certify the same to the proper executive authority that a warrant may issue for the surrender of such fugitive." By section 5270, Rev. St. U. S., commissioners duly designated may issue warrants and hear such cases. The questions involved before the examining magistrates, on a hearing, within the scope of the obligations assumed by the treaty, are clearly (1) the identity of the person charged with the crime; (2) the sufficiency of the evidence of criminality.

It is urged that the complaint before the commissioner is not sufficient to give him jurisdiction. This objection is not well taken. The instrument alleged to be forged, the amount of the note, the date and names of the persons, and the bank which discounted the note, are all minutely

set forth. The complaint is not only good in substance, but in form, and so describes the crime that the prisoner could not be mistaken in regard to the accusation. The commissioner had full jurisdiction to issue the warrant, and proceed in the case. The identity of the prisoner is established by his own admission, when brought before the commissioner, that he was the person named in the complaint, and that he executed the note therein described. Nothing further was necessary except to show probable cause of guilt by competent evidence. If this is done, the prisoner must be remanded. The original note was produced, and certain depositions offered in evidence respecting the allegations in the complaint. The manager of the bank which discounted the note certified, as appears in the copy of his deposition, that the prisoner brought the note alleged to be forged to the bank, and represented that the note was made by persons whose names are charged to be forged. The copy of the deposition of Robinson, whose name appears as one of the makers of the note, states that he did not sign it, "nor was the prisoner or any other person authorized to sign it for me." If these depositions are competent evidence, and properly received, the sufficiency of the evidence of criminality is not doubtful. These copies of depositions and all the foreign papers offered in evidence have attached a certificate of the American consul at the city of Toronto, in the province of Ontario and dominion of Canada, that they are properly and legally authenticated to entitle them to be used for similar purposes in the tribunals of the said province and of the said dominion.

An objection is interposed to this certificate the force of which I do not clearly comprehend. The counsel concedes that the question to be considered is the competency of the copies of the depositions, as evidence of criminality, and it is also true that the competency of the evidence is to be determined by our law, according to the rules of evidence which congress has prescribed in the act passed August 3, 1882, but it is claimed that proof should have been given, in addition to the certificate of the consul, that the law of the dominion of Canada would allow "copies of original depositions taken before a magistrate to be received as competent proof against the accused for the purposes of commitment." I cannot appreciate this point. The fact for the commissioner to determine is the criminality of the person charged, and by the treaty the question is, what is competent evidence of that fact here in Minnesota where the prisoner is arrested? The act of congress must settle this, which declares in substance "that in extradition cases copies of depositions relating to the allegations in the complaint shall be received and admitted as evidence on the hearing, for all the purposes of the hearing, if they shall be properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consulate officer shall be proof that any deposition, warrant, or other paper, or copies thereof so offered, are authenticated in the manner required by this act." See 22 St. at Large, § 5, p. 216.

The certificate of the consul to the depositions fully meets the requirements of this act to entitle the depositions to be received by the commissioner as evidence of criminality. It has been held by all tribunals which have passed upon this act of 1882 that "similar purposes" refers to the words "for all the purposes of such hearing," that is, to proof of criminality. See *In re McPhun*, 30 Fed. Rep. 57; *In re Harris*, 32 Fed. Rep. 583; *In re Hinrich*, 5 Blatchf. 414, 425; and others.

The other objections to the proceedings are technical. According to the record, the prisoner, when shown the note, admitted that he made it, and got the money on it from the Merchants' Bank in Chatham. I find no error in the proceedings before the commissioner, and an order will be entered dismissing the writ of *habeas corpus*, and remanding the prisoner.

BENKERT v. FEDER *et al.*

(Circuit Court, N. D. California. March 26, 1888.)

TRADE-MARKS—INFRINGEMENT—MEASURE OF DAMAGES.

The owner is entitled to recover of the infringer of a trade-mark the profits arising from the sale of the spurious goods, with the trade-mark impressed upon them. He is not limited to the difference between the price for which the spurious goods would sell without, and the price of the same goods with, the trade-mark impressed upon them.

(Syllabus by the Court.)

Suit for Infringement of Trade-Mark.

M. A. Wheaton, for complainant.

Mastick, Belcher & Mastick, for defendants.

SAWYER, J. This is a suit for the infringement of a trade-mark "C. Benkert & Son," used by the plaintiff, doing business under that name, as the successor in interest of a Philadelphia firm of which he was an original member, engaged in the manufacture and sale of boots and shoes, upon which the trade-mark was stamped. There is no doubt in my mind, as to the right of the plaintiff as an original owner in part, and successor in interest to the business to this trade-mark acquired by many years use, (more than a third of a century,) and so generally known as to have almost become a part of the public history of the country. And I have as little doubt that defendants knowingly and willfully infringed, by using the words "C. F. Benkert & Son, Phila.," and "C. F. Benkert & Son," on at least 250 dozen pairs of boots and shoes sold by them. The boots and shoes so sold were not manufactured by defendants, but purchased from other manufacturers at the East, and then sold by them with the simulated trade-mark of plaintiff stamped upon the soles and on the inside of the boot-top. Such sale is admitted by the defendants in their answer and in the testimony of defendant Feder. It does not appear whether they were so stamped before or after purchase by defendants, but they were sold with the trade-mark stamped upon them.

The defendants insist that the measure of damages or profits should be limited to the difference in price for which the goods would sell with the trade-mark upon them and the price for which the same goods would sell without it. I am unable to adopt any such rule. It would be exceedingly indefinite, and equivalent to giving no damages or profits at all. How would it be possible for any one to say how much less a pair of boots or shoes would sell without, than with the trade-mark upon it? There would be no definite measure of compensation for the injury. One who deliberately and knowingly uses another's trade-mark commits a palpable and unmitigated fraud, for which there is no possible excuse. He seeks to avail himself of the good reputation of another's goods, and puts his own goods,—usually, if not always, of an inferior quality,—upon the market, thereby not only fraudulently cutting off the market from the party who has by years of labor, and at great expense, established a reputation for his wares, but in addition to this injury destroys or injures largely that reputation which is the foundation of the owner's business, by selling inferior goods under his trade-mark, thereby leading the world to believe that the inferior goods are his. To adopt as the measure of compensation for such injuries the difference between the price for which the spurious goods would sell without the trade-mark and for which they will sell with it imprinted thereon would be a mockery of justice. In my judgment the infringer should at least account for the entire profits made upon the goods wrongfully sold with the trade-mark impressed thereon. And this is the rule established, after mature consideration, in *Graham v. Plate*, 40 Cal. 598; *Sawyer v. Kellogg*, 9 Fed. Rep. 601. There may also be damages beyond the mere profits resulting to the owner of the trade-mark infringed, which he may recover. See, also, *Cod. Trade-Marks*, §§ 237, 246. I do not think there is any just analogy with respect to profits and damages between the infringement of a trade-mark and a patent for an improvement in a machine. A machine may embrace inventions for half a dozen improvements, for each of which there is a patent held by different individuals. One machine might infringe them all. In such case, each would be entitled to recover the profits attributable to his own invention, and not the profits made upon the machine as an entirety. There is no analogy to such a case on the infringement of a trade-mark. The infringer fraudulently attaching another man's property to his own occasions only a confusion of property with a view of taking advantage of that other's property. The trade-mark sells the whole article, however inferior or injurious in that particular, and prevents the sale of the owner's goods of equal amount. At least that is the fraudulent purpose, and the natural tendency, whether always accomplished or not; and the injured party should have at least the whole profit resulting from the wrongful act, and such I understand and hold the rule to be. The damage may be much more arising from destroying the reputation of the owner's goods.

Let there be a decree for the complainant, in pursuance of the prayer of the bill. Let reference be made to the master to ascertain and report the amount of profits and damages.

TOMKINSON v. WILLETS MANUF'G Co.

(Circuit Court, S. D. New York. March 26, 1888.)

PATENTS FOR INVENTIONS—DAMAGES FOR INFRINGEMENT—MEASURE.

In an action for an infringement of a patent on a peculiar square-shaped dish, the measure of damages is not the gains derived by defendant from the use, manufacture, and sale of the infringing dishes, but is only the difference between the profits fairly attributable to plaintiff's design which defendant would have derived from the adoption of plaintiff's peculiar variety of square-shaped dish, and those which he would have derived from the sale of other non-infringing square-shaped dishes.

In Equity. On exceptions to master's report.

Bill by A. S. Tomkinson against the Willets Manufacturing Company, for the infringement of a patent. Judgment for plaintiff, and the case now comes up on defendant's exception to master's report assessing the amount of damages.

Frank v. Briesen, for complainant, cited:

Dobson v. Carpet Co., 114 U. S. 440, 5 Sup. Ct. Rep. 945; *Dobson v. Dorman*, 118 U. S. 10, 6 Sup. Ct. Rep. 946; *Bates v. Railroad Co.*, 32 Fed. Rep. 628; *Hammacher v. Wilson*, Id. 796; *Piper v. Brown*, 3 O. G. 97; *Wooster v. Thornton*, 26 Fed. Rep. 274; *Munson v. New York*, 21 Blatchf. 342, 16 Fed. Rep. 560; *Nicholson v. Elizabeth*, 6 O. G. 764; *Emerson v. Simm*, 3 O. G. 293; *Illinois v. Turrill*, 12 O. G. 709; *Knox v. Silver*, 14 O. G. 897; *Mees v. Conover*, 11 O. G. 1111; *Vulcanite Co. v. Van Antwerp*, 2 Ban. & A. 252; *Allen v. Blunt*, 1 Blatchf. 486.

Philo Chase, for defendant, cited:

Dobson v. Carpet Co., 114 U. S. 439, 5 Sup. Ct. Rep. 945; *Dobson v. Dorman*, 118 U. S. 10, 6 Sup. Ct. Rep. 946; *Schilling v. Gunther*, 15 Blatchf. 810; *Garretson v. Clark*, Id. 70; *Scott v. Evans*, 11 Fed. Rep. 726; *Root v. Lamb*, 7 Fed. Rep. 222.

LACOMBE, J. This is a suit in equity for infringement, founded upon design patent No. 13,295, granted to John Slater, assignor to Gildea & Walker, September 12, 1882, for a design for a vegetable dish. Upon final hearing before Judge COXE, it appeared that in a precisely similar suit in the district of New Jersey between the same parties for infringement of this patent, the defendant appeared by its president, and consented to a decree; whereupon, before the commencement of the present suit, judgment was entered, sustaining the patent. Passing upon the effect of such adjudication, Judge COXE says:

"That decree was pleaded and proved in this action. It is valid and binding upon the rights of the parties, and as to all the questions determined by it *res judicata*. Unfortunately, perhaps, for the defendant, the court is not now permitted to consider the defenses, which, by the defendant's own action, are thus eliminated from the case. The question of infringement is alone open to investigation. * * * I am constrained to say that the defendant infringes." *Tomkinson v. Manufacturing Co.*, 23 Fed. Rep. 895.

It was referred to a master to take account of the gains and profits, and assess the damages. The master has duly reported that the com-

plainant is entitled to recover "the gains and advantages derived by the defendant from the use, manufacture, and sale of the infringing dishes, in the sum of \$1,853.29." The case now comes up on defendant's exceptions to the master's report.

The report must be set aside. Even if a method of comparison such as was adopted by the master were conceded to be the proper way in which to accomplish the result sought for,—and that question is not now passed upon,—he has not selected a suitable standard of comparison. In order to ascertain the profit derived from the use of complainant's model, comparison should be made, not with goods of an entirely different model, but with goods of the most similar pattern, which defendant was free to use. What makes, or, rather, what is supposed to make, the design patentable? The circumstance that it is an improvement upon the existing state of the art. The patent covers only the particular advance which the patent has made; it gives the patentee no rights in what was common property before. It appears that complainant's patent is for a particular model of square-shaped dish,—for the shape only, not for the decoration. Defendant sold a number of infringing square-shaped dishes, called "Doric." It also sold dishes of a totally different shape,—an oval,—called "Excelsior." It further appeared that defendant was free to use other square-shaped dishes, and did in fact make a non-infringing square-shaped dish, called the "Piedmont." The entire profit on the "Doric" dishes over cost of manufacture could no doubt be found, but to that entire sum the plaintiff is not entitled. *Dobson v. Carpet Co.*, 114 U. S. 440, 5 Sup. Ct. Rep. 945. All he should recover is the amount of such profit, which is fairly attributable to his design. Nor is that amount ascertained even by finding what profit the defendant secured by making and selling the infringing square dishes, instead of oval ones. The amount of that profit must be itself subdivided into the sums due respectively to the adoption of a square-shaped dish generally, and to the appropriation of plaintiff's particular variety of square-shaped dish. To the latter sum he is entitled, but its amount is certainly not ascertained by comparing the sales and cost of the infringing dishes with the sales and cost of the oval dishes. *Non constat* but what defendant would have secured 90 per cent. of its "extra profits," as complainant calls them, by sales of such square dishes as it was free to use. If so, the plaintiff would be entitled only to the remaining 10 per cent. as profits resulting from pirating his peculiar square dish. It may be that complainant may find it difficult, if not impossible, to prove the amount of such profit, but that is a difficulty inherent in the particular kind of patent which he holds. One who by some lucky chance secures a patent for "the mere shadow of a shade of an idea" should not be disappointed if the grant, even though uncontested, subsequently proves of no appreciable pecuniary value.

SEIBERT CYLINDER OIL-CUP CO. v. MANNING *et al.**(Circuit Court, S. D. New York. March 26, 1888.)*

PATENTS FOR INVENTIONS—AGREEMENTS FOR USE—BREACH OF COVENANTS.

In an action for the infringement of a patent it appeared that the defendants' licensors, who owned a similar patent to the one in dispute, had entered into a contract with plaintiff wherein it was agreed that so long as plaintiff should perform certain covenants and said licensors should make certain payments to plaintiff, neither party was to sue the other on their respective patents. *Held*, that performance of plaintiff's covenants was a condition precedent to the payments, and the plaintiff, after having broken the contract, could not claim the failure to make the payments as an abandonment of the contract, so as to authorize a suit on its patent.

In Equity. Hearing upon the sufficiency of the plea. Action by the Seibert Cylinder Oil-Cup Company against Henry S. Manning *et al.* For former hearing see 32 Fed. Rep. 625.

Thomas Wm. Clarke and Edmund Wetmore, for complainant.

C. A. Kent and Francis Forbes, for defendants.

LACOMBE, J. The sole point arising upon this hearing is as to the sufficiency of the plea, and lies within a narrow compass. Concededly, the plaintiff owns a patent, which is infringed by certain articles made by the Detroit Lubricator Company, and sold by the defendant. The amended bill, besides other necessary and ordinary averments showing title and acts of infringement, sets out, in anticipation of the defense, that—

"The defendants sell lubricators manufactured by the Detroit Lubricator Company, which sale constitutes the infringement herein complained of; and the said defendants pretend that they have a right to sell the same without suit by, or other molestation from, the complainant, because on or about the 1st day of December, 1883, this complainant and the said Detroit Lubricator Company made an agreement in writing whereby, among other things, it was covenanted that, 'so long as the covenants and agreements to be observed and performed by the parties respectively are observed and performed, each party agrees not to sue, or directly or indirectly authorize to be sued, the other party, its agents or vendees, under any of the letters patent now or hereafter owned by it.' And the said defendants pretend that agreement is still in force; but these complainants aver that said agreement has long since, and prior to the commencement of this suit, and prior to the acts of infringement herein complained of, been rescinded, and that said rescission was caused by the wrongful acts and default of the said Detroit Lubricator Company, because said company was obliged by the terms of said agreement to make certain returns, and pay certain royalties to the complainant herein monthly, which the said Detroit Lubricator Company wrongfully refused to do; and for such neglect and refusal, and because of the repudiation by the said Detroit Lubricator Company of the covenants and agreements by it to be performed under said contract, the complainant herein elected to rescind the same, and the same was rescinded by the acts and defaults of the said Detroit Lubricator Company, and the act of the complainant. That at the time when the lubricators referred to herein, and containing the invention set forth and described in the said letters patent hereinbefore mentioned, were sold, and the acts herein

complained of were committed, the said contract of the 1st of December, 1883, with the Detroit Lubricator Company was abrogated and annulled, and the defendants derived no rights thereunder."

The plea sets out the agreement in full, and the circumstances preceding and attending its execution. It then proceeds as follows:

"And defendants further aver, on information and belief, that said Detroit Lubricator Company did perform the covenants in said agreement of settlement by it to be performed, and so continued to do, and to pay large sums of money under said agreement; but, as it had a right to do, it ceased to make certain payments when it learned that complainant had a long time before violated its covenants in said agreement not to authorize the use, except as in said agreement provided, of said N. Seibert patents outside of the New England states, * * * and by imitating the shapes and styles of said Detroit Company's lubricators, contrary to the covenants of complainants; and otherwise in divers ways complainant tried to injure and damage, and did and still does greatly damage and injure, said Detroit Company, contrary to said agreement, whereby the business of said Detroit Company was and is greatly damaged, and its profits greatly reduced, and said damage and loss by reason thereof do still continue. And the defendants aver that said agreement of settlement between said parties is still in force, and they deny that the same has been rescinded or canceled by complainant, or that complainant had a right so to rescind or cancel the same, or that the same was ever rescinded or repudiated by said Detroit Company. Therefore these defendants aver and plead the same, and demand judgment," etc.

Upon the amended bill and plea, which now contain the full agreement, it appears that by and under such agreement the Detroit Company, and defendant as its vendee, possessed a perfect defense to suits for infringement. The only question to be determined now is whether the facts admitted by the plea, and by setting down the same for argument, have destroyed this defense. The complainant's reliance is upon the fact that the Detroit Lubricator Company wrongfully refused to make certain monthly returns, and to pay certain royalties to the complainant monthly, for which neglect and refusal complainant elected to rescind the contract. The only provisions of the contract requiring the lubricator company to make returns and pay royalties are these:

"(10) * * * The said Detroit Company agrees, so long as the covenants and agreements to be performed by said Seibert Company are performed by it, and so long as this agreement remains in force, to report to the treasurer of said Seibert Company in Boston, at the end of each and every month, the full number of lubricators [except certain specified kinds] made and sold by it during the month next preceding," etc. "(11) And said Detroit Company agrees that it will at the same time * * * remit * * * a sum equal to," etc.

Further, by the fifteenth clause the Detroit Company guarantied that these payments should be at least \$200 monthly. Of this covenant to make returns and payments it is to be noted that it is conditional only. "So long as the covenants and agreements to be performed by said Seibert Company are performed by it, and so long as this agreement remains in force," is the phrase used to qualify its provisions. Compliance by the Seibert Company with its obligations is a condition precedent to the return and payment. It will not be contended that, if the covenant

provided that return and payment should be made each month upon the filing by the president of the Seibert Company of an affidavit setting forth that it had kept the contract, there would be any default on the part of the Detroit Company in delaying or refusing payment till such affidavit were first filed. There is no material distinction between such a covenant and the one at bar. If non-performance by the payee is shown, the payor is not in default for not making its return. Upon such a breach the Detroit Company might either rescind the contract, or decline to make its return. The defendant by its plea avers that the Seibert Company failed to perform its covenants and agreements in two particulars: *First*, that it authorized the use of the N. Seibert patents outside of the New England states, which is in express violation of the seventeenth clause of the agreement; and, *second*, that it imitated the shapes and styles of the Detroit Company's lubricators, in violation of the seventh clause. The covenant of the Detroit Company to return and pay was at least suspended while the contract was thus broken by the Seibert Company; and its failure to make returns and pay royalties, under those circumstances, would not be such a failure "to observe and perform its covenants and agreements"—to use the language of the sixth clause, on which complainant relies—as would authorize the latter to sue "under any of the letters patent * * * owned by it."

So far the plea has been considered as distinctly averring breaches of covenant by the Seibert Company. Upon the argument stress was laid by complainant's counsel upon the language used, (*q. v. supra*), and particularly upon the word "learned." This, it was contended, is merely equivalent to an allegation that at the time it ceased to make payments, the Detroit Company was informed that the complainant had violated its covenants, and believed the information. Strictly construed, the word "learned" perhaps means more than this, but in ordinary speech it does not necessarily import that degree of certainty which is implied in the assertion of a fact. The plea in its present form is insufficient, as not distinctly averring the breaches upon which defendant relies to excuse the failure of the Detroit Company to make returns. As the only valid objection to its sufficiency, however, is the technical verbal objection last above indicated, defendant may amend the same within such reasonable time as may be fixed on the settlement of the order. As to the question of jurisdiction, I fail to see that the plea has materially changed the situation since that point was considered by Judge WALLACE, (32 Fed. Rep. 625,) and shall therefore accept his decision as the law of this case.

MUNDY v. LIDGERWOOD MANUF'G Co.

(Circuit Court, S. D. New York. March 27, 1888.)

1. PATENTS FOR INVENTIONS—COMBINATIONS—USE OF DIFFERENT ELEMENTS.

Under the ruling in 20 Fed. Rep. 114, Icker's patent No. 9,239, for an improvement in friction drums for pile-drivers was confined to the peculiar elements of the combination therein described, one of which was a cross-grained friction surface; and the use by a defendant, against whom an injunction had been issued restraining the use of the patented device, of a drum having a sidewise friction surface, is not a violation of the injunction.

2. SAME—INJUNCTION—VIOLATION BY CARELESSNESS—FAILURE TO NOTIFY AGENT.

The carelessness of a defendant, against whom an injunction has been obtained restraining him from using a patented device, in omitting to notify his agent of such injunction and its effects, will render him liable for a technical contempt for sales of the patented articles by such agent after the injunction had been obtained.

In Equity. On motion for sequestration, and attachment for violation of an injunction.

Frederick H. Betts and Ernest C. Webb, for complainant.

Edward N. Dickerson and Livingston Gifford, for defendant.

LACOMBE, J. This is an application for sequestration against the defendant, and attachment against its officers for violation of an injunction. The decree enjoining defendant was made by Judge WHEELER upon the pleadings, proceedings, and proofs, May 5, 1884, and was duly served upon defendant. The grounds of decision are set forth in the opinion reported in 20 Fed. Rep. 114. The patent is for an improvement in friction drums (windlasses) for pile-drivers and hoisting machines. It is claimed that the defendant has violated the injunction in three ways—*First*, by selling through one of its agents or consignees two machines with drums precisely like those which were held by Judge WHEELER to infringe the patent; *second*, through the furnishing by such agent or consignee of springs for the use of purchasers of its old machines, which had been sold without the springs, and which concededly did not infringe unless the springs were inserted; *third*, by making and selling friction drums of a new model, the variations from the old model being, as complainant contends, colorable only.

The last of these propositions will be first considered. Both sides concede that, for the purposes of this motion, the construction put upon the patent by Judge WHEELER is to be taken as final. That construction, however, must be itself construed, and the parties not being in accord on this point, the former opinion must be analyzed in order to determine precisely what the injunction forbade to the defendant. The record and the arguments upon which Judge WHEELER's decision was predicated (and which are presented on this motion) show that it lies within the extreme border land of the doctrine which finds inventive faculty in mere mechanical recombinations of devices old, well known, and already otherwise combined. The opinion must, therefore, be strictly

construed; every element of the combination which, by express language or fair intendment is enumerated by the court as entering into the new combination, must be taken as essential. The ingredients of the combination whose patentability the court sustained will be found recited in the following excerpt from its opinion:

"The orator accomplished this by providing a conical projection on the side of the gear-wheel next to the drum, of nearly the same diameter, made of wedge-shaped pieces of wood, with the broad ends outward forming a tapering friction surface on the ends of the wood, and a circular flange projecting from the circumference of the drum, loose on the same shaft, to fit tightly over the friction surface on the wheel when pressed towards it; and a spring coiled about the shaft between the wheel and the drum, to separate the surfaces. The specification mentions a shell or flange on the side of the gear-wheel supporting the wood, and describes mechanism for pressing the drum towards the wheel, and bringing the surfaces together. The claim is for a combination of the drum, loose, and the gear-wheel having the friction cone and side flange to support it and spring to repel it, fast upon the shaft, for this purpose."

The phrase here used, viz., "forming a * * * friction surface on the ends of the wood," clearly imports that the friction surface intersects the grain of the wood. Grammatically it can hardly mean anything else. All doubt, however, as to its meaning is resolved by a consideration of other parts of the opinion. Thus the court says: "Friction surfaces, one of metal and the other of the ends of wood, * * * were old and well known." "Letters patent were granted to Knowlson for improvements * * * presenting friction surfaces composed of the ends of the wood of each piece." This language plainly indicates what the learned judge understood by the expression, "on the ends of the wood." The complainant insists that the Knowlson patent does not in fact say anything about a cross-grain friction. That patent, however, did in fact describe the sections of wood of which its friction surface was composed in language not inconsistent with a transverse engagement, and an examination of Fig. 3 therein shows that in no other way could there be any pretense of the improvement in durability asserted in the third paragraph. The question here, however, is not what the Knowlson patent says, but what Judge WHEELER understood it to say. An examination of the testimony and arguments which were before him can leave no doubt that he understood that the Knowlson patent covered a friction surface across the grain of the wood, as shown in the very model, which was before him, and has been presented here and that, in his enumeration of the ingredients of complainant's combination, he intended by the use of the phrase "on the ends of the wood" to designate a cross-grain friction surface. In the new model drums of the defendant the grain of the wood is not presented endwise to the wear, but sidewise, and thus one ingredient of the combination, which, as a combination only, was held to be patentable, is omitted. The defendants also insist that they now use a V friction instead of a cone friction, and thus dispense with another ingredient of complainant's combination. Upon this point there is a conflict of testimony. The friction surface is undoubtedly V-shaped;

but complainant insists that one side of it is a dummy, which does not engage with the flange, and that thus the engaging surface is in fact a cone. Upon all the evidence I am of the opinion that the complainant has not established his contention by a fair preponderance of proof. In view of the disadvantage, however, under which the moving party labors in motions of this kind, I should send it to a master to take further testimony on this point, were I not satisfied that a cross-grain engagement must, upon every application made at the foot of Judge WHEELER's decree, be taken as an essential element of the patented combination. Nor is this conclusion modified by a careful examination of Judge NIXON's opinion in *Mundy v. Kendall*, 23 Fed. Rep. 591. The learned judge in that case only indicates what upon the affidavits before him he understands to be the extent of Judge WHEELER's decision. If the record which is presented here had been laid before Judge NIXON, he would no doubt have adopted the same construction as that indicated *supra*.

As to the alleged infringement arising from the furnishing by Mr. Wormer of St. Louis of two springs to be used in old model machines sold without them, I do not think his relations to the defendant are such as to warrant punishing it for his act, in the absence of any evidence from which acquiescence in such act can be inferred. As to his sale of the two old infringing machines, however, the defendant has not shown the same care in notifying him of the injunction, and its effect, that it used in the case of its goods on sale in Boston, Philadelphia, etc. This carelessness has caused a violation of the injunction, constituting a technical contempt. A fine of three times the royalty which complainant charges, in analogy to the provisions of the law as to damages, would seem an appropriate penalty therefor, but the exact amount may be determined upon settlement of the order.

THE ATLAS.¹

THE LIZZIE WILSON.

CHADWICK *et al.* v. ATLAS S. S. Co.

(District Court, E. D. New York. March 7, 1888.)

COLLISION—STEAM AND SAIL—FAILURE TO KEEP PROPER LOOKOUT.

The steam-ship A. was bound down the Atlantic coast on a comparatively clear night, when, some 50 miles south of Barnegat, she collided with the schooner L. W. For the damage the steamer was libeled, and set up in defense an alleged change of course on the part of the schooner, averring that the first light of the schooner seen by her was the green light over her starboard bow, whereupon her wheel was starboarded; that the light afterwards changed to red, on which the steamer's wheel was ported, but too late to avoid the collision. The schooner swore that her course was not changed. From the

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

evidence it appeared either that the light seen by the steamer was the light of some other vessel than the *L. W.*, or else that the schooner was never seen by those on the steamer until they were upon her. *Held*, that the collision was due to want of proper lookout on the steamer.

In Admiralty. Libel for damage.

Goodrich, Dedy & Goodrich, for libellant.

Cary & Whitridge and *George A. Black*, for claimants.

BENEDICT, J. This is an action to recover damages for a collision which occurred on the high seas about 50 miles south of Barnegat, on the 18th of August, 1887, between the steam-ship *Atlas* and the schooner *Lizzie Wilson*. The decision of the case is, by the pleadings, made to turn upon the question whether the schooner changed her course, and threw herself under the bows of the steamer. The steam-ship at the time was bound down the coast, and the schooner up the coast. There was a fresh breeze,—the schooner sailing from eight to ten knots an hour, and the steam-ship about the same. The night was thick, but not so thick as to prevent vessels' lights being seen at a considerable distance. The master of the steamer says a green light could be seen at the distance of a mile. According to the testimony of the men from the schooner the steamer's lights were seen two miles away. I cannot find upon the evidence that there was any difficulty on the part of the steamer in seeing the schooner in time to avoid her. The steamer asserts that the schooner changed her course, and in support of her assertion produced witnesses from the steamer who testify that as the vessels approached each other the schooner displayed to the steamer first her green light, which was seen over the steamer's starboard bow,—and the steamer's wheel starboarded; that afterwards the schooner showed her red light, and the steamer's wheel was at once ported, but too late to avoid the schooner, then crossing the steamer's bows. From the schooner there is positive testimony that the steamer was seen on the schooner's port bow; that the schooner held her course; that when the steamer was near the schooner she suddenly starboarded, and came across the schooner's course, and so ran her down. At the argument it was conceded on both sides that it was impossible to reconcile the testimony given by the respective parties, and this is true in regard to some of the testimony. It seems to me, however, not wholly impossible to reconcile much of the testimony by supposing that the green light said to have been seen by the chief officer of the steamer was not a light of the *Lizzie Wilson*, but of some other vessel.

As already stated, the assertion that the schooner changed her course is sought to be proved by testimony from the steamer tending to show that the schooner as she approached displayed to the steamer first her green light, and afterwards her red light. If it be supposed that the green light which the chief officer of the steamer says he saw off his starboard bow was not a light on the *Lizzie Wilson*, but the light of some other vessel at the same time bound up the coast, on a course to westward of the course of the *Lizzie Wilson*; that the attention of those on

the steamer was fastened on this light, so that, although the red light of the *Lizzie Wilson* was visible on the port bow, it was not seen until the steamer starboarded to give more room to the green light on the starboard bow,—the conflict of testimony is easily understood. This suggestion is not without some support in the testimony. For instance, the wheelsman says that before the order "hard a-port," and after his wheel was hard a-starboarded, he looked out of his window, and saw a green light about two points on the starboard bow, and a ship's length away. But before this, the master of the steamer,—who jumped from his room to the bridge while the wheel was being starboarded,—when he reached the bridge, and while his vessel was swinging to the east, under a hard a-starboard wheel, saw the red light of the *Lizzie Wilson*, and she was near enough to allow her sails to be seen. If this be correct, the green light which the wheelsman saw after the helm was hard a-starboarded could not have been on the *Lizzie Wilson*, but must have been on another vessel coming up to the westward of the *Lizzie Wilson*. But this supposition, if adopted, condemns the steamer for not seeing the *Lizzie Wilson* in time to avoid her. If the suggestion be not adopted, then the case resolves itself into a question of credibility, and in this aspect the weight of the evidence appears to be in favor of the schooner. I am not able to find from the evidence the fact to be that the *Lizzie Wilson* was at any time displaying her green light to the steamer, or that the *Lizzie Wilson*, in presence of a steamer known to be approaching, without reason suddenly threw herself under the steamer's bows, at the risk of total destruction. The testimony from the steamer affords good ground for the belief that no one on the steamer saw the *Lizzie Wilson* until they were upon her, and that the cause of the collision was failure to keep a proper lookout. This plainly appears in the testimony of the witness Rube, who was on the steamer's bridge. This witness says that he was the first on the steamer to know of the presence of the approaching vessel; that he saw first the schooner's sails, then her green light, and that a collision was imminent before any order was given on board the steamer. If this statement be true, no testimony from the steamer respecting the change of the light from green to red would be of any value to show that the cause of the collision was a change of course on the part of the schooner, for whatever was seen from the steamer was seen after the collision was inevitable. My conclusion therefore is that the steamer has failed to show that the cause of the collision was a change of course on the part of the schooner, and that, on the contrary, the witnesses from the steamer themselves prove that the cause of the collision was want of proper lookout on the steamer.

Let a decree be entered in favor of the libelants, with a reference to ascertain the damages.

v.34f.no.7—35

THE BRITANNIA.¹

THE BEACONSFIELD.

CLEUGH v. THE BRITANNIA.

LA COMPAGNIE FRANCAISE A VAPEUR v. THE BEACONSFIELD.

COTTON v. THE BRITANNIA AND THE BEACONSFIELD.

(District Court, S. D. New York. March 21, 1888.)

1. COLLISION—BETWEEN STEAMERS—CROSSING STEAMERS—THWARTING MANEUVERS.

A crossing steamer, required by old rule 18 to keep out of the way of another vessel is bound at her peril to take into account all the circumstances, including both the speed and heading of the other. The latter has no right to thwart the former's maneuvers. A vessel's stopping is not "keeping her course," but is a violation of rule 23, and a fault, specially so after an agreement by signals, unless its necessity in order to avoid collision is reasonably certain. Till then the privileged vessel must rely on the other's performing her duty, and the burden of proving the necessity is on the former. Mere doubt and apprehension are not sufficient to justify a departure from the rules by the adoption of a thwarting maneuver.

2. SAME—PRIVILEGED VESSEL—CHANGE OF COURSE—SIGNALS.

Rule 22, in requiring the privileged vessel "to keep her course," is not designed to confer a favor or privilege, but to impose an obligation in order to enable the other vessel with certainty to keep out of the way. After the other's intention is known, or, an agreement by signals had, the former is bound upon any change thought necessary, to give notice of her intention by any available signals, either danger signals, under supervising inspectors' rule 8, or the short blasts provided by new article 19, when these would be certainly understood.

3. SAME—STATE STATUTES—ON WRONG SIDE OF CHANNEL—PROXIMATE CAUSE.

Where the statutes require vessels to keep on the right-hand side of the river channel, a colliding vessel will not be held in fault merely because she was in the wrong part of the river, if there was, nevertheless, ample time and space to avoid collision. Bad navigation is then deemed the only proximate cause. But in case of an unexpected crossing from the right to the wrong side of the river, which causes embarrassment to the other, or such reasonable apprehension of collision as leads to erroneous orders by the other vessel, whereby a collision is produced, the former's disobedience of the statute should be deemed a contributing and proximate cause, which renders her liable.

4. SAME—NEGLIGENCE.

The Beaconsfield, going out of the East river, came in collision off pier 1, in the northerly third of the channel, with the Britannia, which was turning up the East river. They exchanged signals of one whistle when two-thirds of a mile apart, and when the Britannia was just past Governor's island. Both understood that they were to pass port to port. The latter had to make a swing of about 6 points to starboard. Owing to the ebb tide and the high west wind, her swing to starboard during the first minute and a half was much delayed, whereupon the Beaconsfield, uncertain as to the other's eventual course, reversed when 1,500 feet distant, and came to a stop in the water without giving any signal to indicate her change of intent. The helm of the Britannia was all the time hard a-port, and she would have gone clear had the Beaconsfield kept on. Her swing to starboard was perceived directly after the

¹Reported by Edward G. Benedict, Esq., of the New York bar.

Beaconsfield reversed. As soon as the latter's stop was perceived, about 600 feet distant, the Britannia reversed full speed but too late to avoid collision. Held, that the Beaconsfield was in fault (1) for not keeping her course, but stopping without apparent necessity; (2) for giving no signal of her change of intention; (3) for not pursuing any firm or consistent course; (4) for lying still and doing nothing to avoid collision, for a minute and a half after she had stopped and the real danger was evident.

5. SAME.

Held, further, that the Britannia was in fault for coming within 100 yards of Governor's island, instead of going further to the westward, and for not shaping her course so as to make her turn within the right-hand side of mid-channel, where the state statutes required her to go.¹

In Admiralty. Cross-litigations for damages.

Cross-suits by the respective owners of the steam-ships Britannia and Beaconsfield to recover damages occasioned to the vessels by reason of collision. The third suit, that of Cotton, was brought by the owner of the cargo on board of the Beaconsfield, which vessel was sunk by the collision, against the Britannia alone, the Beaconsfield being made a party defendant by petition of the Britannia, under the fifty-ninth admiralty rule of the supreme court.

Geo. A. Black, for Cleugh and the Beaconsfield.

Sidney Chubb, for Cotton.

R. D. Benedict, for the Britannia.

BROWN, J. On the 19th of November, 1886, between 9 and 10 o'clock in the forenoon, as the English steam-ship Beaconsfield, outward bound from Dow's Stores, Brooklyn, was going out of the East river, she came in collision off pier 1, with the French steam-ship Britannia, bound up the East river. The Beaconsfield was 270 feet long, her gross tonnage 1,736 tons, and draft 21½ feet. The Britannia was 337 feet long, her gross tonnage 2,442 tons, and draft 17 feet. The collision was at an angle of from five to seven points. The stem of the Britannia struck the port side of the Beaconsfield, a little aft of amid-ships, and penetrated about five feet, doing damages to both ships and cargo, amounting as alleged to \$115,000.

The first two suits are cross-litigations brought by the owners of the steam-ships to recover their respective damages, each alleging that the other was wholly in fault. The third libel was filed by the owners of the cargo to recover the sum of \$45,000 damages against the Britannia alone. Upon her petition, under the fifty-ninth supreme court rule in admiralty, the Beaconsfield was brought in as a party defendant. The chief faults alleged against the Britannia are that she ran too near Governor's island, and attempted to make too short a turn into the East river; and that she did not stop and back in time, nor keep out of the way of the Beaconsfield, as she was bound to do. The Britannia alleges that she took all proper measures to keep out of the Beaconsfield's way, and would have done so, by going safely astern of her, had not the latter thwarted those measures by her own misconduct in unjustifiably stopping in the

¹As to the effect of the screw on steering, see note, p. 555.

line of the Britannia's course, and thereby bringing about the collision. The two steamers first came within sight of each other when the Beaconsfield was a little to the eastward of pier 4, East river. The Britannia had then just come up past Fort William, on Governor's island. She had previously shaped her course to go near to Governor's island, and on approaching the fort she had come still further to the eastward in order to avoid a tug and tow which were coming down the river; and when a little to the westward or northward of the fort, and very near it, she grazed the bottom. The master testifies that his previous course had been about N. N. E., coming up under a slow bell, and that after starboarding (porting) to clear the tug, he resumed his former course; and that he was on that course when he touched bottom; that he then rang the bell to go full speed ahead until the Britannia had cleared the ground, and that he then again slowed, and put his wheel hard a-port to round into the East river; and that the wheel remained hard a-port until the collision. When the vessels were first visible, and were first seen, they were about two-thirds of a mile apart. Very shortly afterwards the Beaconsfield, when opposite pier 4, gave a signal of one whistle, and heard what she understood to be an answer of one whistle; but seeing the Britannia swing a little to port, as was thought, instead of to starboard, she repeated her signal of one whistle, from one to two minutes after the first, and reversed her engines. The wind was high from the west, and neither of the Beaconsfield's whistles were heard on the Britannia. The Britannia, however, gave three signals of one whistle each, the second and probably the third of which were heard upon the Beaconsfield. The pilots on both vessels understood the purpose of each to pass port to port, as the Britannia should turn around into the East river. The pilot and master of the latter say that she did not swing at all to port after their first signal, but swung all the time to starboard.

The tide was the last of the ebb, and the water lower than usual. There was, however, some current, estimated at the rate of about a knot an hour, which, as the Britannia drew above Fort William, struck her starboard bows and retarded somewhat her swing to starboard, under her port wheel. This was probably soon after one of the whistles of the Britannia had been heard on the Beaconsfield. The pilot and master of the latter, seeing that the Britannia was slow in changing her course to starboard, reversed, as above stated, when about 1,500 feet distant, and at the same time gave a second signal of one blast of the whistle. "Directly after the order to reverse," as the master testifies, "he saw that the Britannia was swinging more to starboard. She was then about four points on his port bow." The Beaconsfield's engines were, however, kept reversed until her motion in the water was nearly or quite stopped, running, as her master estimates, about two lengths, and occupying, as he thinks, about two minutes; and from that time till the collision, *i. e.*, from one to two minutes more, she remained nearly still. When the Beaconsfield was seen to have stopped in the water, or nearly so, about five or six hundred feet distant, the Britannia's engines were reversed, and from that time they were kept reversed until the collision, when the

Britannia was nearly, but not quite, stopped. The high west wind neutralized the effect of slight ebb tide on the Beaconsfield's course. The estimates of the two masters as to the distance at which the Britannia reversed agree at 500 to 600 feet; and the engineer of the Beaconsfield says that after he had stopped reversing his engine he came out on deck and saw the Britannia about a length away. When the two vessels sighted each other, they were going at very moderate speed. Careful attention to the testimony of the engineers, and the number of revolutions of the engines, satisfies me that the two differed not more than about one or two knots in speed; the Beaconsfield going about four or four and one-half knots, and the Britannia from five to six. The full speed of the former was about nine to ten knots; of the latter, about ten or eleven. From the time each sighted the other to the collision was probably less than five minutes, though the aggregate of the estimates of the various intervals would exceed that. It is not probable that the Beaconsfield was backing over a minute or a minute and a half, running some 300 or 400 feet. The Britannia claims that by porting she took timely and sufficient measures to go to port of the Beaconsfield, and astern of her, and that no collision would have happened except for her unexpected and unjustifiable stopping, which brought her under the bows of the Britannia.

As respects the Beaconsfield the main controversy has been whether she was, under the circumstances, legally justified in stopping as she did. The Beaconsfield invokes rule 21, § 4233, Rev. St., which provides that "every steam-vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse." This rule does not require a vessel to stop or reverse unless (1) the vessel is approaching another so as to involve risk of collision; nor (2) unless stopping and reversing are necessary. The word "reverse," used in connection with the word "stop," shows that both words have reference to the engine, and that even stopping the engine is not required unless that be apparently necessary. The words "if necessary," as they stand in this rule, do not grammatically qualify the direction to "slacken speed." In article 18 of the new rules the words "if necessary" are transposed to the end of the sentence, presumably for the purpose of qualifying both the previous clauses; and as no reason is apparent why a vessel should be required to "slacken speed" when it is not necessary, or apparently necessary, to do so, the change of phraseology in the new rule might well be regarded as showing the intention of the former rule. That question is not involved here, as we have to do, not with slackening speed, but with stopping and reversing. The Britannia contends, however, not only that there was no "necessity" for stopping, but that there was no "risk of collision" till the Beaconsfield created that risk by her own misconduct in stopping her headway.

The evidence leaves no doubt in my mind that there was no actual "necessity" for stopping, and no actual "risk of collision" when the Beaconsfield reversed; and that had she kept a steady course, the Britannia, even without reversing or stopping her engines, would have passed her

track not less than two lengths astern, and possibly three. Had the Britannia not reversed when she was 500 or 600 feet distant, she would have occupied about one minute in reaching the place of collision, as the Beaconsfield was nearly or quite stopped; and during that interval, had the latter kept on at her previous speed of four or five knots, she must have been nearly two lengths to the westward at the moment of collision. Besides this, she lost nearly a length while slowing, before she stopped reversing. On this point my conclusion might have been different if I had found that the weight of testimony sustained the Britannia's contention that the collision was south of mid-channel; or so far to the south that the Britannia, on swinging her head to the westward, after the accident, (if in fact she did swing due west,) had the Diamond Reef buoy nearly astern, and on her starboard quarter. Not only is the weight of evidence, in my judgment, clearly opposed to so southerly a position, but I regard it as impossible for the Britannia upon the course of N. N. E. and passing very near Governor's island, to have turned up the East river in that wind and tide south of mid-channel; but if she could, she must, on turning, have crossed ahead of where the Beaconsfield would have been. In other words, the collision could not have happened in that way. See *Chamberlain v. Ward*, 21 How. 548, 562. The place of collision, I find, was most probably from 1,100 to 1,200 feet about S. W. by S. from the end of pier 1, or a little to the north-east of the figures 31, on the chart. This is about the position that would be reached by the Beaconsfield upon a course W. by N., passing, as her pilot finally said he passed, about 300 feet north of Diamond Reef buoy, and then porting a little. It accords with the testimony of the pilot of the Dentz, and also with that of the pilot of the Van Dyke, who came down some distance astern of the Beaconsfield, a little to the northward, as he said, of mid-channel, heading about W. $\frac{1}{2}$ S., and having the Beaconsfield "a little on his port bow;" and it accords with the estimated distance of 500 feet to the southward of the Van Dyke after her stem had taken the ground. It seems probable that she grounded near the shallow spot marked 18 on the chart, from 500 to 600 feet S. W. by S. from pier 1. In that position her stern would extend a little to the eastward of that pier, as the proof shows it did.

The immediate cause of the collision I must therefore find to have been the Beaconsfield's reversing when the two vessels were about 1,500 feet apart. This maneuver thwarted the Britannia's efforts, and was not justifiable for the following reasons: In order to prevent the confusion and fatal results that would often arise from conflicting orders, if both vessels were to undertake the duty of avoiding each other, the rules of navigation impose upon one of them primarily the whole duty of taking active measures "to keep out of the way," and require the other "to keep her course." Old Rules, 19-23. The former is bound to shape her course with reference to all the circumstances. Good judgment and careful handling are often necessary to avert disaster. In selecting the mode of keeping out of the way, the speed of both vessels is as necessary to be taken into account as their courses. This is the

every-day practice of seamen. Safe navigation, especially in crowded harbors, would otherwise be impossible. As the vessel bound to keep out of the way must, therefore, at her peril, shape her course with reference to the speed as well as the heading of the other, the latter, after an agreement between them is had, or after the other's maneuvers are known, has no right to change either her direction or speed to the other's prejudice, while she is executing proper and sufficient maneuvers to keep out of the way, unless some circumstances exist that make such a change necessary. The vessel required to keep her course must do nothing to thwart the other. This general rule is well settled and constantly applied. It prohibits every unnecessary act or change that would embarrass or defeat the other's efforts. As between a steamer and a sailing vessel this general rule has been affirmed by the supreme court in the strongest language. In the case of *The Scotia*, 14 Wall. 170, 181, the supreme court say:

"The duty of the steamer (to keep out of the way) implies the correlative duty or obligation of the ship to keep her course, and to do nothing to mislead."

In *The Illinois*, 103 U. S. 299, the court say:

"But the sailing vessel is under just the same responsibility to keep her course, if she can, and not embarrass the steamer while passing by any new movement. The steamer has the right to rely on this as an imperative rule for a sailing vessel, and govern herself accordingly."

See, also, *The Free State*, 91 U. S. 200, 205; *The Adriatic*, 107 U. S. 512, 2 Sup. Ct. Rep. 355; Mars. Col. (2d Ed.) 414. These observations are ordinarily just as applicable to a steamer that is required to keep her course, as to a sailing vessel. The reasons are the same, and in my judgment rule 21 creates no exception in the case of steamers; certainly none as respects stopping and reversing, except where special circumstances make it "necessary." It is to be observed, first, that none of the rules are to be taken absolutely or independently of the rest. They are to be construed and applied together, and with reference to each other, and to their common design, viz., to prevent collision. *The Cayuga*, 14 Wall. 270, 276; *The Sunnyside*, 91 U. S. 208, 214, 218; *The Benares*, 9 Prob. Div. 16; *The Columbia*, 25 Fed. Rep. 844. Hence when observance of a rule would plainly tend to bring about a collision which departure from the rule would avoid, departure becomes a duty. The case, then, falls under the exception of rule 24. Articles 23 and 24 of the new regulations in like manner expressly recognize the duties arising from the ordinary practice of seamen, and from the special circumstances of the case. It is well settled that although the crossing rule (16) and the approaching rule (21) use the same words "so as to involve risk of collision," they do not come into operation contemporaneously. A vessel bound to keep out of the way, and crossing another's course "so as to involve risk of collision," if she adopt timely and sufficient measures for that purpose by the use of the helm, is not bound by rule 21 to slacken speed also. *The Jeopardy*, L. R. 4 P. C. 1; *The Free State*, 1 Brown, Adm. 251, 268, 91 U. S. 200, 205; *The Beryl*, 9 Prob. Div. 137, 142. The other ves-

sel, in like manner, has a right to presume, and is bound to presume, that the former is performing her duty, until the contrary is reasonably certain. *The Free State*, 91 U. S. 204, and cases there cited. It is then only that she has a right or is bound to assume that there is risk of collision, and to stop and reverse, and thereby depart from her ordinary duty to keep her course. *Mars. Col.* (2d Ed.) 425, 426. The case is much stronger when the vessel bound to keep out of the way is perceived to be maneuvering for that purpose, or when a common understanding has been had, through the exchange of signals, as to her mode of doing so. It would make the rules practically contradictory if, after having come to a proper agreement as to the very mode of avoiding a collision, the privileged¹ vessel might straightway violate that agreement by making a contrary maneuver that tended to defeat the other in the performance of her duty, and was contrary to what the latter was bound to consider, and had a right to rely upon, in shaping her course. Under such an agreement, until it is reasonably certain that the vessel bound to keep out of the way cannot or will not do so, the duty of the privileged vessel to do nothing to thwart the other's efforts seems to me plainly controlling. The case is one in which, under rule 24, having regard to the dangers of a contrary course and the special circumstances of the agreement already had, a departure from rule 21 would be required, if the latter rule could be deemed applicable at all. *Fry, L. J.*, in the case of *The Beryl*, page 145, observes that "article 18 (old rule 21) comes into operation from time to time whenever the circumstances existing at the time make it necessary that the article should be acted on." The remark of *BRETT, M. R.*, in the case last cited, that "keeping her course * * * has nothing to do with the question of speed" was not necessary to the decision of the cause, and was not, I think, fully considered. I have found no such adjudications. On the contrary, the vessel required to keep her course has not unfrequently been held liable for backing while the other was maneuvering to avoid her. *The Favorita*, 1 Ben. 30; *The Northfield*, 4 Ben. 112. Although *The Favorita* was reversed on appeal, (8 Blatchf. 539,) it was only on the ground that the error was committed *in extremis*. The phrase "shall keep her course," in rule 22, must be construed in its ordinary nautical sense; and when a steamer stops and reverses until she is still in the water, she certainly does not "keep her course" in the nautical sense, or in any sense. She has then no "course" at all. If reversing is continued until she gets sternway, it is absurd to say that she still keeps the same course as when she was going ahead. If her heading remained unchanged, her "course" would be precisely opposite. It may, possibly, be an open question whether a material slackening of speed by the privileged vessel, when it tends to thwart the other, is "keeping her course" in the nautical sense, or permissible under rule 23. Under old rule 21, to stop still, as the *Beaconsfield* did, certainly is not. Under

¹ NOTE. I use the word "privileged" for the sake of brevity only. But the duty of one vessel to "keep her course" is not intended by the rules as a privilege conferred, but as an obligation imposed, in order to enable the other vessel with certainty to keep out of the way. Per *BLATCHFORD, J.*, in *The Columbia*, 25 Fed. Rep. 845.

new article 18 I have no doubt that in such a case slackening speed is not permissible unless "necessary." Mars. Col. (2d Ed.) 415.

I feel bound to hold, therefore, that the *Beaconsfield*, in stopping her headway, broke rule 23, which required her, under the circumstances, to keep her course; that where a common understanding by signals has been had, and the vessel bound to keep out of the way is taking sufficient measures accordingly, as the *Britannia* in this case did, rule 23, and the implied legal obligation of the privileged vessel to do nothing to thwart the other, are controlling; and that rule 21 does not, in such a case, authorize stopping and reversing, unless special circumstances that subsequently appear make stopping and reversing necessary. A certain time is required and must be allowed for the execution of the maneuvers agreed upon, necessarily varying according to the circumstances. When the maneuver involves a swing from pointing ahead to going astern of the privileged vessel, considerable time is necessary. While the proper maneuver is pending, after an understanding by signals, the privileged vessel has no right to assume that the other vessel is not executing it properly, or that there is any risk of collision under rule 21. The agreement for the time being presumptively terminates the risk of collision, and rule 21 does not come into operation. *The Free State*, 91 U. S. 204; *The Clement*, 2 Curt. 368; *The Northfield*, 4 Ben. 117.

But it may be that after such an understanding by signals has been had, the movements of the vessel bound to keep out of the way may, in consequence of miscalculation, unforeseen circumstances, or fault, be so tardy, ineffectual, or contrary, as justly to renew apprehension of collision, in spite of the previous agreement for avoiding it. Such, it is claimed on the *Beaconsfield's* part, was the present case. It was by reason of the uncertainty of her officers as to the other's course, no doubt, that she was stopped and backed. Nor have I any doubt that under the circumstances, and in the apparent situation, this renewed apprehension was natural and reasonable. But I cannot hold that the circumstances were so urgent as to warrant a contrary maneuver that tended to defeat the agreement that was already made and presumptively in course of execution. The stop being, as I have said, under the circumstances, a violation of her obligation to "keep her course," the burden of proof is upon her to show its necessity, and that it was reasonably calculated to avert the danger; both because stopping was a departure from rule 23 of the statute, and because it tended to thwart the *Britannia's* efforts. Mars. Col. (2d Ed.) 413, 414, 431 and cases there cited. Even if there were no regulation providing for such a case, I should hold that mere doubt and apprehension are not enough to justify such a thwarting maneuver. This was emphatically stated by BLATCHFORD, J., in the case of *U. S. Grant*, 6 Ben. 465, 467. There must be a reasonable certainty that the vessel bound to keep out of the way is not doing her duty, and cannot or will not keep away in the manner agreed on, before the other vessel can be held authorized to violate the pending agreement and her legal obligation under it, and to take the matter into her own hands by executing a conflicting maneuver. If that were allowed, the rules would

have little or no value in the very cases where the observance of them is most needed; and all certainty as to the duty and responsibility of keeping away would be lost. The situation, doubtless, required firmness and nerve; but these qualities are indispensable in navigation. Sailing vessels are often put in the same doubt and uncertainty by steamers; but the rule that requires them to hold their course, and not execute a contrary maneuver, is never relaxed except when the peril is imminent. The rule and the tests applicable in reference to maneuvers that tend to defeat the other vessel's action are manifestly totally different from those that might tend to aid the other in avoiding collision. When one vessel is certainly crossing another's bows, and there is evident risk, the latter is bound to slacken or reverse, because that is apparently necessary, and cannot do harm; but where the former is known to be trying to go astern it is culpable in the other to reverse without a reasonable certainty of its necessity.

In this case, though there was reasonable doubt and uncertainty, through the Britannia's delay in swinging, and through her continued approach towards the north side of the river, where she had no right to come, yet when the Beaconsfield reversed, the case was far short of any reasonable or apparent certainty that the Britannia was not otherwise doing her duty, or could not avoid her by going astern as agreed on. The fact was quite the contrary. She was doing all she could. The time since the exchange of signals was short. Her officers say she did not swing to port at all after the signaling, but was swinging to starboard all the time. Their means of knowing were best. The Beaconsfield's pilot finally estimates the swing to port at half a point. I do not think he could distinguish a change so slight. The tide coming against the starboard bow first would, of course, make some delay. But that influence would continue for about a length only, or a little over half a minute. The high wind would make some additional delay in her swinging. The pilot of the Beaconsfield says that he expected and looked for that. "Seeing more of her broadside" was the natural result of the nearer approach. The agreement to go astern was understood. No subsequent signal to the contrary had been given by the Britannia, whereas such a signal must have been expected by the pilot of the Beaconsfield in case of any change of purpose by the Britannia; and the master and pilot do not say that they believed she had made any change of purpose. The agreement for her going astern was therefore still in full force. The Britannia was still at least a quarter of a mile distant in a direct line, and considerably more than that by the paths on which the vessels were approaching each other. She was at least four points on the Beaconsfield's port bow, and the pilot and master of the latter could not know how rapidly the Britannia could swing after the first effects of the wind and tide were overcome; nor were they charged with that responsibility. The reasons for stopping, given by the master and pilot, are stated in a loose and unsatisfactory manner. They do not say that they thought she was going ahead of them, nor even that they were uncertain which way she would go. But such uncertainty is, I think,

to be inferred; and I give them the benefit of that inference; their conduct is not consistent with anything beyond mere apprehension and uncertainty. These circumstances, with the facts which the subsequent events show, that if the *Beaconsfield* had kept on steadily, the *Britannia* would have crossed her path from 500 to 700 feet astern, satisfy me that there was no such reasonable or apparent certainty of collision, or any such apparent necessity, as alone would authorize the *Beaconsfield* to stop her course instead of keeping it; when stopping, if not certainly right, was sure to embarrass the *Britannia*, and likely to bring on collision. That her reversing was premature is confirmed by the fact that she came to a substantial stop within a little over half the time and space that separated them.

But the case does not rest upon the general rules of navigation only. Supervising inspectors' rule 3 provides for just such cases of doubt and uncertainty. The uncertainty, doubtless, was as to whether the *Britannia* would, after all, go astern, or ahead, or collide; i. e., the doubt and uncertainty were as to her "course." Rule 3 in that case requires that the pilot, who is thus in doubt, "shall immediately signify the same by giving several short and rapid blasts of the steam whistle, and if the vessels shall have approached within half a mile of each other, both shall immediately be slowed to a speed barely sufficient for steerage way until the proper signals are given, answered, and understood, or until the vessels shall have passed each other."

It is plain that the pilot in this case did not observe this rule, nor act with any reference to it. He did not give several blasts of the whistle, but one blast only, i. e., his original signal, which meant that he would pass ahead; and yet he stopped his boat, a maneuver directly contrary to the meaning of that signal, and ported his wheel, which, the master says, worked true while the steamer had headway.¹

¹It is often stated that upon reversing the screw the action of the rudder, even while the ship has headway, is, though feeble, the reverse of its normal action. See *Mars. Col.* (2d Ed.) 396, 397; *Whit. Nav. Arch.* 605. Masters usually testify in general terms to that effect; but few have made any actual experiment with their vessels, so as to testify with any exactness or certainty. Careful experiments made with the *Aurania*, 29 Fed. Rep. 99, 121, 122, showed that during the first minute after reversal the action of the helm was true and normal, though reduced. The same was deemed established in the case of the *Ranger*, L. R. 4 P. C. 519, 527. See *The Nacoochee*, 22 Fed. Rep. 355, 358. In this case it is noticeable that both masters testified that so long as their ship had headway the helm worked true. This is probably correct for only the early part of the period of reversing. When the engine is reversed, the race of water from the propeller runs forward; and the rudder blade, meeting less resistance from the water has less effect in swinging the ship's stern. When the ship's headway is so diminished, and the forward race so strong as to draw the water wholly away from the forward side of the rudder, its effect wholly ceases. How soon this happens after reversing depends in part upon the relative position of the rudder and the screw, and may therefore differ in different vessels, though probably not greatly. The effect of the screw upon the heading arises from the unequal lateral thrust of the propeller blades in the upper and in the lower half of the circle of revolution. When the vessel is light, and the blades come near the surface, so as to churn the water, the resistance of the water in the upper half of the revolution is materially less than in the lower half; so that there is a preponderance of resistance by the water below, that presses the stern opposite the direction of the lower half of the circle of revolution; i. e., head to port, with a right-handed screw working ahead, and in the opposite direction when working astern; and with a left-handed screw, the reverse. When the steamer is well loaded, and the propeller deeply immersed at the top, the difference of resistance above and below is slight, and the propeller has then little effect on the heading.

He did not merely bring his vessel down to steerage-way, but stopped her. It is plain that inspectors' rule 3 was ignored. Again, common prudence demands that no thwarting maneuver by the vessel required to keep her course should be made contrary to a previous agreement or understanding with the other vessel, except upon notice to the latter of the intended new movement by any available signals, in order to prevent as far as possible misleading the other. Such signals were available here,—either the danger signals under inspectors' rule 3, or the three blasts, under new article 19, either of which would have been immediately understood. *The Martello*, ante, 71. It cannot be inferred that because the *Beaconsfield's* one blast was not heard, three or several would not have been heard or noticed. If heard, the *Britannia* would doubtless have reversed at once, as she did do as soon as she saw that the *Beaconsfield* had stopped; and this would have avoided the collision. And neither the inspectors' rules, nor any other rule, authorized her to "stop and reverse" unless apparently "necessary;" and that, as I have said, does not appear.

But if the order to reverse had been justifiable when given, the *Beaconsfield* was bound to act with consistency, and to adhere to her maneuver till she was out of danger; or if the order was found to be erroneous, to remedy the error by countermanding it and going ahead again as soon as possible. She did neither, but continued reversing for about one or two minutes, till she came to a substantial stop, right in the *Britannia's* path; and then lay still about a minute and a half more till struck, despite anything the *Britannia* could do. The master says that "directly after the order to reverse was given the *Britannia* was seen to be swinging more to starboard." He should therefore instantly have countermanded his order to reverse, or kept on reversing till out of danger. There was nothing in the way to prevent either, and either would have averted this disaster. After the vessel was stopped, and when the real danger became evident, he was, moreover, bound to do what he could to avoid it; but he lay still and did nothing. He neither went ahead nor backed, when either would have prevented collision. In this I think the *Beaconsfield* violated a duty that was reasonably obvious. *Mars. Col.* 425, 426. The *Beaconsfield* is therefore to blame (1) for not "keeping her course" as required by old rule 23, but thwarting the *Britannia's* efforts to avoid collision by backing without the justification of any rule or regulation, and without reasonable or apparent necessity; (2) for adopting this conflicting and dangerous maneuver, after an understanding to the contrary, without notice to the *Britannia* of her intended change; (3) for lack of any firm or consistent course on her part afterwards; and (4) for doing nothing to avoid collision during a considerable time after she had come to a stop, when the real danger became evident.

The *Britannia*. The evidence, in my judgment, does not establish any fault in the *Britannia*, after the first signals were exchanged, aside from her near approach to Governor's island, with her heading about N. N. E., and its effect on her subsequent course. It is clear that her way was nearly stopped when the vessels struck. Her officers testify, and

there is no reason to doubt their testimony in this respect, that they reversed as soon as the Beaconsfield was seen to be stopping, when about 150 or 160 meters distant, i. e., from 500 to 600 feet. In the high wind that prevailed from the westward, the fact that the Beaconsfield's whistles were not heard does not warrant my finding that proper attention was not given to her. The Britannia, so far as the evidence shows, gave the proper signals; made the proper maneuver by putting her wheel hard a-port at once. She would have gone from one to three lengths astern of the Beaconsfield except for the latter's fault in stopping her headway; and as soon as the Beaconsfield's stopping was visible, or the danger of collision discoverable, the Britannia reversed her engines full speed. That was all she could do. The rules required no more. *The Greenpoint*, 31 Fed. Rep. 231; *The Khedive*, 5 App. Cas. 876. In these latter respects there was no fault on her part. The amended libel of Cotton, however, sets up as a fault in the Britannia that in the ebb tide and the strong west wind she came up too near to Governor's island, and should have gone more to the westward, so as to head the tide and make an easier, i. e., a quicker, turn into the East river. The proof sustains the charge, and is not met by any sufficient justification. A statute of this state, passed April 12, 1848, (4 Edm. St. 60,) requires that the East river, from the battery to Blackwell's island "shall be navigated as near as possible in the center of the river." The Revised Statutes of this state (page 683) require steam-boats meeting on any waters within the jurisdiction of the state to go to starboard so as to pass each other with safety. Taking these provisions together, the Britannia was required to shape her course so as to be able to turn within the southerly side of mid-channel. She could easily have done so, notwithstanding the ebb tide and high west wind, had she come up at a reasonable and proper distance to the westward of Governor's island, or shaped her course properly below it. But passing within 100 yards of Fort William, and heading about N. N. E., she could not help running a considerable distance into the northerly side of the channel, where, as I find, the collision occurred, and where she was forbidden to go. Neither of these statutes has any sanction annexed to it. It is not declared that any vessel going in the wrong part of the river shall be deemed in fault so as to be held responsible, wholly or in part, for every collision she may incur there, without reference to any other fault on her part. In this respect these statutes differ from the British act of 1873. *The Khedive*, 5 App. Cas. 876. Aside from some special provisions making the non-observance of the statute in itself a ground of liability, as in the British act above referred to, the mere transgression of such a statute will not make the vessel liable where the disobedience of it did not contribute to the collision. And inasmuch as only the proximate causes of collision are deemed material, the mere fact that a vessel is on the wrong side of the river does not make her liable, if there was ample time and space for the vessels to avoid each other by the use of ordinary care. In such cases the cause of the collision is deemed, not the simple presence of the vessel in one part of the river rather than in another part, but the bad nav-

igation of the vessel, that, having ample time and space, might easily have avoided collision but did not do so. *The F. M. Wilson*, 7 Ben. 367; *The Funita*, 8 Ben. 11; *The Delaware*, 6 Fed. Rep. 195; *The E. A. Packer*, 20 Fed. Rep. 329. This general principle has often been affirmed by the supreme court. In the case of *The Dexter*, 23 Wall. 69, 76, it is said:

"It is not necessary to consider what was done by the respective vessels when they were some distance from each other; as it is clear they had ample time and opportunity to adopt every needful precaution to avoid the collision after it must have been apparent to both that they were fast approaching each other from opposite directions."

The same question was elaborately considered in the house of lords in the case of *Cayzer v. Carron Co.*, 9 App. Cas. 873, where it appeared that the steamer *Clan Sinclair*, by not easing her engines-as early as she should have eased them, in rounding a bend in the Thames, where vessels were not intended to meet, had come into collision with another steamer, and it was held, reversing the court of appeal, that she was not liable; because the two were seen by each other in ample time to avoid collision by ordinary care; and the proximate cause of the collision was held to be the reckless attempt of the other steamer to pass where there was not room for her to go. See *The Nereus*, 28 Fed. Rep. 457. But where sailing in a part of the river prohibited by statute, or forbidden by reasonable prudence, prevents the vessels from being seen in time, or causes unreasonable obstruction or embarrassment in the performance of their respective duties, or in any other way actively contributes to the collision, the violation of the statute or regulation becomes material, and the offending vessel is responsible. *The Favorita*, 1 Ben. 30, 39, 8 Blatchf. 539; *The Maryland*, 19 Fed. Rep. 551, 556; *The Sam Rotan*, 20 Fed. Rep. 333; *The Doris Eckhoff*, 32 Fed. Rep. 556; *The Yourri*, 10 App. Cas. 276. In the case of *The Dentz*, 26 Fed. Rep. 40, 29 Fed. Rep. 525, in which the tug *Dentz* with three canal boats lashed alongside in passing through Hell Gate had, by her whistles, assented to the *Plymouth Rock's* passing on the port side of her in going through Hell Gate, where the inspectors' rules prohibited two boats passing, and a collision ensued, this court held the *Dentz* in fault for assenting to dangerous navigation in violation of the inspectors' regulation, and in part responsible for the collision; because, having given that assent, she did not go to the starboard side of mid-channel, which was unobstructed, so as to give the *Plymouth Rock* sufficient room for her necessary turn in that dangerous passage. In the circuit court this view of the maritime fault of the *Dentz*, in assenting to the violation of the regulation, "was fully approved;" but the *Dentz* was absolved from responsibility, because, upon the facts, it was held that the collision was brought about by the haste and recklessness of the *Plymouth Rock*; and that the latter did have "sufficient room on the port side" without requiring the *Dentz* with her three other boats alongside to leave the mid-channel. The duty of the *Dentz*, under the circumstances, to give the *Plymouth Rock* "suffi-

cient room on the port side of the channel to execute her maneuvers" was recognized. The court further say, page 528:

"When it appears that the Dentz has violated a rule which it was her duty to observe, she must assume the burden to show not only that it did not probably contribute to the disaster, but that it certainly did not."

That rule is applicable in this case to the Beaconsfield and the Britannia alike. This case differs from those in which the faulty situation of one of the vessels was held to be immaterial, in this respect; that in those cases the faulty situation existed at the beginning, and was fully known. The duties of each had reference to the known situation. Here the Britannia was at first on the proper side of the river, and the pilot of the Beaconsfield is not chargeable with knowledge that with her position and heading she could not round within the southerly half of the river where she was required by law to go. He could not tell exactly what her heading was, or how quick she could turn. He had a right to rely on her keeping on the southerly half of the channel; and as he was on the northerly side, there would in that case be abundant clearance. But it soon appeared that the Britannia could not keep within the south half. She had to turn some five or six points. Her continued approach towards the north half of the channel, with no perceptible turn, and still pointing ahead of the Beaconsfield raised reasonable apprehension and doubt as to her eventual course; and this apprehension led to the faulty orders that brought about the collision. It was the original fault of the Britannia in coming too near Governor's island, and in not shaping her course properly, so as to head the East-river tide sufficiently to enable her to observe both the statute and the obligations of reasonable prudence, in view of the many vessels constantly coming down past the battery in the northerly half of the channel, that caused the uncertainty and apprehension of the Beaconsfield's officers, and thus led to the collision. It was not the immediate cause of collision; but, as it seems to me, it was a direct, contributing cause. Again, it has often been held that a vessel bound to keep out of another's way is bound to do so by a reasonable margin, so as not to excite undue apprehension of danger. Where one vessel is put in very great and imminent peril through another's fault, by not allowing such a margin for safety as might and ought to have been given her, the whole blame is put upon the latter for her fault in bringing the other into such peril; though the collision may have been immediately caused by an error committed by the latter. These are cases *in extremis*. *The Favorita*, 8 Blatchf. 539; *The Columbia*, 9 Ben. 254, 258; *The Laura V. Rose*, 28 Fed. Rep. 104, 109.

This is not a case of error committed through fear *in extremis*. But the same principle, as it seems to me, must be recognized as applicable in some measure, where the apprehension of danger, though not amounting to a legal justification, has in fact directly led to the collision; and where that apprehension has been caused, as in this case, by a maritime fault of the vessel bound to keep out of the way, in her unexpected and near approach to the other vessel, in a part of the river where the former was forbidden to go and was not expected to come. In such a case the

violation of the statute seems to me to be one of the active and proximate causes of the collision. When the whistles were first given, the precise path of the *Britannia* could not be foreseen. As I trace it, had both kept on they would in fact have run within less than 100 feet of each other as they passed angling port to port, though the *Beaconsfield's* course would not be crossed till she was two lengths distant. That is very near for so large vessels, when one of them is making a swinging course. It was not a reasonably safe margin for a turning vessel bound to keep out of the way. It was just sufficient to pass if no error were committed by either; but it was only barely sufficient. It was not "ample room," in the sense of not necessarily exciting just apprehension in the other vessel. The doubt and apprehension of the *Beaconsfield* were, as I have said, natural and reasonable; and although she acted, as I have found, prematurely, and without that reasonable firmness and consistency and observance of the rules that the situation demanded, for which she, too, is held in fault; yet none the less, as it appears to me, was her fault directly induced through a reasonable and strong apprehension of danger caused by the *Britannia's* approach to the north half of the river, where she had no right to be. The *Britannia* had no right to encroach on the water that belonged to outgoing vessels; nor, through disobedience of the statute, to run upon so narrow a margin, and thereby put outgoing vessels in the north half of the river under such stress of apprehension of collision, from which the statute was in part designed to exempt them. In the case of *Cayzer v. Carron Co.*, *supra*, Lord Watson says:

"If that conduct on the part of the *Clan Sinclair* (getting further down the Thames than she ought to have been) had been such as to place the *Margaret* at this disadvantage, to throw her into difficulties, and make it doubtful what course she ought to pursue, then I could hardly have excused the *Clan Sinclair* from contribution to the collision in the present case."

In the subsequent case of *The Yourri*, 10 App. Cas. 276, where that vessel was improperly going down river on the left-hand side, in the night-time, when there was "a certain degree of mist," and there collided with the *Spearman* coming up without any lights, both were held to blame. The fault of the *Yourri* it was said "could hardly admit of dispute." The circumstances I have mentioned, seem to me, in the language of Mr. Justice NELSON, in *Cramer v. Allen*, 5 Blatchf. 250, to "bring the case within the reason of the rule of apportionment." I am satisfied, moreover, that the construction above given is in the interests of safe navigation about the Battery; that it is practically necessary, in order to insure a due observance of the statute, and the avoidance of collisions; and that the contrary rule would leave the statute without effect where its application is most specially needed.

I do not find it necessary to refer to the other questions discussed in the argument. Decrees may be entered in accordance herewith, with a reference to compute the damages.

WILSON v. WESTERN UNION TEL. CO.

*(Circuit Court, N. D. California. March 19, 1888.)***1. REMOVAL OF CAUSES—PROCEDURE—ACTS OF STATE COURT.**

The United States removal act, as amended by act of March 3, 1887, gives to the circuit court immediate jurisdiction upon the filing of the required petition and bond in the state court, where the action is pending, the case being removable; and no act of the state court is necessary to, or can prevent, the jurisdiction of the circuit court, which court, upon the filing of a copy of the record, may proceed with the case as if it had been originally entered there.

2. SAME—RIGHT OF REMOVAL—NON-RESIDENT DEFENDANT—ACT OF MARCH 3, 1887.

Under the act of March 3, 1887, providing that United States circuit courts shall have jurisdiction of civil causes between citizens of different states; and that when the jurisdiction is founded only on diverse citizenship suit may be brought in the district where either plaintiff or defendant resides; and that civil suits, of which the circuit court has jurisdiction, and which are brought in state courts, may be removed to the circuit court by defendant, if a non-resident of the state,—a foreign corporation sued in a state court by a citizen of the state has a right to a removal to the circuit court.

On Motion to Remand.

Before FIELD, Justice, and SAWYER, J.

H. B. Gilks, for plaintiff.

Philip G. Galpin, for defendant.

FIELD, Justice. This action was brought to recover damages alleged to have been sustained by the plaintiff from a collision with the telegraph wires of the defendant, the Western Union Telegraph Company, which, by its negligence, had become detached from the poles by which they were usually held, and were suspended near the ground. It was commenced in the superior court of Siskiyou county, Cal., in June, 1887, and the sheriff served the summons issued on the company the 1st of July following, by delivering a copy thereof, attached to a certified copy of the complaint in the action, to one Frank Jaynes, in the city of San Francisco. The plaintiff is a citizen of the state of California, and the defendant is a corporation created under the laws of New York, and is, therefore, to be deemed, for the purposes of jurisdiction in the federal courts, a citizen of that state. On the 23d of July the defendant filed a petition for the removal of the action to the circuit court of the United States, on the ground of the citizenship of the parties in different states, accompanied by the bond required by the act of congress in such cases. Objections were made by the plaintiff to granting the petition, on the ground that no notice of it had been filed or served on him, and that the appearance of the defendant had not been entered; and the petition was denied. The defendant, notwithstanding this denial, had copies of the papers in the state court filed in the circuit court of the United States, and in that court it appeared and put in an answer to the complaint. The circuit court having thus taken jurisdiction, it is moved that the

case be remanded to the state court, on the ground that it was unlawfully removed, and by stipulation of parties the motion is submitted to myself and the circuit judge for decision.

The denial by the state court of the petition of the defendants for removal of the action in no respect affects the jurisdiction of the circuit court of the United States, if the action was removable, and the bond offered was such as the statute required. The statute makes the removal upon the filing of the petition with the necessary bond. The order of the state court directing the removal would have been a proper proceeding; it would have been record evidence of the court's acceptance of the bond, and of its acquiescence in the transfer of the action from its jurisdiction. But its refusal to make the order could not take from the circuit court its rightful jurisdiction. The statute of March 3, 1887, amending the act of 1875, determining the jurisdiction of the circuit courts of the United States, and regulating the removal of causes from state courts, provides that whenever a party is entitled to remove a suit from a state court to the circuit court of the United States, and desires to do so, he shall, except in certain cases, not material to the question here, file a petition for such removal in the suit at the time, or any time before the defendant is required to answer or plead to the declaration or complaint, and file a bond with good and sufficient surety for his entering in the circuit court, on the first day of its then next session, a copy of the record in the suit, and for paying all costs that may be awarded by that court, if it shall hold that the suit was wrongfully or improperly removed thereto, and also for his appearing and entering special bail in the suit, if special bail was originally requisite therein. And the statute declares that "it shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court." 24 St. 553, c. 373, § 3. As thus seen, no order of the state court or the circuit court is contemplated to transfer the jurisdiction of the action. As said by the supreme court, in *Railroad Co. v. Koontz*, 104 U. S. 14, speaking of the provisions on this subject in the act of 1875, which were similar to those in the act of 1887:

"It is a well-settled rule of decision in this court that when a sufficient case for removal is made in the state court, the rightful jurisdiction of that court comes to an end, and no further proceedings can properly be had there, unless in some form its jurisdiction is restored. *Gordon v. Longest*, 16 Pet. 97; *Kanouse v. Martin*, 15 How. 198; *Insurance Co. v. Dunn*, 19 Wall. 214; *Railroad Co. v. Mississippi*, 102 U. S. 135. The entering of the copy of the record in the circuit court is necessary to enable that court to proceed, but its jurisdiction attaches when under the law it becomes the duty of the state court to proceed no further. The provision of the act of 1875 is, in this respect, substantially the same as that of the twelfth section of the judiciary act of 1789, and requires the state court, when the petition and a sufficient bond are presented, to proceed no further with the suit; and the circuit court, when the record is entered there, to deal with the cause as if it had been originally

commenced in that court. The jurisdiction is changed when the removal is demanded in proper form, and a case for removal made. Proceedings in the circuit court may begin when the copy is entered."

It does not appear what relation Frank Jaynes bore to the Western Union Telegraph Company, to render the service of process on him service on the company. This is not, however, important, as the company accepted the service as sufficient, and appeared in the state court with its petition, and in the circuit court filed its answer. When the petition was filed, the time for its presentation had not expired. By the law of California, a defendant, served with summons out of the county in which the action is commenced, has 30 days to appear and answer the complaint. Only 23 days had elapsed in the present case from the service of the summons and copy of complaint, when the petition for removal was filed. The evident object of this motion is to obtain a reconsideration of the decision of the circuit court in the case of *County of Yuba v. Mining Co.*, rendered in August, 1887, and reported in 32 Fed. Rep. 183. It was there held that, under section 1 of the act of 1887, the circuit court could not take cognizance of an action brought against a party in a district of which he was not an inhabitant, and that, under section 2, no removal could be made to the circuit court of the United States of an action brought in a state court against a party who was not an inhabitant of the district. In that case, the plaintiff was a county of the state of California, and the defendants were corporations of the state of Nevada. The opinion in the case was written by my associate, the circuit judge, but I concurred in it, and in the judgment which followed. I have, however, long been satisfied that we fell into an error, and I am happy that we have so early an opportunity of correcting it. Whether that case is in such a position that the motion can be renewed, and the ruling reconsidered, I am not able to state. We can, however, prevent the decision from misleading hereafter in other cases.

The first section of the act of March 3, 1887, declares in what cases the circuit courts of the United States shall have original cognizance with the courts of the several states of suits of a civil nature at common law or in equity. In some of them, perhaps in all, it prescribes the amount or value which must be involved, exclusive of interest and costs. Omitting any consideration of that matter, the jurisdiction is extended to the following cases: (1) Those which arise under the constitution or laws of the United States, or treaties made or which shall be made under their authority; (2) those in which the United States are plaintiffs or petitioners; (3) those in which there is a controversy between citizens of different states; (4) those in which there is a controversy between citizens of the same state claiming lands under grants of different states; and (5) those in which there is a controversy between citizens of a state and foreign states, citizens, or subjects. The section also prescribes the jurisdiction of the circuit courts in criminal cases, both original and concurrent with the district courts; but that is a matter not pertinent to the present inquiry. It then declares that "no person shall be arrested in one district for trial in another in any civil action before a circuit court or district

court, and no civil suit shall be brought before either of said courts against any person by any original process [or] proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." The plain meaning of this clause, so far as it relates to the district in which a civil suit in a circuit or district court may be originally brought, is this: that such suit, where the jurisdiction is founded upon any of the causes mentioned in the section, except the citizenship of the parties in different states, must be brought in the district of which the defendant is an inhabitant; but where such jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides. No other intelligible meaning can be given to the section without omitting from consideration the concluding lines of the clause quoted; and such an omission is not permissible. The settled canon in the construction of statutes requires effect to be given to every sentence and word, if practicable; and here there is no difficulty in carrying out the requirement. The clause is not happily drawn; it wants the precision and clearness that a careful and intelligent revision would have given; but it is not difficult to get at its purpose and meaning. The concluding lines are to be read as a proviso to the general provision that no civil suit shall be brought except in the district whereof the defendant is an inhabitant.

Passing now to the second section of the act of 1887, we find the cases mentioned in which a removal of suits of a civil nature may be had from the state court to the circuit court of the United States. They embrace, among others: *First*, suits of a civil nature arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which by the previous section of the act the circuit courts are given original jurisdiction, but which are pending, or may be brought, in a state court; these may be removed by the defendant or defendants therein; and, *second*, other suits of a civil nature of which the circuit courts are given original jurisdiction by the first section, but which are pending, or may be brought, in a state court; these may be removed by the defendant or defendants therein being non-residents of the state. In one of these classes of suits a removal may be asked by the defendant or defendants without regard to his or their residence; in the other class, a removal can be asked only when the defendant or defendants reside without the state. According to this construction of the two sections, the corporations of Nevada, defendants in the *Yuba County Case*, had a right to its removal to the circuit court of the United States, and we erred in remanding it back to the state court. So, in the present case, the defendant, the Western Union Telegraph Company, has a right to its removal to the circuit court; and the removal being made, the motion to remand the case back to the state court must be denied. Since the decision in the *Yuba County Case*, the same question has been before several circuit courts, and the decisions rendered

by them, after a careful consideration of the subject, have been against the one we made, and which we now overrule. See *Fales v. Chicago*, 32 Fed. Rep. 673; *Gavin v. Vance*, 33 Fed. Rep. 84; *Loomis v. Coal Co.*, Id. 353; *Railroad Co. v. Railroad Co.*, Id. 385. Motion denied.

HALSTEAD v. MANNING, BOWMAN & CO.

(Circuit Court, S. D. New York. April 18, 1888.)

COURTS—FEDERAL—OBJECTIONS TO JURISDICTION—DEMURRER.

A bill for infringement of a patent, in the circuit court for the Southern district of New York, by a citizen of that state, alleged that the defendant was a corporation of Connecticut doing business in the district. *Held*, on demurrer to the bill, for which a special appearance only had been entered, that the court had no jurisdiction; the defendant, under the act of congress of March 3, 1887, not being liable to suit outside of the district of which it was an inhabitant, except where it consents thereto, or waives its objection, or where the jurisdiction of the circuit court is invoked solely on the ground of diverse citizenship.

In Equity. Bill for infringement. On demurrer to bill.

F. W. Crocker, for complainant.

Edwin B. Smith, for respondent.

WALLACE, J. The defendant raises by demurrer to the bill of complaint the objection that this court has not jurisdiction over the person of the defendant. The bill alleges the infringement by the defendant of letters patent of the United States granted to the complainant for a new and useful improvement in stewing kettles or boilers, and also alleges that the defendant is a corporation organized under the laws of the state of Connecticut, and doing business in the Southern district of New York. Prior to the act of congress of March 3, 1887, the defendant could have been sued here, if "found" within the district, but that act has made a radical change in the former provisions of law respecting the jurisdiction of this court, and a defendant can no longer be sued outside the district of which he is an inhabitant, unless he consents, or waives his right to object, except where the jurisdiction of the circuit court is founded only on the fact that the action is between citizens of different states. The present action does not fall within that category; and, as the facts showing want of jurisdiction appear upon the face of the bill, and the defendant has not appeared generally in the action, but specially, in order to raise the objection by demurrer, the demurrer must be sustained.

GATCH *v.* FITCH *et al.*SUNMAN *v.* GATCH *et al.*

(Circuit Court, D. Indiana. February 2, 1888.)

BANKS AND BANKING—NATIONAL BANKS—INSOLVENCY—PREFERENCES BY STOCKHOLDER.

Section 2, act Cong. June 30, 1876, (19 St. at Large, p. 63,) provides that the individual liability of shareholders of an insolvent national bank, fixed by Rev. St. U. S. § 5151, "may be enforced by any creditor of such association by bill in equity in the nature of a creditors' bill brought by such creditor on behalf of himself and all other creditors." *Held*, that a mortgage of all his individual property executed by a cashier and stockholder of such bank, after it had closed its doors, to secure a depositor, amounted to a preference, and was void as against a judgment recovered against the cashier by the receiver under Rev. St. U. S. § 5151, either in the hands of the receiver or in those of a purchaser from him for value.

In Equity. On demurrer to cross-bill.

Duncan, Smith & Wilson, for cross-complainants.

The cross-bill of Sunman alleged that the City National Bank of Lawrenceburgh closed its doors on August 10, 1883, in insolvency, and never opened up for business thereafter; Walter Fitch, a defendant to the cross-bill, was its cashier, and owned \$5,000 of the stock of the bank; that defendant Gatch was a depositor in the bank at the time of its suspension in the sum of \$14,492.37; that there were a large number of creditors, and the assets of the bank were insufficient to pay its creditors in full; that on August 11th, and after the bank had suspended, Gatch, who resided in Lawrenceburgh, demanded and procured of Fitch a mortgage on all the lands owned by Fitch, to secure and protect him as such depositor; that such lands were of the value of \$4,000, and constituted all the property owned by Fitch; that Gatch knew that Fitch was such cashier and stockholder, and that this mortgage covered all the property owned by him; that there was no other property out of which an assessment by the comptroller upon Fitch as stockholder, for the benefit of the creditors of the bank, could be paid; that this mortgage was made and received for the purpose and with the intent of securing to Gatch a preference over the other creditors in the payment of his debt; that there was no consideration for this mortgage other than the debt of the bank; that in 1884 the comptroller appointed a receiver for the bank; that the receiver exhausted all the available assets of the bank, which failed to pay the creditors, and thereupon an assessment of 50 per cent. was made by the proper authorities upon all the stockholders, including Fitch; that, Fitch having failed to meet this assessment, the receiver, under instructions, instituted an action in this court against him to recover the amount, and did recover a judgment for \$2,500,—the amount of such assessment; that execution issued on this judgment, and was returned *nulla bona*; that thereupon the receiver filed his petition in this court, and, under the instructions and order of this court, sold the judgment to the cross-complainant, at public auction, at the court-house door of Dearborn county, in the city of Lawrenceburgh, after proper notice, the said cross-complainant being the highest and best bidder; that this sale was reported to the court, confirmed, and the judgment assigned to Sunman. Subsequently Gatch brought his suit in the state court to foreclose his mortgage, making Sunman a defendant. The latter procured the removal of the cause to this court, and filed

the foregoing cross-bill. The mortgage consisted in a deed absolute in form, and a defeasance executed by the grantee to the grantor.

Two questions are presented by this demurrer to the cross-bill: (1) Can one of a large number of the creditors of an insolvent national bank take a mortgage on all the property of an individual stockholder, to secure to himself the payment of the debt due from the bank, so as to defeat the right of the receiver to enforce an assessment against such stockholder? In other words, can one of a number of the creditors of an insolvent national bank, after the happening of such insolvency, secure to himself over all other creditors of the bank a preference in the enforcement of the individual liability of a stockholder in such bank? For practically this is what it amounts to. (2) Is there any consideration to uphold the mortgage? The first question presented depends upon the construction to be placed upon the provisions of the national bank act and its amendments. We call attention to the following provisions of the national bank act: Rev. St. U. S. § 5151, provides: "The stockholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares," etc. See Ball, Banks, 164. Section 5210 declares "that the president and cashier of any national banking association shall cause to be kept at all times a full and correct list of the names and residence of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors during business hours of each day." Ball, Banks, 210. Section 1 of the act of June 30, 1876, provides "that whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as provided in section fifty-two hundred and thirty-nine of the Revised Statutes of the United States, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes." Ball, Banks, 224. Section 2 of the above act reads: "That when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association by bill in equity in the nature of a creditors' bill, brought by such creditor on behalf of himself and of all other creditors of the association against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which said association may have been located or established." Ball, Banks, 244. Section 5234 provides that "on becoming satisfied, as specified in section fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the comptroller of the currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the treas-

urer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings." Section 5236 provides that "from time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction, and as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated, and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held." Section 5242 provides that "all transfers of the notes, bonds, bills of exchange, or other evidence of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any state, county or municipal court."

What is the purpose, what the policy and intent, of these provisions of the national banking laws? It is manifest that the act contemplates that upon insolvency the assets which go to the creditors shall be equally and ratably distributed among them. The assets of which the bank is possessed, under section 5242, at the time of suspension, and the assets raised, under section 5151, by assessment of the individual stockholders, are placed, when distribution is had, upon exactly the same footing. Section 5234 and section 1 of the acts of June 30, 1876, declare that when a receiver enforces this individual liability, he shall pay over the moneys so raised to the treasurer of the United States, subject to the order of the comptroller, and section 5236 provides for a "ratable" division of the fund among the creditors. And section 2 of the act of June 30, 1876,¹ (Ball, Banks, 244,) provides that when the creditors proceed to enforce such individual liability by creditors' bill, it must be on behalf of all the creditors of the association, thus securing a ratable distribution when the creditors proceed without a receiver. It is true, the act does not say in negative terms that "no preference shall be had" out of this claim against the individual stockholders; but it says the liability shall be for all the creditors, and that the fund shall be ratably divided. Such provisions, construed along with section 5242, which declares that no preference shall be had or obtained by the general creditors of an insolvent national bank out of the assets of the bank, plainly indicates the intent and policy of the laws. Technically speaking, this individual liability is not called an asset of the bank under section 5242, yet, so far as the creditors are concerned, it is as much an asset of the bank as the property in the possession of the bank at the time of its suspension, and is, therefore, in the policy and purpose of section 5242. In other words, reading all these provisions together, as *in pari materia*, it is the manifest intention of the act that all creditors shall be paid ratably and equally, and that no preference shall be allowed. We call attention to a few authorities supporting an elementary rule bearing upon the point. See, particularly, *Oates v. Bank*, 100 U. S. 239, 244; *Atkins v. Disintegrating Co.*, 18 Wall.

¹ 19 St. at Large, 68.

272, 301; *Jackson v. Collins*, 3 Cow. 89, 96; *People v. Insurance Co.*, 15 Johns. 358, 381; *Brown v. Somerville*, 8 Md. 444, 456; *Ryegate v. Wardsboro*, 30 Vt. 746; Co. Inst. 24 V.

J. K. Thompson and D. Turpie, for defendants.

We take the position herein that a debtor in embarrassed circumstances has, under the common law, an absolute right to prefer a creditor,—to pay or to secure the payment of one of the claims against him,—and this claim may be either a debt due, or one which may become due upon any lawful contingency. It may be either direct or collateral. * * * It may be a debt growing out of or a liability created, or about to mature, by virtue of a note, bond, or statute. As to how it is created makes no difference, so that it be a lawful claim or liability. Fitch was a stockholder in a national bank; the grantee and creditor Gatch was an unpaid depositor therein; the liability of Fitch to Gatch was created and then existed, under section 5151, Rev. St. U. S., quoted *supra*. * * * As long as unpaid deposit of Gatch existed, there was a consideration for the conveyance, because there was a liability of Fitch (under the statute) “individually” to pay it to the extent of the par value of his stock, greatly exceeding Gatch’s claim and the value of the property conveyed. The terms of that law are that the stockholder “shall be held individually responsible * * * for all * * * debts * * * of the association.” It is not said, “in case the bank fails to pay,” or “in case others fail to pay,” but his responsibility is direct, individual, several. The subsequent provisions of the act of congress for ascertaining and collecting the amount of the debt do not at all affect its directness and individuality. It being well determined that at common law a debtor may prefer a creditor, whether the liability so provided for be due, to become due, contingent, direct, or collateral, the deed in controversy can only be defeated by some legislation clearly shown to be in derogation of this common-law right. We have now no general bankrupt law. Is there anything in the national bank law in derogation of this right of preference. In making a stockholder liable for the debts of the bank is to be presumed that congress gave him the power to choose which, if any, of these debts he might prefer in payment out of his own property unless that right is forbidden. * * * Under the well known rule of construction, “expression of one thing is the exclusion of the other,” we say that when congress forbids (as it does in section 5242) one class of transfers—that of the bank assets—as an unlawful preference, and says nothing about the other class of transfers,—that of their private assets by stockholders,—the indisputable, undeniable inference is that as to this latter class of transfers, the law is unchanged, and a transfer in preference of his private property by a stockholder is not affected by the act of congress in any way.

WOODS, J. After some hesitation, I have come to the conclusion that the demurrer to the cross-bill should be overruled, there being, as there has been in argument, no dispute that the cross-complainant, as assignee of the judgment against Fitch, has the same right to attack the mortgage in question which the receiver had before the assignment was made. Fitch was not liable directly as surety or otherwise for the indebtedness of the bank to Gatch. In the execution of the mortgage, therefore, he was not exercising the common-law right of preference among creditors who had demands directly against him; and the mortgage was made without consideration, unless the fact that he was a holder of stock of the bank involved such a liability as to afford a binding consideration for the execution of the instrument, and at the same time to warrant the

preference given to Gatch over other creditors of the bank. Was this so? The individual and ratable liability of stockholders in national banking associations for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, is definitely declared in section 5151 of the law; but in section 2 of the act of June 30, 1876, it is provided that this liability "may be enforced by any creditor of such association by bill in equity, in the nature of a creditors' bill, brought by such creditor on behalf of himself and of all other creditors," etc. The liability being enforceable only in behalf of all creditors, it seems necessarily to follow that any voluntary discharge or security given for the payment thereof should likewise be for the equal benefit of all creditors, and that any effort to give a preference should be deemed illegal. This conclusion is in harmony with the general and well-established doctrine that the liability of corporate stockholders is a fund, or source of a fund, for the ratable payment of all creditors. If the mortgage in question is valid because of Fitch's liability as stockholder,—and, unless valid for this reason, it was clearly without consideration,—and if such a preference as was here given is valid, then, in the suit by the receiver against Fitch upon his liability as stockholder, he might, it would seem, have pleaded in bar payment of the amount due or payable upon this mortgage, if payment had been made; and, upon the facts as they are shown to be, might have insisted that he should be required to pay nothing to the receiver until the amount of his liability upon this mortgage should be determined and deducted from the amount demanded.

The demurrer is therefore overruled.

LIPPINCOTT *et al.* v. SHAW CARRIAGE Co. *et al.*

(*Circuit Court, D. Indiana.* March 10, 1888.)

1. CREDITORS' BILL—DISTRIBUTION OF FUNDS—DEFENDANTS' RIGHT TO SHARE.

Chattel mortgages covering the company's entire property given by an insolvent corporation to two banks, which were among its creditors, were held to be invalid, not for fraud or want of consideration, but because the corporation, being governed by four directors, two of whom were liable as indorsers upon the notes to secure which the mortgages were executed, could not prefer the holders of the notes over unsecured creditors. These mortgages had been foreclosed in the state courts prior to the filing of the bill, which was brought by a judgment creditor of the corporation, who was not a party to the foreclosure, and who sought for himself, and other creditors who should come in, to have the mortgagees declared trustees of the funds realized. *Held*, the mortgages being valid as between the banks and the corporation, that the banks were not in the case as intervenors, and that they could not be required, as a condition of being allowed to share in the fund, to put on record a formal request to be admitted "under the invitation of the bill."

2. SAME—CHATTEL MORTGAGES—FORECLOSURE.

Where a chattel mortgage executed by an insolvent corporation to some of its creditors has been foreclosed in the state courts, the fact that it is subsequently set aside in the federal courts at the suit of a judgment creditor not a party to the foreclosure, on the ground, not of fraud or want of considera-

tion, but because the preference was beneficial to some of the directors, does not affect the rights of the mortgagees to retain the proportionate shares of the fund of such intervening creditors as were parties to the proceedings in the state courts, as well as his own share.

3. SAME—CREDITORS CONCLUDED BY DECREE OF FORECLOSURE.

Two banks, F. and I. creditors of an insolvent corporation, procured each a chattel mortgage from the company on the entire plant to secure their claims. They then foreclosed the mortgages in the state courts in separate suits, which were consolidated before final decree. To the suit of F. a partnership creditor was made a party, but in the suit of I. the firm was not properly served under the laws of Indiana, where the bill was filed. Both mortgages were subsequently held invalid, because the preference so given was beneficial to some of the directors, in the federal court, on a judgment creditors' bill filed by creditors who were not parties to the foreclosure, and the banks adjudged trustees of the respective proceeds of sale. *Held*, on final distribution of the fund, that the partnership should take nothing from the proceeds in the hands of F., but should receive its percentage from those in the hands of I.; that creditors who were not parties to the foreclosure should share alike in both funds; and that neither bank should have anything from the other, but that each should retain what, but for the decree in the state court, and because of the validity of the mortgages between the parties thereto, would go out of its fund to the other, and to the creditors bound by that decree.

4. SAME—SOLICITORS' FEES.

An allowance of a solicitor's fee to be taxed as costs, or taken from the fund before distribution, will not be granted complainant in a judgment creditors' bill to set aside certain mortgages executed by an insolvent corporation, and to have the mortgagees declared trustees for the company's creditors, where the mortgages are invalid solely on the ground that they amount to preferences beneficial to directors, and not because of fraud or want of consideration.

5. SAME—COSTS OF REFERENCE—APPORTIONMENT.

A judgment creditors' bill attacked a chattel mortgage executed by an insolvent corporation on the ground of fraud, and, a foreclosure having been had, asked that the mortgagees be adjudged trustees of the proceeds of sale for the benefit of the company's creditors. The court found no fraud or want of consideration, but set the mortgage aside because it contained an illegal preference of demands indorsed by directors of the corporation. The testimony put in at the first reference was pertinent, however, on the question of the amount of the debt owing to the mortgagee when the mortgage was made. *Held*, an exact apportionment of costs being difficult, that the costs of the reference should be paid from the fund before distribution.

In Equity. On final distribution under master's report.

This is a suit by creditors of the Shaw Carriage Company, an insolvent corporation, for the benefit of all creditors intervening, to set aside certain mortgages made by that company to its co-defendants, the First National Bank of Indianapolis and the Indiana Banking Company, and to have the mortgagees declared trustees for the creditors of the proceeds of sales of the mortgaged property made before the bringing of this action, by virtue of a decree of foreclosure obtained in the superior court of Marion county, Indiana. As will be seen by a reference to the opinion of this court in 25 Fed. Rep. 577, where the master's report upon the first reference and a full statement of the averments and prayer of the bill may also be found, the mortgages in question are held to have been invalid, not for fraud or want of consideration, as alleged in the complaint, but because the Shaw Carriage Company, being an insolvent corporation, governed by four directors, two of whom were liable as indorsers upon the notes to secure which the mortgages were given covering the company's

entire property, could not give the holders of these obligations a valid preference over creditors whose demands were without such indorsement. Besides the proceeds of the chattel property sold under the decree of the state court, the defendant banks are chargeable with sums realized from, or the estimated value of, real estate of the carriage company, upon which, as the court in its former opinion held, they had acquired valid judgment liens; but for these sums they are required to account only as credits upon their demands against the carriage company, thereby reducing *pro tanto* their share in the fund derived from the chattel property, which they obtained and hold only by virtue of the mortgages, which have been declared invalid as against complainants and other creditors.

Pertinent to the subject of the distribution of this fund and to the different positions of counsel, the master's report, as modified by the court and by agreement of counsel, shows the following facts: By the decree of the Marion superior court the proceeds of the property sold were divided on the basis of 257 to the Indiana Banking Company and 300 to the First National Bank. The total fund in the possession of these banks to be accounted for in this action, including interest to the 1st of January last, is \$63,097.93. The total indebtedness of the Shaw Carriage Company, existing when the mortgages in question were made, including the demands of the defendants, reduced by the value or amount received from sale of real estate, is \$125,293.18; the several demands of the respective creditors, counting the mercantile creditors as one, being as follows:

Fletcher & Sharpe,	-	-	-	-	-	-	-	\$20,103 38
Meridian National Bank,	-	-	-	-	-	-	-	4,767 03
Wishard, assignee,	-	-	-	-	-	-	-	9,679 75
Mrs. Holliday,	-	-	-	-	-	-	-	4,936 28
Indiana National Bank,	-	-	-	-	-	-	-	759 87
Mercantile creditors,	-	-	-	-	-	-	-	14,896 39
First National Bank, defendant,	-	-	-	-	-	-	-	21,285 73
Indiana Banking Company, defendant.	-	-	-	-	-	-	-	49,415 25
								<hr/>
								\$125,293 18

Excepting Fletcher & Sharpe and the mercantile creditors, the intervening creditors above named were all made parties, and served with process, in the actions of the defendant banks (afterwards consolidated) in the state court, wherein the decree of foreclosure was had as stated, and, as indicated in the former opinion, are held to be estopped by that decree from disputing here the validity of the mortgages so foreclosed; and Fletcher & Sharpe, having been made parties to the action of the First National Bank, are likewise estopped from claiming any share of that portion of the fund in the hands of that bank, but are not estopped as to the Indiana Banking Company, because one of the members of the firm was not named as a defendant, nor served with process, in the action of that company, and the facts in respect to the mortgage of that company were not so set out in the bill of the First National Bank as to authorize a foreclosure thereof without process upon the bill of the banking com-

pany in its separate action, or on a cross-bill in the action of the First National Bank. In this condition of the case, what are the respective rights of the parties in the fund to be apportioned? Counsel for complainants and intervenors, in a supplemental brief defining and summarizing their positions and arguments, say:

"What amount shall be allowed for solicitor's fees, and how shall it be charged in the distribution? Shall the complainant be entitled to recover full costs, including the master's fee, and shall these costs, so far as made by the defendant banks, be charged against their dividends, or shall all the costs be charged against the fund, or shall any portion be charged against the complainant? Shall the funds be treated as one, and all the parties allowed to participate, including Fletcher & Sharpe, or as two funds, Fletcher and Sharpe being admitted as to the Indiana Banking Company and excluded as to the First National, and each of the defendant banks excluded from the division of the assets with which the other is chargeable? We will not attempt to reproduce the points made in argument, but desire to emphasize one proposition which seems to us to be controlling of several of the questions raised, and that is that the defendant banks are not claiming—cannot claim—anything here under their mortgages. If they do so claim, they must be content with the residue after the complainants and intervenors have been paid in full. The mortgages have been annulled, set aside, held for naught. It is as if they had never been, and the fund brought in had been found in the hands of the defendant banks as money received to the use of the Shaw Carriage Company, and the whole fund had been brought into court. *Riggs v. Murray*, 2 Johns. Ch. 582. The creditors of the Shaw Carriage Company, your honor having this fund in charge, present their claims as upon a distribution. The banks come in by the same door with the complainant and the other intervenors. The fund is the property of the Shaw Carriage Company, every dollar of it. No dollar of it belongs to either of the banks until your honor has assigned it to them upon distribution here. No more than a single dollar belongs to the complainant or any other intervenors. If the complainants had asked it, the court would have appointed a receiver for the Shaw Carriage Company, and directed him to recover that money, and his recovery, of course, would have been for the whole amount; and you should have ordered as in *Riggs v. Murray*, *supra*, that the whole be paid in. As to solicitor's fees, our position is that the fund in court has been brought in by the complainants. The other intervenors, including the defendant banks, if they come in at all, come in under the invitation of the bill, and that is upon condition that they share costs, the necessary burdens of bringing the fund into court. Solicitor's fees have never, in any case to our knowledge, been denied in such cases in the United States courts. The argument of the attorneys for the defendant banks rests upon the proposition that they are not here as intervenors dividing the fund that has been brought in, but as defendants paying in only a portion of the proceeds of the mortgage property, and retaining under their mortgages the balance. This is not true. The mortgage has been set aside. We cite as bearing upon this question: *Trustees v. Greenough*, 105 U. S. 527; *Railroad Co. v. Pettus*, 118 U. S. 116, 5 Sup. Ct. Rep. 387; *Attorney General v. Society*, 13 Allen, 497; *Ex parte Plitt*, 2 Wall. Jr. 482, 483; *Larkin v. Paxton*, 2 Mylne & K. 320; *Barker v. Wardle*, Id. 818. If the estoppel as to the First National Bank against Fletcher & Sharpe is maintained, then, of course, the funds in the hands of the two defendant banks must be distributed separately as to those who are entitled to share as to it; and it is agreed by the counsel representing both banks, respectively, that neither is entitled to share as against the other. Therefore the order should be that, as to the fund for which the Indiana Banking Company must account, the defendants Fletcher & Sharpe and com-

cial debt creditors shall share; that, as to the fund for which the First National Bank must account, the commercial debt creditors and that bank shall be admitted to share; or your honor must reconsider your ruling that the estoppel as to Fletcher & Sharpe prevails in behalf of the First National Bank, and hold that there is no joint estoppel, and that, the defendants being jointly bound, consequently no estoppel arises. In that event, Fletcher & Sharpe must be admitted to prove against the whole fund as one fund."

Counsel have also cited the following cases: *In re Stephens*, 3 Viss. 187; *Hone v. Henriquez*, 13 Wend. 240; *Weed v. Pierce*, 9 Cow. 729; *Bodley v. Goodrich*, 7 How. 276; *Bank v. Hofheimer*, 23 Fed. Rep. 17; *Bank v. Earle*, 110 U. S. 716, 4 Sup. Ct. Rep. 226; *Morsell v. Bank*, 91 U. S. 357; *Butler v. Jaffray*, 12 Ind. 504; *Graydon v. Barlow*, 15 Ind. 197; *Tompkins v. Association*, 19 Ind. 197; *Cooke v. Ross*, 22 Ind. 157.

Horace Speed and Harrison, Miller & Elam, for complainants and intervenors.

Claypool & Ketcham and Duncan, Smith & Wilson, for respondents.

WOODS, J., (*after stating the facts as above.*) It is certainly a mistake to say that "the fund is the property of the Shaw Carriage Company." The mortgages in question were valid between the parties, and, as between them, have never been set aside. The mortgagee of a chattel has the legal title, (*Jones, Chat. Mortg. § 426; Fay v. Burditt*, 81 Ind. 433;) and consequently, if the bill in this action had been brought, and the present stage of procedure reached, before steps to foreclose had been taken in the state court, it could not have been said that the Shaw Carriage Company had any interest in the property, except a right of redemption, by paying the mortgage debt. But by the decree of the state court, consummated in a sale of the property, that equity has been extinguished; and upon no supposable contingency—not even if this court had found that the mortgage debts were fictitious, and the fund more than enough to pay all just demands—could an order be rightfully made for the return or payment of a dollar of the surplus to the Shaw Carriage Company. That surplus would justly belong to the defendant banks, and it would be so adjudged, not upon the theory of a distribution made to them as intervenors under complainants' bill, but because the money was lawfully theirs by virtue of a transaction valid between the parties, and to that extent unassailable by creditors of the Shaw Carriage Company. Indeed, in the case of *Dunphy v. Kleinsmith*, 11 Wall. 610, speaking in respect to an action of creditors to set aside a mortgage alleged to have been fraudulently made to secure fictitious liabilities, the supreme court said: "The decree against the defendant must be a decree for an account. He must be called to account for just what property has come into his hands, and no more; and he will be entitled, under ordinary circumstances, to a rebate for the amount that was justly and honestly due him." That is to say, as I understand this statement, the case being one in which a lawful preference might have been given for the "amount justly due," the preference given, under ordinary circumstances, will be upheld to that extent, notwithstanding an overstatement in the mortgage or assignment of the amount of indebtedness intended to be secured. Much

more,—and certainly, as it seems to me, both upon principle and upon reason,—it must be said in cases like this, where there is no taint of fraudulent intent in the conduct of the respondents, that they will be permitted to retain, as justly their own, such proportion of the fund as they would have been entitled to receive upon a ratable distribution between creditors. This view involves no wrong in theory or result to other creditors. The strict right of each of them, when the debtor became insolvent, and ceased to do business, was to receive his proportionate share of the assets; and, holding the defendants as trustees of the fund derived from the assets, they can claim in a court of equity no further interference than necessary for the full enforcement of that right and the corresponding rights of other intervening creditors. 1 Story, Eq. Jur. § 371; *Stewart v. Platt*, 101 U. S. 731; *Findley v. Cooley*, 1 Blackf. 262; *Burtch v. Elliott*, 3 Ind. 99; *Springer v. Drosch*, 32 Ind. 486; *O'Neil v. Chandler*, 42 Ind. 471; *Van Wy v. Clark*, 50 Ind. 259; *Garner v. Graves*, 54 Ind. 188; *Edwards v. Haverstick*, 53 Ind. 348; *Stout v. Stout*, 77 Ind. 537. Beginning with the original hearing, counsel for the complainants have insisted and several times have moved that as a condition of being allowed to share in the fund the defendant banks be required to abandon their hostile attitude of defense, and to put on record a formal request to be admitted “under the invitation of the bill” to share the benefit of the suit on an equality with other intervenors. The inadmissibility of this proposition, now that its bearing upon present questions is apparent, is, as it seems to me, quite evident. As against the carriage company and all parties to the decree of the superior court, the defendant banks have a perfect and exclusive right to the entire fund, and in respect to other creditors are bound to surrender to them only their proportionate share of the fund. As stated in the case of *Stout v. Stout*, *supra*:

“The theory of the action [which was to set aside a series of fraudulent conveyances] is not to annul the deeds, and revest the title in the original fraudulent grantor, but to convert the final grantee into a trustee holding for the benefit of the injured creditors. Except as to creditors, the conveyance is valid, and it will not be interfered with further than necessary to secure their rights.”

In a proper case, of course, as has been suggested, a receiver will be appointed, and, if necessary, the entire property or assets brought into the custody of the court will be converted into money; but this involves no different principle from that stated. The costs of the receivership, including compensation to the receiver's counsel or solicitors, might doubtless be taxed against the fund in such cases, (*Hubbard v. Camperdown Mills*, 1 S. E. Rep. 6;) but if on final distribution any of the fund remains after payment of creditors in full or in part, according to their respective equities, the remainder will go to the defendant from whom the fund or property was taken, as of right, and not upon the fictitious theory that he takes as an intervenor or plaintiff in the action, when in fact he has been a defendant throughout the litigation. The attitude and conduct of the defendants in the case, therefore, in the

opinion of the court, afford no reason for denying them the ordinary privilege conceded to litigants of contesting any adverse ruling of the court, and of carrying the question to the supreme court for final decision. But, if the position of counsel be true, the defendant banks cannot receive or retain any part of the fund in their possession, without thereby surrendering the right to dispute further the first and most important ruling in the case,—that is, that their mortgages were invalid. Outside of bankruptcy cases, the court knows of no authority for such practice, or for such a rule of right and equity. Counsel, it may be observed, have not adhered with entire consistency to the proposition that the defendant banks, if they share at all in the fund, must do it upon the terms offered to intervenors; because they have also insisted that as between themselves these defendants must not only continue bound by their mortgages and by the decree of foreclosure thereof, but must separately account in this action, each for the portion of the fund in its possession, without right to share in that portion thereof in the possession of the other, or to have the debt of the carriage company to the other counted as a part of the aggregate indebtedness; while, as they urge, the commercial creditors shall be allowed to prove their demands in full against each; and reference is made to *Bank v. Car Co.*, 20 Fed. Rep. 69, as authority for permitting the proof of claims in full against distinct funds. Of this case it is enough to say that the claims there considered were liens by contract upon the different funds, and the decision simply gave full effect to contract rights. It is, of course, true that these banks can be put in no new attitude towards each other, but their relation to the complainants and other creditors who are not bound by the decree of the state court is different, and must be determined by the principles of equity already stated; and therefore, whether the distribution shall be deemed to be of one fund or two, the sum of all demands against the carriage company, including those of the defendant banks, should be taken into consideration; and, if this be done, the share or percentage of the fund which each creditor entitled to participate can receive will be the same in the aggregate, whether treated as derived from one fund or two. But if the distribution is to be made upon the theory of two funds separately considered, and the demand of one defendant bank is not to enter into the computation by which distribution of the fund in possession of the other shall be determined, and *vice versa*, then not only will the commercial creditors and Fletcher & Sharpe receive much larger shares of the fund, but their shares, as between themselves, will be relatively greatly different; and the amounts taken from the defendants, besides being larger in the aggregate, will be increased in an unequal ratio,—these inequalities and irregularities arising in part from the fact that Fletcher & Sharpe can share in one fund and not in the other, and in perhaps larger part from the fact that the difference between the respective demands of the defendant banks against the carriage company does not correspond with the difference between the respective amounts for which they must account. Besides, a computation upon this basis leads, as will be found upon experiment, to an arithmetical tangle from which

there seems to be no escape entirely consistent with either equitable or mathematical principles; while, if each creditor be allowed a percentage of the fund or funds in which he is entitled to share, equal to the percentage of his demand in the sum of all demands against the carriage company, the computation will be free from difficulty, and in harmony with the principles stated, both of law and equity. In this way Fletcher & Sharpe will take nothing from the First National Bank, but will receive their percentage of the fund in the possession of the Indiana Banking Company; and the commercial creditors will take alike from both funds; while neither bank will take anything from the other, but each will retain what, but for the decree of the superior court and because of the validity of the mortgages between the parties, would go out of its fund to the other and to the creditors bound by that decree. On this theory, it was conceded in argument, as I understood, that if defendants had paid to any creditor his proportionate share of the fund, or of the value of the mortgaged assets, they would be entitled to have the amount of that creditor's demand considered, as if assigned to them, in determining what other creditors should receive; and by the same principle I am unable to see why the defendants shall not be allowed a like benefit from the estoppel obtained in the state court against the creditors made parties to that procedure. To so hold does not diminish the just remedies of creditors not estopped; while to hold otherwise would, without merit or consideration moving from them or from any other for their intended benefit, enhance their interests, to the detriment of the defendants who obtained the decree. If complainants had procured a lien by levy of their execution upon the mortgaged chattels before they were sold under the foreclosure decree, and they had brought their bill here to annul the mortgages, this court would of course have recognized their priority or right to full satisfaction, both as against the defendants and against intervenors. But that is not the situation, nor is the case one in which by the mere bringing of the bill and the service of process the complainants sought to procure, or, perhaps, could have procured, an equitable lien or priority over other creditors; and consequently the cases wherein such priorities have been recognized are not controlling of the questions presented here. In any event, the lien of a creditors' bill is commensurate only with the remedy or relief proper to be granted under the bill; and that much, in effect, the complainants are awarded in this case, in that the defendant banks are held to account for all moneys and property received by them under their mortgages, and the fund and property, so far as brought under the power or into the custody of the court, (as the real estate in possession of the receiver of the First National Bank has been,) is held for the full payment of the sums decreed to be paid into court for the complainants and intervenors. The question is not whether the defendants might, of their own motion, have proved and brought into the computation the claims of creditors who were not parties to the foreclosure decree nor to this suit, and to whom they had paid nothing. Doubtless, in order to obtain a complete adjustment of rights and liabilities, and to protect themselves against further suits, they might have had a

reference, with an order that claimants should present their demands within a time stated, or be barred of any right in the fund; but the question presented respects only the rights and demands of parties to the record whose claims have been established, beyond dispute by the complainants and, in respect to the amount due thereon, beyond dispute by any party to the case. Consistently with this situation and the respective rights of the parties, the distribution can be made only on the basis already stated: that is, the fund must be apportioned according to the several amounts of the different demands proven. And when this is done, who shall take the sums corresponding to the demands of A., B., and C., the estopped creditors, so called? The complainants and other intervenors cannot, because as against them the rights of A., B., and C. are perfect and exclusive; but, as against the defendants, A., B., and C. cannot take, because they are estopped by the decree of foreclosure. The necessary conclusion, not inconsistent, as already shown, with the rights of any party, is that these sums must remain in the hands of the defendants. If possibly there be error in this conclusion, I think it more probably is in the holding that in this action any creditor is estopped from sharing by reason of the decree in the state court, and, if the court has erred in this respect, an appeal will give the creditors so excluded their just rights, without harm to other parties, plaintiff or defendant; but, after a distribution upon the theory contended for, such an appeal, successfully prosecuted, would result in an incomplete remedy to the appellants, or in taking from the defendants more than would be just, or at least in a situation difficult to adjust equitably between the parties.

The motion of complainants for an allowance of a solicitor's fee, to be taxed as costs, or taken from the fund before distribution, it is evident from what has already been said, should be denied. The power to make such allowances, at best, is dangerously arbitrary, and, as has often been suggested by the courts, ought not to be extended to doubtful cases. In this case, such an allowance, if asked, might properly be made against intervenors who have accepted "the invitation of the bill;" but no example of a like charge against defendants in the attitude of these has been cited, or, as I think, ought to be established. To illustrate the inequity of the consequences to which the proposition would lead, let us suppose that the court had ordered in this case that the commercial creditors and Fletcher & Sharpe should be paid in full, taking \$35,000 of the fund, and leaving in possession of the defendants \$28,000; or suppose, instead of the mortgaged property having been converted into a fund, that the defendant banks had purchased the property at the decretal sale, and were still holding it, and that by reason of enhanced values it had been found, in this case, to be worth a sum exceeding the amount of all demands against the carriage company, and that accordingly the court had required the defendants to bring into court money enough to satisfy the demands of all creditors not bound by the decree of foreclosure,—could it be insisted (and yet such is the logic of counsel) on either supposition that, theoretically, not only the entire fund or property must be deemed to have been brought into court,—which in a

sense is true,—but that the defendants must be deemed to take, as distributees under complainant's bill, the remainder left in their possession, and therefore should be required to contribute to the compensation of complainants' solicitors ratably, and not only in proportion to the amount of their demands against the common debtor, but also upon the surplus over and above all demands derived from the enhanced value of the property?

In respect to the costs of the first reference to the master, which the defendants ask to have taxed against the complainants, it is true, as stated in the former opinion, that the charges of actual fraud, in respect to which mainly the evidence on that reference was taken, were not sustained, but nevertheless much of this evidence was more or less pertinent to the inquiry made on the last reference into the amount of the demands of the defendant bank against the Shaw Carriage Company, and it would doubtless be quite difficult to make a fair or exact apportionment of these costs; therefore, as the nearest practicable approximation, it is ordered that all costs in the case be taxed against the defendant banks, and the amount thereof deducted from the fund in their hands, and that the remainder be distributed as indicated. Decree accordingly.

CITIZENS' ST. RY. CO. v. JONES.¹

(Circuit Court, E. D. Arkansas. March 15, 1888.)

1. MUNICIPAL CORPORATIONS—CONTROL OF STREETS—DELEGATION OF AUTHORITY.

When a statute authorizing a municipal corporation to contract "for the purpose of providing street railroads," and conferring, "for the time which may be agreed upon, the exclusive privilege of using the streets and alleys of such city for such purpose," it is the actual use of the streets for the purpose which confers the exclusive privilege, and the exclusive right to use the same attaches only when the use or its equivalent begins, and the city has no power under such a grant to devolve on any contractor the duties it owes to the public of determining when and on what streets the public convenience requires a line of road.

2. SAME—CONSTRUCTION OF GRANT.

Where an instrument is susceptible of two interpretations, one of which will antagonize the law and render it invalid, and the other will harmonize with law and give it validity, the latter interpretation will be adopted.

3. SAME—GRANTS OF FRANCHISES—CONSTRUCTION.

Grants of franchises by public corporations are to be strictly construed, and no exclusive privileges pass unless by express words or necessary implication.²

In Equity. Bill to restrain the building of a street railway by defendant, plaintiff claiming the exclusive privilege in the city by virtue of a contract with the city.

¹Reported by Messrs. Stephenson & Trieber, of the Helena bar.

²Respecting the power of a state or municipality to create a monopoly, see *Stein v. Supply Co.*, 84 Fed. Rep. 145, and note; *Teachout v. Railway Co.*, (Iowa,) 83 N. W. Rep. 145.

J. M. & J. G. Taylor, for plaintiff.

White & Parker, for defendant.

CALDWELL, J. The foundation of the plaintiff's case is an ordinance of the city of Pine Bluff, passed on the 4th day of February, 1885, and adopted as a contract on the 24th day of March, 1885. The provision of the contract on which the case turns reads as follows:

"That for the purpose of providing for a single-track street railway or street railways, the said party of the first part [the city of Pine Bluff] does hereby grant unto the said party of the second part [John O'Connell, Frank Silverman, and Sam Fies] and their assigns, for the term of ninety years from the date of this contract, the right of way on, over, and along the following streets, to-wit: All of Barraque street, all of Broadway street, all of Fugate street, all of Newton street, their present and future limits, and all other streets within the present and future corporate limits of the city of Pine Bluff, as the parties of the second part think public necessities require, with the exclusive privilege of using said streets and said designated portions thereof for the purpose of constructing, operating, maintaining, and owning such street railway thereon."

The contract required the construction, within three years from its date, of a railway over the following streets: On Fugate from Broadway to Barraque, thence on Barraque to Newton, thence on Newton to Broadway, and thence on Broadway to Fugate; but by a later ordinance this requirement was so modified that the company was only required to build, within three years, a railway on Barraque street for a distance of 10 blocks, and the company is under no obligation to construct any more railroad in the city during the life of the contract—90 years. The plaintiff is assignee of the contract. On the 9th day of August, 1886, the city entered into a contract with the defendant, Wiley Jones, whereby he was authorized to build and operate a street railway on certain named streets in the city, on which the plaintiff has not constructed, and does not propose to construct, such a railway. The object of this suit is to enjoin the defendant from constructing or operating a street railway on the streets of the city included in his contract, upon the ground that the plaintiff under its contract has an exclusive right to the use of all the streets of the city for street railway purposes, and that this exclusive right is not restricted to the streets on which it has constructed its railway, but extends as well over all the streets of the city upon which it has not constructed, and does not propose to construct, such railway.

The power granted to the mayor and council to contract on this subject, is, as the act in terms declares, "for the purpose of providing * * * street railroads," and it is for that purpose they are authorized to grant "for the time which may be agreed upon the exclusive privilege of using the streets and alleys of such city for such purpose. * * *" Section 755, Mansf. Dig. It is the actual use of the street for the purpose that confers the exclusive privilege. The city council has not the power to agree that if the contractor will build a street railway on one street in the city he shall be under no obligation to build on any other street for 90 years, and that for that period the city shall not itself build

such railway on any street in the city, or authorize it to be done by others, however much the public convenience and necessity may demand it. The effect of such a contract is not to give the exclusive privilege of using the streets for the purpose of constructing and operating a street railway over them, but it is to give the contractor the exclusive privilege of preventing their use for that purpose. Under such an agreement the contractor occupies the position of "the dog in the manger." He need not use the streets for a railway himself, and he can prevent the city and all the world from using them for that purpose, regardless of the public wants and necessities. The power and duty of determining when and on what streets the public convenience requires street railroads is devolved by law on the city council, and that body cannot refuse to discharge this function, or devolve it on a street-car company, whose action would be controlled by its own, rather than the public interests. But this is exactly what it is said was done. Whether any more than a few hundred feet of railroad, on one street, should be constructed in a populous and growing city for a period of 90 years, is left to the discretion of the street-car company; or, as it is expressed in the contract, "as the parties of the second part think public necessities require." The present company affects to "think" the public convenience and necessities do not require a street railway on the streets over which the defendant, by authority of the city, has constructed one. It declined to build the road itself, and seeks to prevent the defendant from operating the one he built. The city council was the proper tribunal to determine the public needs in this matter, and, when it did so, and authorized the defendant to build his road on streets not used or occupied by the plaintiff, and which it was under no obligation to so use or occupy, the council was discharging its duty to the public, and one of its lawful functions under the law of its creation, of which it could not divest itself by any ordinance or contract. But it is said that when in the opinion of the city council the public needs require street railroads on streets over which the plaintiff declines to build, the city can purchase from the plaintiff by condemnation proceedings, if the price cannot otherwise be agreed upon, the privilege to build on such streets, and in this way repossess itself of the right and power to meet the public wants and necessities. The plaintiff is mistaken in supposing it could gain exclusive dominion and authority over all the present and future streets of the city, so far as relates to their use for street railroads, without building or incurring any obligations to build a street railroad on them. The favor was greater than the city council had the power to bestow. The right to the exclusive use of a street for a street railway, under the statutes, attaches when the use begins, or what is equivalent to that, when it has been stipulated for, and assured by an obligatory contract. Here there is no such use, and no such stipulation or contract. But the contract does not give the plaintiff the boundless exclusive privilege claimed. It grants "the exclusive privilege of using said streets and said designated portions thereof for the purpose of constructing, operating, and maintaining and owning such street railway thereon." This clause of the contract must receive the same construction as the act au-

thorizing the city council to make it. The exclusive privilege is limited to the streets used "for the purpose of constructing, operating, maintaining, and owning such street railway thereon," or in other words, to the streets on which the plaintiff shall build and operate a street railway. This construction makes the contract harmonize with the powers of the city council under the law. When an instrument is susceptible of two interpretations, and one will put it in antagonism to the law, and render it invalid, and the other will make it harmonize with the law and give it validity, the latter interpretation will be adopted. It is also a canon of construction that grants of franchises by public corporations to individuals or private corporations are to be strictly construed, and no exclusive privilege passes, unless it be plainly conferred by express words or necessary implication.

Let an order be entered sustaining the demurrer and dismissing the bill for want of equity.

MACKINTOSH *et al.* v. FLINT & P. M. R. Co. *et al.*

PARKER *et al.* v. SAME.

(*Circuit Court, E. D. Michigan. March 22, 1898.*)

1. RAILROAD COMPANIES—BONDS AND MORTGAGES—REORGANIZATION AGREEMENT—DIVERSION OF FUNDS.

A railroad being about to be foreclosed under a consolidated deed of trust, a committee of the consolidated bondholders, the members of which were large holders of stock and prior bonds, drafted "a plan for purchase and reorganization." This provided that the old stock should be deposited, and that the new company should issue (1) first mortgage 6 per cent. bonds, to be used only to fund the past due and maturing interest on the prior bonds, and for permanent construction and improvement; (2) preferred 7 per cent. stock, to represent the par value of outstanding consolidated bonds; and (3) common stock to represent the outstanding common stock. Holders of common stock were not to be entitled to shares, or to vote, until preferred stock had been paid five successive annual dividends of 7 per cent. The property was bought in, and a reincorporation effected on this basis. The new charter provided that the funds applicable to the payment of dividends on preferred stock was the net income, "after paying interest on prior bonds, repairs, expenses of equipment," etc., any surplus, after paying 7 per cent., to stand over until next dividend day. At the first meeting of the new board it was resolved that "under operating expenses only such improvements and additions shall be included as are necessary to keep the property efficient, and that all beyond this shall be provided for out of funds other than net earnings." *Held*, that the provisions of the agreement and the charter, as interpreted by the resolution, were binding upon the directors, and, it having been made to appear that the earnings and income, which had been wrongfully converted to pay for improvements and extensions, would, if applied to dividends, be sufficient to pay five successive dividends of 7 per cent. each on the preferred stock, that the common stock was entitled to representation.

2. SAME—RIGHTS OF COMMON STOCKHOLDERS—LIENS ON LAND GRANT.

Pursuant to an agreement for purchase and reorganization, a railroad company, which was about to be foreclosed under a consolidated trust deed, conveyed to the trustees of the separate mortgage of its land grant all its equities

therein, in trust to pay off all liens on the lands, and to turn in the balance to the trustees of the consolidated deed of trust. When the property was sold under this last trust, and bought in by the purchasing committee, these equities went with it. The land trustees paid off all liens, except one of \$800,000, which was secured, in part, on other property, and from 1861 to 1885, both inclusive, had on hand fourfold security for that charge. *Held*, as between preferred stock and common stock, which latter under the charter was to be debarred from participation until the former had been paid successive dividends of 7 per cent. during those five years, that the surplus, after providing for the security of the \$800,000 lien, was to be applied to dividends.

8. SAME—PREMIUMS ON MORTGAGE BONDS.

The same is true of premiums received by the company on first mortgage bonds issued and sold by it.

4. SAME—OPERATING EXPENSES.

As between such stockholders, a steel rail betterment should be charged to "construction account" and not to "operating expenses."

5. SAME.

The same is true as to money spent on steamers owned by the company to make them "more efficient;" and, where no "depreciation account" is kept, it is error to charge "expense account" with an estimated depreciation, when the money so charged was not actually spent upon repairs.

6. SAME—MONEY BORROWED TO PURCHASE ENGINE.

Nor, under such circumstances, should money borrowed by the company and laid out in the purchase of new freight engines and coal cars be charged to operating expenses.

7. SAME—PURCHASE OF OTHER ROADS—ACTION TO RESTRAIN—SUPPLEMENTAL BILL.

A suit having been brought by holders of common stock of a railroad company to compel the board of directors to recognize them as such, another bill to the same effect was filed by substantially the same parties, November 28, 1887, setting out, in addition that the defendant was about to buy in another road, and asking that the contemplated purchase, which was to take place two days later, be enjoined, on the ground that it was *ultra vires*, etc. The road about to be bought was improperly made a party to this bill. *Held*, the right to the relief demanded in the original bill having been established, that the second bill was properly a supplemental bill, and that, although it had been filed without the leave required by equity rule 57, it should, under the circumstances, be allowed to stand as to the defendant in the original suit.

8. SAME—RIGHT TO PURCHASE FRANCHISE OF OTHER ROADS.

There is nothing in the general railroad law of Michigan (act of 1873) authorizing one railway corporation to acquire the stock and franchises of another completed company, with the intention of itself exercising such franchises; and, in the absence of such a statute, such an acquisition is unlawful.

9. SAME—INJUNCTION.

Where holders of common stock of a railroad company are entitled to, but are deprived of, the right of representation, equity will enjoin, pending suit for the enforcement of such right, a disadvantageous, illegal, and *ultra vires* purchase by such company of another road.

In Equity. On final hearing.

J. Lewis Stackpole, Alfred Russell, and Henry S. Dewey, for complainants.

William L. Webber and Henry M. Campbell, for respondents.

JACKSON, J. The above-entitled causes were heard together. The first is filed by complainants on behalf of themselves and other holders of provisional certificates, as hereinafter explained, to compel the Flint & Pere Marquette Railroad Company and its directory to recognise them in full as stockholders in said company, and to issue to them regular

certificates of stock therein, such as will give them the rights of actual stockholders in said corporation, entitle them to vote and exercise a voice in the management of its affairs, from which they claim to be at present unjustly and improperly excluded. The second bill is filed by substantially the same parties, asserting the same right, and seeking to enjoin and restrain the Flint & Pere Marquette *Railroad Company*, in which they claim the right to be admitted as actual stockholders, from purchasing or leasing the Port Huron & Northwestern *Railway Company*, on the grounds that such leasing or purchase would be injurious to their interests, and unwarranted by law. The questions presented by this second bill, or, rather raised by the motion for preliminary injunction thereunder, depend to a greater or less extent upon the conclusion which the court may reach as to whether complainants, and those standing with them in the same position with them, are entitled to be treated and regarded as present stockholders in the Flint & Pere Marquette *Railroad Company*. It will, therefore, be most proper first to consider the matter involved in the first of the above suits, and to determine the relations which complainants bear to, and the rights which they may justly assert in, the Flint & Pere Marquette *Railroad Company*.

The material facts of this case, as disclosed by the bill, answer, exhibits, and proofs, are these: The Flint & Pere Marquette *Railway Company*, a corporation existing under the general railroad laws of Michigan, in 1872, executed to W. W. Crapo, Andrew G. Pierce, and Publius V. Rogers, as trustees, its consolidated trust deed or mortgage upon its franchises and property of every description, (except certain land grants derived from the United States through the state of Michigan, which had been previously conveyed in special parcels, and by separate trusts to secure certain bonds of the company,) for the purpose of securing the payment of an issue of bonds, as provided for therein, to the amount of \$6,657,000, to be known and designated as "Consolidated Bonds" of said railway company. Between four and five millions of these consolidated bonds were actually issued, on which the company made default in the payment of the interest thereon; and in June, 1879, said trustees filed their bill in the United States circuit court for the Eastern district of Michigan, at Detroit, for the foreclosure of said consolidated trust deed and mortgage by a sale of the property and franchises covered thereby. Shortly before the commencement of this suit, Jesse Hoyt, as president, and H. C. Potter, as secretary, of said railway company, issued a circular to the stockholders and others interested, notifying them that foreclosure proceedings were about to be instituted, explaining the situation of the company affairs and informing them "that a plan for purchase and reorganization will be prepared by a committee of the consolidated bondholders at an early day." Such committee, composed of H. A. V. Post, as chairman, Francis Hathaway, A. G. Brower, H. H. Fish, and Loum Snow, Jr., was appointed by the bondholders about the time of, or soon after, the institution of the foreclosure proceedings. This committee issued the reorganization scheme made Exhibit A to the bill of complainants, which, so far as need be noticed, was as follows:

"(3) The new company to issue reorganized first mortgage six per cent. bonds, having thirty years to run, and redeemable, at the pleasure of the new company, at par and accrued interest. This mortgage to be used only to fund the past due and maturing interest on the prior bonds, and for such permanent construction and improvement as may be deemed desirable by the board of directors of the new company. (4) Preferred seven per cent. stock shall be issued, sufficient in amount to represent the par value of the outstanding consolidated bonds and the past due coupons to May 1, 1879, inclusive. This preferred stock shall always be entitled to one vote for each and every share. Payment of dividends of seven per cent., or any part thereof, on this preferred stock, will be contingent on the net earnings of the company, and without accumulation. (5) Common stock shall be issued, sufficient in amount to represent the outstanding common stock of the old Flint & Pere Marquette R. R. Co., and this stock shall not be entitled to vote until the new company shall have earned and paid, for five successive years, seven per cent. annual dividends on the preferred stock. (6) The preferred and common stock of the new company will be issued to the purchasing committee, who will deliver, or cause to be delivered, to the representatives, for the time being, of the holders of the eight per cent. consolidated bonds, and of the holders of the common stock of the old company, who may join in this scheme of reorganization, the amount *pro rata* to which they are entitled, as near as may be, and the purchasing committee will dispose of fractions for the benefit of the parties entitled thereto, in such manner as they may deem most expedient and equitable. (7) The benefit of these proceedings shall accrue only to those who shall deposit their securities and common stock with this committee within the time limited by them; it being understood that they may extend the same from time to time, as seems to them proper for the interests of all concerned. (8) The purchasing committee will issue certificates and stock that they may be entitled to." "(12) The general principles in this scheme, and the order of priority, and the respective amounts of these organization securities and stocks, being substantially maintained, the purchasing committee may change this scheme to meet any exigencies that may arise."

The defendants in their answer deny that this was the scheme actually adopted by the committee, and insist that the bondholders in fact agreed upon another and different plan, which did not contain any recognition, or make any provision for the common stockholders of the railway company. While there is some conflict in the testimony on this point, the decided weight of the evidence establishes to the satisfaction of the court that the reorganization scheme, as set out above in Exhibit A, was the one which the committee adopted, recognized, and acted upon. It was under this scheme that the consolidated bonds and stock certificates of the Flint & Pere Marquette Company were delivered by the holders thereof to the depositaries designated by the committee, and authorized to receive and receipt for the same. While the committee were engaged in getting the stock and consolidated bonds deposited under this reorganization scheme, and pending the foreclosure proceedings in the circuit court, the Flint & Pere Marquette Railway Company, the only defendant therein, by a conveyance, bearing date August 23, 1879, surrendered to W. W. Crapo and Oliver Prescott, trustees under the several land-grant mortgages, its equity of redemption, and all its right, title, and interest in the surplus lands and land funds then held or thereafter received by said trustees, after satisfying and discharging prior trusts, as an addi-

tional security for the payment of said consolidated bonds. This conveyance contained a general declaration of trust, and provided that, after satisfying the prior land-grant mortgages, the balance of said lands and the surplus of funds thence arising and held by said trustees, Crapo and Prescott, should be accounted for, and be by them transferred to the trustees of said consolidated mortgage or trust deed, so that such surplus funds and lands would inure to the benefit of said consolidated bonds, and become a part of the security for their payment. This conveyance and declaration of trust by the Flint & Pere Marquette Railway Company, made with the consent of the stockholders of said company, as the court must assume or presume, brought within the operation of the consolidated mortgage, then being enforced, the surplus lands and land funds held by Prescott and Crapo as trustees, after discharging prior liens, and gave the consolidated bondholders the benefit of an additional security worth several millions of dollars. Whether the general scheme of reorganization adopted by the committee formed the consideration or inducement for this large and valuable addition to the security of the consolidated bonds does not distinctly appear, but it is a fair and reasonable inference that the stockholders of the railway company then in default, and then being proceeded against, would not have consented to place their surplus land and land funds under the operation of the consolidated mortgage, at that time, without some well-founded expectation of being admitted into the new company that might be organized upon the ruins of the old. After the execution of this trust conveyance of August 23, 1879, a supplemental bill was filed immediately in said foreclosure proceeding by the trustees under both the consolidated and the land-grant mortgages, for the purpose of bringing this additional security under the decree of sale. Such proceedings were thereafter had under the original and supplemental bills as resulted, June 12, 1880, in a decree of the court, finding that the defendant corporation was in default; that the outstanding and unpaid consolidated bonds and interest coupons thereon, up to and including May 1, 1880, amounted to \$6,236,368.80; that the trustees were entitled to have the property sold, as specified in the consolidated mortgage and in the trust conveyance of August 23, 1879; but directed that such sale should be made subject to certain prior claims mentioned in the pleadings, and particularly enumerated, as follows:

"(1) Such lawful claims as may be made under the trust deed dated April 6, 1862, and the bonds secured thereby, and referred to in the bill as the first (land) trust; (2) such lawful claims as may be made under the trust deed of September 25, 1866, and the bonds secured thereby, referred to in the bill as the second (land) trust; (3) such lawful claims as may be made under the trust deed dated September 4, 1868, and the bonds secured thereby, referred to in the bill as the third (land) trust deed; (4) such lawful claims as may be made under the trust deed and the bonds secured thereby on the Bay City Branch, amounting in the whole for principal, besides interest, to \$175,000; (5) such lawful claims as may be made under the trust deed and mortgage dated September 4, 1868, and the bonds secured thereby, referred to in the pleadings as the Flint & Holly bonds; (6) such lawful claims as may be made under the trust deed and mortgage, dated January 2, 1871, and the bonds secured thereby, referred to in the pleadings as the Holly, Wayne & Monroe

bonds; (7) such claims as may be outstanding and unpaid against the receiver heretofore authorized, and such as may be hereafter authorized by this court."

The line of railway, as described in the bill, with all its property, rights, franchises, including things in action and equitable rights, together with the trusts as to the surplus lands and land funds, conveyed by the trust deed of August 23, 1879, were sold August 18, 1880, by a special master commissioner, duly appointed by the court, after advertising the sale as directed by the decree; and said Post, Fish, Snow, Brower, and Hathaway, as the purchasing committee under the aforesaid scheme of reorganization, became the purchasers at the price of \$1,000,000, which, under the terms of the decree, was paid chiefly with consolidated bonds as cash. The sale was reported to the court, and the purchasing committee thereupon presented their petition to the court, setting forth that their said purchase was made pursuant to a scheme of reorganization before then agreed upon; that said purchasers and their associates had reorganized a corporation by the name of the "Flint & Pere Marquette Railroad Company," to take charge of, manage, and operate the railroad property so purchased under the decree, etc.; and praying that the special master commissioner might be ordered and directed to make a deed upon said sale direct to said newly-organized corporation. This order, after confirming the commissioner's report of sale, was passed by the court, and the special master commissioner, by deed bearing date September 28, 1880, formally conveyed and transferred to the new corporation, the Flint & Pere Marquette Railroad Company, all the property, rights, franchises, trusts, etc., so sold, as aforesaid. After the sale by the master commissioner, the purchasing committee, to whom the franchises, privileges, equitable rights and trusts were struck off, together with their associates, under date of August 31, 1880, filed with the secretary of state at Lansing, Mich., a "certificate of reorganization and articles of association of the Flint & Pere Marquette Railroad Company, successor to the Flint & Pere Marquette Railway Company." These articles of association, which constitute the charter, or organic law, of the new corporation, after reciting the foregoing steps and proceedings, leading up to its formation, certify and declare, among other things not material to be noticed, as follows:

"Clause 2. The purpose for which said corporation is organized is to use, maintain, and enjoy, manage, and operate the said railroad and other property and franchises as aforesaid, including the right of using and enjoying the railroad, built, as aforesaid, and in use; and also for the purpose of extending such spurs and branches from time to time, as may be found useful and necessary for the purpose of developing and increasing the traffic of said road, and as may be authorized by law.

"Cl. 3. The present property of the corporation hereby organized consists of all the property of every kind and description, including franchises and rights sold and purchased under said decree, as aforesaid.

"Cl. 4. The capital stock of the corporation hereby organized shall be the sum of ten million dollars, in shares of one hundred dollars each, divided into two classes, to-wit: *First*, preferred stock, which shall consist of the sum of six million and five hundred thousand dollars, divided into sixty-five thousand shares, each share being the sum of one hundred dollars; *second*, com-

mon stock, consisting of three million five hundred thousand dollars, divided into thirty-five thousand shares of one hundred dollars each. And it is agreed that the rights of the holders of said preferred stock and said common stock shall be as hereinafter stated, to-wit: The holders of said preferred stock shall be entitled to receive from the earnings of said railroad company hereby organized, dividends to the amount of seven per cent. per annum, payable semi-annually or annually, as may be directed by the board of directors; provided the net income, after paying interest on prior bonds, repairs, expenses of equipment and renewals, shall be sufficient for that purpose, or such portions thereof as the said net income shall amount to. In case there shall be any surplus of net income after the payment of said dividend of seven per cent. upon the preferred stock, the same shall stand undivided until the next dividend day, and so from time to time and from year to year, until such time as the holders of said preferred stock shall receive five consecutive annual dividends of seven per cent., or semi-annual or quarterly dividends equivalent thereto. In case, on any dividend day, the net income as aforesaid shall not be sufficient to pay seven per cent. annual dividend to the holders of said preferred stock, such holders of preferred stock shall have no right to have the dividends made up out of subsequent earnings; it being the intention that there shall be no accumulation of claims against the company for dividends for such preferred stock. We further certify and declare that the said common stock shall not be issued, nor any portion thereof, until after the preferred stock shall have received five consecutive annual dividends of seven per cent. from the net income, as aforesaid, or other dividends equivalent thereto; nor shall said common stock be entitled to any representation at any meeting of stockholders until the same shall have been issued. When five consecutive annual dividends of seven per cent., or, in lieu thereof, semi-annual or quarterly dividends equivalent thereto, shall have been paid upon the preferred stock, then the common stock shall be issued and delivered to parties who may hold certificates issued upon the surrender of the common stock of the old Flint & Pere Marquette Railway Company, or other certificates which may be issued by this company in lieu thereof; and, if there shall be any surplus of common stock it shall be the property of the company hereby organized. After the common stock shall have been issued, as above provided, the preferred stockholders shall be entitled to receive from net earnings seven per cent. dividends each year before the common stock shall be entitled to participate; and after the payment of the seven per cent. to the holders of the preferred stock, any surplus of net earnings that may remain shall be paid as dividends, ratably, to the holders of the common stock, not exceeding seven per cent. in any one year. Should the net income be greater than sufficient to pay a dividend of seven per cent. upon the whole amount of stock, both preferred and common, such surplus shall be divided ratably among the holders of the preferred and common stock. Should the net income of the company, after the common stock shall have been issued, be insufficient to pay the dividends hereinbefore provided for in any single year, such deficiency shall not be made up out of the earnings of the subsequent year or years, and this shall apply both to preferred and common stock."

By the sixth article it is expressly declared that "the undersigned purchased said property at the sale under said decree in trust for themselves and others interested, pursuant to a scheme of reorganization heretofore agreed upon."

At the first meeting of the board of directors of the new corporation, held September 7, 1880, a resolution was adopted authorizing and directing the president and secretary to issue engraved or lithographed cer-

tificates, to be given to the committee of reorganization or their assigns, representing the beneficiary interest to be derived from the issue of common stock, when it may be issued, in accordance with the form then presented, which form was as follows:

"Certificate for Common Stock, when the same bill shall be issued.

"STATE OF MICHIGAN.

"*The Flint & Pere Marquette Railroad Company.*

"INCORPORATED AUGUST 31, 1880.

"This certificate will entitle ——— to ——— shares of the common stock of the Flint & Pere Marquette Railroad Company, when such stock shall be issued. Said common stock consists of 35,000 shares of \$100 each, but will have no vote nor voice in the management until issued in accordance with the plan of organization, viz., when the preferred stock shall have received five consecutive annual dividends of seven per cent., or semi-annual or quarterly dividends equivalent thereto. This certificate is negotiable, and may be transferred on the books of the company in the city of New York on the surrender hereof. By order of the board of directors.

"*Dated East Saginaw, ———, 1886.*

WM. W. CRAPO, President.

"H. C. POTTER, JR., Secretary.

"A. S. APGAR, Transfer Agent."

While the capital stock of the foreclosed company consisted of 35,000 shares of \$100 each, making \$3,500,000, only \$3,298,200, or 32,982 shares of stock, had been actually issued. Of this actual issue there were deposited with the various depositaries designated by the reorganization committee, for the purpose of sharing in the reorganization scheme, and in pursuance of notice from the committee, stock certificates to the amount of \$3,266,500, for which receipts were given by the several depositaries receiving the same, and for which the certificates in the form above stated, as directed by the board at its first meeting, September 7, 1880, were given in exchange. It appears from the testimony of Dr. H. C. Potter, whose relations to, and long connection with, the foreclosed company placed him in a position to know the fact, that when the foreclosure proceedings were commenced, and while the reorganization scheme was being arranged, the holders, or those interested in the old stock, were the same parties, or very largely so, who controlled the consolidated bonds that were in default, and prior bonds. This is an important fact, and should not be lost sight of in considering the questions involved in this case. It will be noticed that by the fifth and sixth clauses of the reorganization scheme both the preferred and common stock, or certificates therefor, were to be issued in favor of those who should join in the plan adopted, immediately upon the formation of the new company, although the common stock was not entitled to vote until the preferred stockholders had been paid seven per cent. annual dividends, for five successive years. This provision for the issuance of the common stock is changed by the fourth clause of the articles of reorganization, which declares "that said common stock shall not be issued, nor any portion thereof, until after the preferred stock shall have received five consecutive annual dividends of seven per cent. from the net income, as aforesaid, or other dividends equivalent thereto." In explanation of

this departure from or change in the reorganization scheme previously adopted, it is said that the committee's attorney advised them that under the laws of Michigan it would not be legal to actually issue common stock, and deprive it of the immediate right to vote. The provisional certificate issued to the old stockholders, as above set out, follows the provision of article 4 of the new company; and the complainants, being the holders of such certificates, acquired since the reorganization or formation of the new company, can only assert the rights which are conferred upon them by and under the fourth article of the reorganized company, and the contract expressed on the face of their certificates. Having acquired or accepted the present form of certificates, the complainants are fairly estopped from asserting claim for the issuance of the common stock, as contemplated by the scheme of reorganization. They are not in a position, nor do they make a case entitling them to have the articles of association, or charter of the new corporation so reformed as to conform to the reorganization scheme in respect to the issuance of common stock certificates.

On the part of the complainants it is claimed that the preferred stock, as provided for in the articles of association forming the new company, was unauthorized by the laws of Michigan; and on the part of defendants it is insisted that the provision in reference to the issuance of common or unpreferred stock was invalid, because founded upon no consideration moving from the old stockholders, or to the new company, and because that provision was in contravention both of the letter and spirit of the Michigan statute against stock watering, (act of 1859, 1 How. St. § 3409;)¹ and that the new corporation may rightfully refuse to recognize or issue said common stock. Neither of these positions, which were practically waived or abandoned on both sides at the hearing, can be successfully maintained. The act of Feb. 10, 1859, (1 How. St. § 3409,) clearly authorizes the issuance of preferred stock in cases like the present. It is equally clear that the stock watering provision of the statute (Id.) has no application. There was no fraudulent or unfair valuation of the property, franchises, privileges, or rights and trusts, which the promoters, consisting of lien claimants and stockholders of the old company, turned over to the new corporation, under the scheme of reorganization. Certainly there was nothing that could be called stock watering, within

¹Sec. 3409. That it shall not be lawful for any railroad company existing by virtue of any of the laws of this state, nor for any officer of any such company, to sell, dispose of, or pledge any shares in the capital stock of such company, nor to issue certificates of shares in the capital stock of such company, until the shares so sold, disposed of, or pledged, and the shares for which such certificates are to be issued, shall have been fully paid; nor issue any stock or bonds except for money, labor, or property actually received, and applied to the purpose for which such corporation was created; and all fictitious stock dividends and other fictitious increase of the capital stock or indebtedness of any such corporation shall be void; and, if any officer or officers of any such company shall issue, sell, pledge, or dispose of any shares or certificates of shares of the capital stock of such company, in violation of the provisions of this act, such officer or officers so doing shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided by law in case of issuing false or fraudulent railroad stocks. The provisions of this act shall apply as fully to the stocks and officers of consolidated railroad companies, as existing in whole or in part within the state, as to original unconsolidated companies existing as aforesaid."

either the letter or the spirit of the Michigan statute. The case of *Railroad v. Dow*, 120 U. S. 287, 7 Sup. Ct. Rep. 482, is a conclusive authority in favor of the legality and validity of the reorganization in the present instance. The provision of the Arkansas constitution there under consideration was substantially the same as the Michigan statute; and a reorganization of a railroad company by purchasers at foreclosure sale, under circumstances undistinguishable in principle from the present, was sustained by the supreme court as not coming within the constitutional prohibition.

The objection of a want of consideration for the provision in reference to the common stock, cannot, for many reasons, avail the defendants; because there was ample consideration in the mutual agreements of the consolidated bondholders and the stockholders, under which the latter surrendered their certificates, and not only assented to the foreclosure, but, by the conveyance of August 23, 1879, provided an additional and valuable security in the shape of the surplus lands and land-grant funds held by Crapo and Prescott, trustees. The courts have not hesitated to recognize and give effect to such compromise arrangements between bondholders and stockholders in respect to corporations being foreclosed. In *Sage v. Railroad Co.*, 99 U. S. 343, Mr. Justice STRONG, speaking for the court, says:

"Let it be conceded that the new organization must be for the benefit of the holders of the first mortgage bonds, how can we say it is not for the benefit of those holders that entirely subordinate interests are conceded to junior lien creditors, and to the stockholders of the former corporation? How can we say that such a concession was beyond the discretion with which the agents of the bondholders—that is to say, the majority—were clothed? Such concessions are generally made in reorganizations of railroad companies, and they are regarded as beneficial to the joint lienholders. They prevent delay and expenditures arising out of litigation between creditors, which are sometimes almost ruinous, and they lessen the risk of redemptions."

"It is sometimes so far within the power of stockholders and unsecured creditors to embarrass and delay proceedings for the foreclosure of the mortgage and sale of the property that it is expedient for the mortgage creditors to arrange for a reorganization, and give up something of their own security for the sake of avoiding litigation and delay." Jones, Ry. Sec. § 614.

But, aside from the foregoing considerations, which sufficiently dispose of the objection of a want of consideration for the provisional certificates or unpreferred stock, it should be borne in mind that the common stock in the old company was held largely by the consolidated bondholders, who, while accepting preferred stock for their bonds, naturally enough assented to the provision for the common stock. After the formation of the new company, its directors, selected alone by and from the preferred stockholders, issued the provisional certificates for common stock, which are not only recognized by the corporation, but become the subject of sale and transfer in the market; and now, after the original holders of these certificates, consisting to a considerable extent of the present directory, have disposed of their holdings, and when the present holders thereof seek to have their rights thereunder recognized and en-

forced, they are met with the objection, interposed by the same directory who issued these certificates, and by the corporation, whose charter recognized their existence, and provided for the issuance of the common stock represented thereby upon the happening of a certain contingency, that this common stock has no validity for want of consideration moving to the new corporation. How can this new company dispute or call in question its own constitution, and the provision therein made for the issuance of common stock in a certain event? How can preferred stockholders, or their representatives, the directors of the corporation, dispute the validity of the very clause of the organic act, which confers and establishes their own rights? Such a proposition rests upon no principle, and is supported by no authority. It is founded upon the idea that because the bondholders, by virtue of their lien, had superior rights over the stockholders of the old company, and could have exhausted its property to the utter exclusion of the stockholders, therefore, when they became preferred stockholders in the new company, they in some way carried with them the superior equities belonging to their former relation to the old concern. This is, however, a mistake, and a fallacy. Their right as bondholders ceased when their character of preferred stockholders began. Their lien as bondholders, as well as their character of bondholders, was extinguished by the foreclosure sale, and the reorganization thereafter had in pursuance of the scheme previously adopted with their consent. In forming the constitution of the new corporation, all prior equities existing under the old company were settled and extinguished; new relations were established, and new rights created. Neither the new corporation, nor the preferred stockholders, nor the common stockholders, who have accepted, acted upon, and acquired rights and privileges under the reorganized company, can be heard, in contests among themselves, to question the organic law declaring and defining the beneficiaries of the legal being thus created. Stockholders, preferred and unpreferred, are only entitled to such rights as the constitution of the new corporation, found in its articles of association, properly confer. These rights the company cannot question; nor can it properly take sides in contests between the two sets of stockholders in respect to their relative rights, as defined by the act or articles of incorporation.

We come next to the main controversy in this case, which relates to the right of complainants, as holders of the provisional certificates for unpreferred shares, to have regular certificates of stock issued to them by the Flint & Pere Marquette Railroad Company. This right is claimed on the ground that the event or contingency on which the provisional certificates holders were to become actual stockholders of the common class has, in the view of a court of equity, happened. It is not claimed in the bill that the preferred stockholders have, in fact, received 7 per cent. annual dividends for five successive years. It is alleged that the dividends actually paid on the preferred stock were 5½ per cent. in 1881, 6½ per cent. in 1882, 7 per cent. in 1883, 7 per cent. in 1884, and 4 per cent. in 1885; but it is charged the failure of the directors to declare and pay the the full 7 per cent. dividends each year for each of said

years was due to their neglect of duty, and intentional disregard of complainants' rights; that the net income of the company applicable to the payment of preference dividends, as defined by article 4 of the certificate of incorporation, was misappropriated, and diverted from its legitimate purpose, as contemplated and provided by said article, and applied to other uses in the interest and to the advantage of the preferred stockholders; "that the real and actual net income of these several years, if the affairs of said railroad company had been properly conducted and the accounts thereof kept with a legal and proper consideration of the rights of your orators, as hereinbefore set forth, together with the surpluses remaining on hand in each several preceding year, was, after paying interest on prior bonds, repairs, expenses of equipment and renewals, sufficient for the payment of a dividend of 7 per cent. in each of said years to the preferred stockholders; and that it was the duty of the defendant corporation to pay such dividend, and issue such common stock, on the 1st of January, 1886." It is further alleged that "the accounts of the company have been kept wholly in the interest of the preferred stockholders, and without regard to the interest of the common stockholders, and in disregard of the trust created, and with intent, on the part of the preferred stockholders and the officers and agents appointed by them, of preventing the common stockholders from having any voice whatever in the management, and with a view to postponing the issue of the common stock to an indefinite period. And your orators are informed and believe, and so aver, that, for this purpose, accounts have not been properly kept of permanent improvements in the property, which should have been paid for as additions to the plant, by way of construction and equipment, out of funds applicable thereto; but that said permanent improvements have been, in fact, paid for out of the current yearly income from the property applicable to dividends. And your orators show that earnings have been diverted from their proper application to dividends, and spent upon the railroad, and upon its road-bed, rails, track, station buildings, and other property, and in the building of branches, especially a branch to the city of Manistee, and in the building of side tracks and sidings, and the purchase and improvement of cars, engines, locomotives, and other equipments; that the operating expenses have in this way been unduly increased, and the net income diminished, all to the prejudice of the common stockholders, in violation of their rights and of the agreement, whether contained in the scheme of reorganization or in the certificate of organization filed with the secretary of state." The bill also alleges that the defendant corporation is entitled to the beneficial interest in the land grants and funds thence arising held by Crapo and Prescott, trustees; that, after satisfying all prior claims and demands thereon under the trust upon which they are held, there is a large surplus belonging to said defendants; that there was, on December 31, 1885, of this fund over \$1,000,000 in bills receivable and cash, besides about 90,000 acres of unsold lands; that since the date of its reorganization in 1880, said corporation had received from said trustees many thousands of dollars, of which only a portion had been applied to construction

and equipment of its road; that said defendant has used sums received from the current operation of the road, which properly belong to the net income thereof, for the purposes of construction and equipment, in place of funds applicable thereto from the land department; and that the surplus lands and funds now in the hands of said trustees, and subject to the demands of the company, are properly applicable to dividends in place of the money from earnings and income diverted and applied to construction and equipment, etc. It is further alleged that complainants, and others in like situation, have applied to the management of the defendant company to correct these misapplications of earnings to construction purposes, and to respect the rights of the common stockholders; which requests have been totally disregarded. It is also charged that they have denied access to the books of account of the company. Aside from the preliminary injunction asked for, which was heard before Mr. Justice MATTHEWS, (82 Fed. Rep. 350,) the relief sought on this branch of the case is that the court will order such amounts from the surplus land funds to be paid into the income amount of the company, applicable to dividends, as will reimburse said income account for any and all sums wrongfully taken therefrom, and spent upon construction or equipment during the period aforesaid; that the defendant company may be ordered to furnish to complainants the accounts received by it from the trustees of the land department, and to render accounts of the sums paid over to it by said trustees; that a true and correct account be made up of the income of the defendant company, from the date of its organization, for each successive year, and that all improper charges to said income may be stricken out, and that any proper additions may be made thereto, and that a balance may be struck each year, and that the income of the succeeding year may be added to the surplus of the year preceding; that the defendant corporation, its officers and servants, be ordered by the court to issue stock certificates to the complainants severally, for the several amounts of shares to which they are entitled; that the defendants may be perpetually enjoined from depriving them of their legal rights as stockholders in voting at the meetings of stockholders, and in other respects; and, generally, that they may have such other and further relief as the nature of the case may require, and to the court may seem meet.

The defendants admit that the holders of preferred stock have been recognized as the only stockholders entitled to any voice in the management and control of the corporation since the time of its reorganization, and that the directors elected by them have had charge of the company and its management; but they deny that the holders of said preferred stock unlawfully combined together. They admit that they have refused to permit the complainants to send their agents into the offices of the defendant company, there to interfere with its business by an examination in detail of the transactions of the corporation; but state that the printed annual reports of the company were open to their inspection. They state, on information and belief, that the accounts of the company have been properly kept as such, and that "no greater amount has been

charged to operate expenses than sufficient to cover the actual expenses incurred." As to the charge "that earnings have been diverted from their proper application to dividends, and spent upon the railroad and upon its road-bed, rails, track, station buildings, and in the building of branches, etc., and in the building of side tracks and sidings, and in the purchase of cars, engines, locomotives, and other equipment; that the operating expenses have in this way been unduly increased and net income diminished, to the prejudice of the common stockholders, in violation of their rights and of the agreement, whether contained in the scheme of reorganization, or in the certificate of reorganization,"—there is no direct response or denial; but the defendants say they "admit that, as directors of said company, charged by the law with the duty of managing the same, they have believed that their duty to the public required that they should keep the road-bed, rails, track, station buildings, and other property in good condition; that they should keep the rolling stock sufficient to enable it to transact its business as the public interests might require; and these defendants believe that in so doing they promoted the true interests of the corporation in their charge, and also performed their duty in accordance with law; and therefore these defendants deny that the interests of complainants, or others in like state, were prejudiced, or their rights violated." They further "state and insist that their first duty in the management of the defendant corporation is to use the current income and funds for the purpose of maintaining the efficiency of the road, and the value of the property, that the same may not be depreciated, and that the same may be safely operated, and serve the public in accordance with the design of its creation." They also deny that the defendant corporation has received, from time to time, sums of money which should have been added to the net income applicable to dividends, and which they have neglected to add; they deny that the premium received on the sale of bonds should have been treated or applied as income; they deny that the railroad company is entitled to receive or has received from the land department income which should be added to its net yearly income, and be applicable to dividends; they deny that said land funds are applicable to dividends within the meaning and in accordance with the certificate of reorganization, now constituting the charter of said defendant company, "and state the fact to be that they have paid dividends from time to time to the holders of the preferred stock to such an extent as, in the judgment of the board of directors, it was prudent, legal, and honest to do; and they deny that a greater sum has been taken from income for the purpose of repairs, equipment, or other uses than what, in the judgment of the board of directors, the best interests of the property, and all interested therein, considered as a whole, absolutely required; and they deny that complainants, and others in like situation, as holders of provisional certificates aforesaid, have any rights which are superior to the public or of the preferred stockholders, or any rights which would require or justify the defendants, or any of them, to withhold money from needed and proper repairs and improvements, in order to force the contingency specified in the certifi-

cate of reorganization." They admit that dividends to the extent and percentage stated in the bill were declared and paid the preferred stockholders for the years mentioned; but they do not claim that full 7 per cent. dividends for each of said years could not have been paid.

The fourth article of the certificate of reorganization, forming a part of the defendant company's charter, was intended to define the legal relations and relative rights of the two classes of stockholders therein described, and to designate, as between them, the funds of the corporation out of which dividends on preferred stock were to be paid. By that provision of the charter, which is obligatory upon the corporation and its directory, the funds applicable to the payment of dividends on the preferred stock was the net income of the company, "after paying interest on prior bonds, repairs, expenses of equipment and renewals." Any surplus of net income, after the payment of said dividend of 7 per cent. upon the preferred stock, was to stand undivided until the next dividend day, and so on, from year to year, until such time as holders of said preferred stock should receive five consecutive annual dividends of 7 per cent., or semi-annual or quarterly dividends equivalent thereto. There was to be no accumulation of dividends on preferred stock. When five consecutive annual dividends, or, in lieu thereof, semi-annual or quarterly dividends equivalent thereto, shall have been paid upon the preferred stock, then the common stock, with the right to vote, was to be issued and delivered to parties who held the certificates issued upon the surrender of the common stock of the old Flint & Pere Marquette Railway Company, or other certificates, which the new company may have issued in lieu thereof. Any surplus of the common stock was to remain the property of the new corporation. At the first meeting of the board of directors under the new organization, a resolution was formally adopted, September 8, 1880, defining the policy of the company, as follows:

"Resolved that the board of directors define their policy to be in conformity to the articles of association; that, under the head of operating expenses, only such improvements and additions shall be included as are necessary, in the judgment of the directors, to keep the property up to the proper standard of efficiency, and that such portion of additions and extensions beyond this, as the board decides, shall be provided for out of funds other than net earnings; that the stockholders are entitled to the benefit of all net earnings after paying expenses and coupons."

This resolution was never repealed or modified; and, read in the light of the reorganization scheme, which provided for the issue of reorganized first mortgage 6 per cent. bonds, "to be used only to fund the past due and maturing interest on the prior bonds, and for such permanent construction and improvement as may be deemed desirable by the board of directors of the new company," it may fairly be regarded as a correct contemporaneous construction of the meaning and intention of article 4 of the charter, in respect to the duty of the new company and of its management, not only in making proper expenditures, but in keeping proper accounts, as between construction and permanent improvements, or additions and extensions, on the one hand, and operating expenses on the

other, upon which the respective rights of the two classes of stockholders were to be regulated, adjusted, and determined. At the next meeting of the board, on the 22d day of September, 1880, a resolution was passed authorizing the issue of the new consolidated 6 per cent. bonds to the extent of \$5,000,000, to be used and appropriated for certain specified purposes, among which, as designated in item 4 of the resolution, were "for such extensions of the road and improvements of the property, including the construction of the Manistee Railroad, the extension of the Saginaw & Clare County Railroad, and the purchase of the Saginaw & Mt. Pleasant Railroad, as may, in the judgment of the directors, be deemed expedient from time to time." These bonds were to be secured upon all the property of the company, except the land assets and land-grant proceeds, held by Crapo and Prescott, trustees. Dr. H. C. Potter was appointed general manager of the railroad company, entered upon his duties as such about October 1, 1880, and has since occupied that relation to the corporation, having the practical control of its business and operations, and directing the manner in which its expenditures should be charged, whether to operating or construction, and the keeping of its accounts, showing receipts and disbursements. The evidence clearly establishes that the company expenditures for operating expenses, and for additions and extensions or permanent construction improvements, were not kept as directed by the resolution of September 8, 1880, nor as the company was bound to do by the fourth article of its charter, so as to preserve the rights of and discharge its obligations impartially between its two classes of stockholders. While the board of directors exercised their proper and legitimate discretion in directing the new works,—additions, extensions, improvements, and equipment that should be made to the road,—they did not designate the account to which the expenditures thereby incurred should be charged. The general manager, directly, or indirectly, through subordinate officers, indicated and directed to what account all expenditures should be charged and receipts credited. In two instances his discretion was so far supervised by the board of directors as to direct \$78,472.59, made up of several items, to be transferred from operating to construction account of the current year, which was done by resolution adopted December 19, 1884, and the depreciation on steamers to be reduced. No question is made as to the correctness of the company's expenditures; but the claim on behalf of the complainants is that their rights have been ignored and disregarded in improperly charging portions of such expenditures to operating, rather than to construction, whereby the net income applicable to dividends under the charter defining their relations to the company and the preferred stockholders, have been reduced to their prejudice. They further claim that receipts and revenues received have not been credited, as they should have been, to income account. It distinctly appears from the testimony of its officers, that the accounts of the defendant company have not been kept with any reference to the rights of the common stockholders; that no regard has been paid to the provisions of the fourth article of the charter in the keeping of the accounts; that the road was not

operated with reference to the unpreferred stockholders at all. The general manager states that the books and accounts were kept, "as we thought the proper way of doing and administering, with reference to its [the road's] permanence and safety. We have not operated it [the road] with reference to them [the common stockholders] at all. We have operated it in accordance with the public benefit and the maintenance of the property." His manner of dealing with the expenditures of the road is fairly illustrated in the following question and answer, (Record, p. 260:) "*Question.* And therefore you think that the question as to whether a reduction of grade should be charged to construction or to operating expenses, is simply a matter for the general manager to decide according to the state of the finances? *Answer.* No, sir; according to his judgment." Not only were the rights of the common stockholders not recognized, or considered in the keeping of the company's accounts, but, as stated by the auditor, Mr. Ledlie, no account was kept to show the surplus of net income yearly after the payment of the 7 per cent. dividend on preferred stock, as provided for in said fourth article of the charter. The policy thus adopted and pursued by the actual management assumed that the contingent rights and interests of the provisional certificate holders were entirely subject to the discretion of the directors, or those in control of the road, in deciding, not only what expenditures should be made, but how they should be charged, as between operating and construction. If this position is correct, and it lies with the directors selected by the preferred stockholders to determine how outlays made to meet what they may consider for the best interests of the corporation, or most beneficial to themselves and associates, or for what they may deem necessary in serving and discharging the company's duty to the public, shall be charged, whether to operating expenses, or to construction, then the provisional certificate holders are placed completely in the arbitrary power and at the mercy of the preferred stockholders, and the charter provision, made for their benefit, in pursuance of the reorganization agreement, is practically abrogated, and become utterly worthless. While the company, in the exercise of its franchises and the management of its business, undoubtedly owes duties to the public and to its creditors which are paramount to the right of its stockholders, preferred and unpreferred, still this artificial body, called the "corporation," is after all but the representative of its stockholders, and exists mainly for their benefit; and in their interest it is to be governed, controlled, and administered according to the provisions of the charter which the state has conferred. In the absence of charter provisions restricting or qualifying their powers, directors have usually a large discretion in managing the affairs of the corporation, in keeping its accounts as to expenditures, and in deciding whether dividends have been earned and should be declared. While their discretion as to making dividends is not unlimited or conclusive, courts will not ordinarily interfere to supervise or control its honest and reasonable exercise on the ground that shareholders have no unconditional right to a division of profits. *Tayl. Corp.* §§ 562, 563, and notes. If, in the present case, the question was merely one relating

to the policy which the company should pursue, or if its duty to the public, or its obligations to its creditors, were involved in a way to affect the company's ability to perform such duty or discharge such obligation, then the foregoing principles would properly apply. But the facts developed by the proof in the case do not warrant the suggestion that these paramount duties are in any way inconsistent with the company's fair and proper observance of its charter duty towards both classes of stockholders, or that the rights of provisional certificate holders could not be recognized and enforced without requiring the company to disregard and neglect its obligations either to creditors or to the public. The company is perfectly solvent; the demands of the creditors have been, and are being, promptly met; and in respect to the public, whose rights are set up as a justification of the policy pursued by the management in not considering the rights of the provisional certificate holders, there is now and has been no failure of duty on the part of the company. Its road has been maintained in first-class condition, comparing favorably with any line of railroad in the state of Michigan. Year by year its lines have been extended, its equipment enlarged, its tracks and buildings improved; and its efficiency increased. These results have been to a large extent accomplished by the application of earnings to construction purposes, notwithstanding the company had at its disposal funds from other sources more properly applicable to those objects; the general manager, as the representative of the directors, asserting and exercising the discretion of charging all expenditures either to operating expenses or to construction, as he deemed proper. Provisional certificate holders, in November, 1882, entered their protest against this course; but their complaint was utterly ignored by the board of directors, and their general manager continued to divert portions of the net income to permanent construction purposes. This refusal on the part of the directors to respect the rights of the common stock partakes more of disregard of duty than of error in judgment. It was a non-performance of official obligation, amounting to what the law considers a breach of trust, if the complaint was well-founded, and made by parties entitled to have their policy as to earnings changed.

But the position is broadly assumed in the answer and in the argument of counsel for defendants that the board of directors, being charged with the power and duty of managing the corporate property and franchises for the best interests of the company, and for the benefit of the public, had the right; and were entitled to dispose of and apply the net earnings of the company in the same way, or in as unrestricted manner, as they would have had if the charter had contained no such provisions as are found in article 4, and there had been but one class of stockholders; and that their discretion in appropriating net income for construction purposes, as they saw proper, and in withholding the same from dividends, could not, at the instance or upon the complaint of the contingent shareholders, be controlled by the court. Can this proposition be sustained without practically nullifying, or destroying article 4 of the charter? We think not. The reorganization scheme contemplated a fund applicable to construction and equipment other than earnings, and

the fourth article of the new corporate constitution undertook to define what expenditures should be borne by net income, as between the two classes of stockholders. The provisions of that article constitute some restriction upon, or qualification of, the powers of the board of directors, which may not, at their option, be disregarded or ignored. If that article of the organic law of the corporation confers upon the provisional certificate holders any rights or interests, even though contingent, there must co-exist with such rights the correlative duty on the part of the company and its management to observe and respect those rights, and especially so when the preference class are in exclusive control of the corporation. This correlative duty and obligation on the part of the company and its management necessarily implies and involves the keeping of proper accounts as between construction and operating expenses, and the proper application of net income to the purposes indicated, and only to those purposes, to the end that a fair opportunity may be allowed for the happening of the contingency on which the provisional certificate holders were to be admitted into the company. The true import and meaning of article 4 of the charter is that, when the company's net income, after paying certain specified charges and expenses, is sufficient to pay a 7 per cent. dividend on the preferred stock, it shall be so applied, provided the rights of creditors are not affected, and be continued for five successive years if in condition to do so from net income, to the end that provisional certificate holders may then be let into the company, and be entitled to a voice in its management, and to share in future earnings in excess of further 7 per cent. dividends. It operates as a charter direction to the management in the interests of the common stock, and limits the discretion which the directors might otherwise exercise in applying the net earnings, or net income of the company.

It may be true, as argued by defendant's counsel, that the preferred stockholders could not have compelled the board of directors, selected by themselves, to declare larger dividends than were declared and paid from 1881 to 1885, inclusive, as held by the supreme court in *New York. Railroad v. Nickals*, 119 U. S. 296, 7 Sup. Ct. Rep. 209, and similar authorities, which rest upon the principle that, in the absence of charter provisions controlling or modifying their usual powers, courts will not generally review or control the discretion of directors on the subject of making or withholding dividends, when honestly and fairly exercised. But the present does not fall within that class of cases, nor is it controlled by them, because the rights here asserted are charter rights, imposing charter duties, binding and obligatory upon both the company and its managing officers, and operating as restrictions and limitations upon the general discretion of the directory in dealing with the net income of the road as between the preferred and unpreferred stockholders. The question in the present case is not, therefore, what regular stockholders, having a voice or vote in the selection of the corporate management, may demand and enforce in the way of having dividends declared and paid; but it is whether the contingent shareholders, having no voice in the corporation or its direction, are entitled to have the company and its di-

rectors, selected by and from the preferred class, observe and respect their rights by carrying out the charter provisions in their favor. It is not a sound proposition, as applied to this case, that the directors, selected by and from the preferred class, have and may exercise the same discretion as against the provisional certificate holders in dealing with, disposing of, or applying the net income of the company, which they might be entitled to exercise as against the preferred stockholders. They were entitled, as between the two sets of stockholders, to employ the net income in paying interest on prior bonds, old or new; in making repairs upon the road, buildings, and other property of the company, so as to maintain their efficiency; and in meeting the expenses of equipment and renewals, which evidently refers to repairs upon and keeping up of the rolling stock of the company, but does not include the purchase of new equipment. The company from the start adopted this construction as to the expenditures chargeable against income, as shown by the resolution already referred to, passed at the first meeting of the board of directors.

With this limitation upon the company and its directors in the way of expending earnings as between the two classes of shareholders, we may next consider what net income applicable to dividends were earned or received during the years 1881 to 1885, inclusive, and the manner in which the management of the company has dealt with or disposed of the same, or, generally, whether the company could reasonably and properly have declared and paid full 7 per cent. dividends during each of said years. As to the surplus lands and proceeds of land sales in the hands of Crapo and Prescott, these were undoubtedly equitable assets of the defendant company corporation, acquired under the trust conveyance of August 23, 1879, and the foreclosure sale, purchase, and reorganization in 1880. Subject to the prior mortgage lien, or liens on said lands, and land proceeds, the company was the beneficial owner thereof, and held the equitable title to the same. In respect to these surplus assets it had something more than the simple right to call the trustees to an accounting. It was the real equitable owner of the property; and the surplus thereof after satisfying prior incumbrances, belonged to the corporation, just as it held its other property subject to mortgage. As the absolute owner of this equitable title and right in said surplus lands and proceeds arising from the same, whatever the company received from that source was as much a part of its income or revenues as if it had been derived from any other source, such as receipts from operating its road, or rents collected for the use of its cars or other property. Income is not limited to the gain which results from business and labor, but it includes as well the proceeds derived from the use or sale of property. Now, what is the situation of these land assets, and what revenues have been actually derived therefrom during the years in question, or could have been received from that source, without impairing or interfering with the rights of creditors? When the new company acquired its right to these lands and assets, the prior charges thereon amounted to about \$2,000,000. Of those prior bonds remaining on January 1, 1881, (Report of company for 1880, p. 21,) there were \$1,704,000 of 8 per cent. land-grant bonds,

and \$300,000 of Flint & Holly 10 per cent. bonds. During 1881 the former were discharged, partly by funds in the hands of the trustees and partly by exchange of new 6 per cent. bonds of the company; so that, at the close of 1881, the \$300,000 of Flint & Holly bonds constituted the only incumbrance on these land assets. They were also secured by a mortgage on the Flint & Holly branch of the company's lines of road. Now, on December 31, 1881, as shown by the company's annual report, the trustees had in their hands a balance of \$575,978.77, arising from land sales, while the land commissioner who made the sale held bills receivable, amounting, principal and interest, to the sum of \$902,058.73, and the unsold lands held by the trustees amounted to 138,454.28 acres, worth about \$10 per acre. Here, then, were \$2,863,577.88 of good assets in the hands of said trustees to secure \$300,000 of 10 per cent. bonds, which were also secured by mortgage on one of the company's main branches. The cash balance in the hands of the trustees exceeded this bonded debt by \$275,978.77. The dividend declared and paid for 1881 was $5\frac{1}{2}$ per cent.,—less than 7 per cent. by $1\frac{1}{2}$ per cent.,—which, on the whole \$6,500,000 of preferred stock, amounted to \$97,500. If this amount had been drawn by the company from the hands of the trustees, the full 7 per cent. could have been readily declared and paid without in the least impairing the security held by them for the payment of the \$300,000 Flint & Holly bonds. On December 31, 1882, said trustees held a balance of \$598,117.28. The bills receivable from sales of lands in the hands of the land commissioner, amounted to \$747,532.78, and there were unsold lands to the extent of 109,815 $\frac{1}{2}$ acres, worth upon an average, say \$9 per acre, or \$988,340, making an aggregate of \$2,133,989.78, controlled and held by the trustees to secure said \$300,000 of bonds. In 1882 the dividend declared and paid was $6\frac{1}{2}$ per cent. The deficiency of $\frac{1}{2}$ per cent., or \$32,500, was actually in the hands of the company, as shown on page 6 of its annual report for that year. For that year it had a surplus of \$35,613.52, after paying the $6\frac{1}{2}$ per cent. dividend, which was carried over to 1883. It could have paid the 7 per cent. for the year 1882, without drawing on the land funds; but, if there had been an actual deficiency of income of \$32,500 from other sources, it could have been withdrawn from the land assets, without in any wise impairing or endangering the security for the payment of the \$300,000 bonds. In 1883 and 1884 full 7 per cent. dividends were declared and paid, leaving in the hands of said trustees large surplus assets, as follows, viz., on December 31, 1883, the balance in their hands was \$681,259.29, the land commissioner held \$627,021.55 in bills receivable, and there were 103,619.42 acres unsold, worth \$932,574, aggregating \$2,240,854.84 of available assets charged with only \$300,000 of liability; on December 31, 1884, the balance in the hands of the trustees was \$693,681.33, the bills receivable from lands sold were \$492,334.14 and there were 101,009.27 $\frac{1}{2}$ -100 acres unsold, worth \$900,000, aggregating \$2,086,015.47 of security, charged with \$300,000 of bonds. On December 31, 1885, there remained of unsold lands 95,914.22 acres, worth upon an average, say \$6 per acre, or \$575,485, and the trustees

held in their hands, as stated by Mr. Crapo, (pages 596,597 of the Record,) funds to the amount of \$764,556; of that amount the sum of \$579,000, was invested in Flint & Pere Marquette Railroad new 6 per cent. bonds, while the balance, except perhaps a small cash deposit arising from daily receipts, was loaned out at interest,—partly to the defendant corporation, to whom this surplus fund belonged, and which paid interest thereon, which was charged to operating expenses. For the year 1885 the company only declared and paid a dividend of 4 per cent. on the preferred stock. The 3 per cent. shortage, amounting to \$195,000, could readily, safely, and properly have been withdrawn from the large surplus in the hands of the trustees, without in the least impairing or endangering the security for the payment of the \$300,000 of Flint & Holly bonds, which constituted the only charge against the funds and assets held by the trustees. The \$579,000 of Flint & Pere Marquette 6 per cent bonds, which the trustees held, were worth in the market, and are still worth, a premium ranging from 15 to 20 per cent. If the deficiency of \$195,000 had been withdrawn from the hands of the trustees, they would have still held \$384,000 or more of the company's 6 per cents., worth a premium of 15 per cent., as security for the \$300,000 of Flint & Holly bonds, beside unsold lands worth \$575,485. On the 31st December, 1886, the balance in hands of the trustees had swelled to \$826,852.73. The \$300,000 Flint & Holly bonds mature May 1, 1888. To say nothing of the branch road mortgaged for their payment, the trustees have for years held, and now hold, funds and assets for the security of these bonds, exceeding fourfold the amount needed, or necessary for their payment. This large surplus the company or its management have intentionally declined to draw upon for the purpose of making dividends, or of returning to income sums that were improperly charged to operating expenses, except in 1884, when the board of directors, after directing the general manager to transfer \$78,472.59 from operating to construction account, called upon and received from said trustees \$100,000, which was used in making the dividend of that year. Why could not the \$195,000 required to make up the 7 per cent. dividend for 1885 have been called for from the same source? Why was it not called for and so applied? The board of directors, by resolution passed December 13, 1883, "resolved, that the trustees of the land funds be authorized to pay over to the treasurer of the company, from time to time, all land funds which shall come into their hands, in excess of what may be required to pay the securities outstanding, for which said land funds have been specially pledged, and all such payments heretofore paid by them to the treasurer be confirmed and approved." The land funds in the hands of the trustees at the close of 1885 in excess of what was required to pay the \$300,000 of Flint & Holly bonds (the only securities outstanding and chargeable against said fund) was more than \$400,000. Out of this excess, \$195,000, for 1885, could have been drawn either to apply on dividends, or to restore to income or earnings what had been diverted from that fund, and applied to construction or new equipment. But, for some reason not explained, this was not done.

Now, aside from the \$100,000 received from the trustees under the resolution of December 19, 1884, how has the company or its management dealt with the moneys actually received from these land trustees? It appears that from October 1, 1880, to the close of 1885, said trustees paid over to the treasurer of the company at various times, as requested, sums of money aggregating \$1,221,168.62, and which was used by the company as follows, viz., \$646,000 in paying off 8 per cent. land-grant bonds, \$100,000 for Bay City & East Saginaw bonds, \$22,118.09 for improvement of Bayou Spur property in East Saginaw, \$81,000 for coupons on Flint & Holly bonds, \$4,500 and \$22,550.53 for interest received, and \$345,000 for the company's use, and which went into the general treasury, and was used "according to the necessities of the company for pressing needs of any kind," as stated by the general manager. But this \$345,000 is not credited to income or earning. In the keeping of the company's accounts the provisional certificate holders are not allowed any benefit from this receipt. It is not permitted to go into earnings or income account. If that had been allowed, it would have more than covered the shortage in the 7 per cent. dividends for the five years in question. In other words, if that sum had been treated as applicable to dividends, or as an equitable restoration to earnings or income of what had been applied to construction, full 7 per cent. dividends could have been declared and paid during the five consecutive years under consideration. But how were these large receipts from the land assets disposed of in the company's account? By reference to the annual report for 1884 (pages 15 and 24) of the vice-president and general manager, it will be seen that the sum of \$1,105,276.97, received from sales of lands and premiums on bonds, (the latter item amounting to \$164,541.25,) was charged to depreciation, and deducted from the road-bed and equipment account of the company. This latter account was, at the same time, further reduced by a credit of \$10,793.48, being the proceeds of narrow-gauge equipment, telegraph line, and portable engine sold. No depreciation account was kept by the company, as the general manager testified, (page 344, Record,) and, year by year, operating expenses, were charged with all repairs and expenses of equipment and renewals made or incurred in, about, or upon the road-bed, rolling stock, buildings, or other property of the company, as contemplated and provided by article 4 of the charter, and then, at the close of 1884, a lumping charge of \$1,116,070.45 is made to depreciation, and deducted from the road-bed and equipment account. While doing this the management of the company, without reason and in disregard of the rights of the provisional certificate holders, keep large surplus land funds in reserve, portions of which it borrows from the trustees from time to time, and pays interest upon its own funds, which is charged to operating expenses, to the prejudice of the unpreferred stockholders, who are excluded from any voice in the management of the corporate affairs. The court is unable to understand upon what principle the receipts or revenues derived from the surplus land assets are to be distinguished from other income or earnings of the company applicable to the payment of dividends.

under the facts of this case. These land assets were brought into the company by the consent of the old common stockholders, under the trust conveyance of August 23, 1879, made manifestly in furtherance of the reorganization scheme. But, whether that creates any equity or not in favor of the provisional certificate holders, they have the same interest in these land assets that they possess in other property of the company, and the funds derived from that source are just as applicable to the payment of dividends on the preferred stock, so as to meet the contingency on which the unpreferred class are to be let in, as revenues derived from operating the road, or renting its cars and dining stations. The principle announced in *St. John v. Railway Co.*, 22 Wall. 149, where it is said: "We are aware of no legal principle which would authorize the stockholders in question to analyze the business, select out a portion of it, and to say that the net earnings specified must be a predicate of that part and none other," applies here. So in *Ryan v. Railway Co.*, 21 Kan. 865, the court says, in considering the rights of stockholders in reference to the sources from which profits are made "that it is immaterial at what time or from what sources these profits may have been derived. It is wholly immaterial whether they have accrued from rents, the profits of the construction of the road, or from the sale of lands equitably belonging to the company, they are all incidents to the shares." Without reference, therefore, to the diversion of income, or the improper application of earnings to construction, or the charging to operating expense what properly belonged to construction account, but taking the company's reports as made, and the dividends annually declared on the net earnings there shown, it is clear that there was at the disposal of the company ample surplus land funds in addition to such net earnings, to have made and paid full 7 per cent. dividends for each of the years 1881, 1882, 1883, 1884, and 1885, without in any way impairing the rights of its creditors, or neglecting its duty to the public. In the judgment of the court, fair dealing and a due regard to the contingent rights of the provisional certificate holders, required of the management that funds thus at their disposal should have been applied in making the full 7 per cent. dividends for the five years, so as to let the unpreferred stockholders into their inheritance. Is it to be said in a court of conscience that the preferred stockholders in charge of the corporate management and affairs, may have at their disposal ample funds to meet the contingency, and comply with the event on which the unpreferred class are to be let into their rights; that they may arbitrarily decline or wrongfully neglect to receive and apply such funds, so that the happening of the contingency is thereby postponed, and that they, or the corporation controlled by them, may thereafter set up and rely upon such contingency as an excuse or defense against the admission of such unpreferred class into their corporate rights and privileges? To state this proposition is enough. A court of equity will not permit parties occupying towards each other either legal or trust relations, whether direct or through the instrumentality of an artificial body called a "corporation," thus to act, and thereby postpone or defeat the rights of the defendant class.

But, aside from the surplus land funds and assets, how stands the case in respect to income and earnings derived from other sources? Were they sufficient, if fairly and properly applied, according to the true meaning of the article 4 of the charter to have paid full 7 per cent. dividends on the preferred stock for the five consecutive years in question? This can only be determined by an analysis and examination of the company's accounts, showing receipts and disbursements during said period. It appears that the total issue of the company's new 6 per cent. bonds amounted to \$3,924,000; that of these \$1,058,000 were exchanged for 8 per cent. land-grant bonds; that the land trustees purchased over \$500,000 of said bonds at par, and that the residue thereof were sold at a premium, ranging from 5 to 10 per cent. This premium on its bonds sold was received by the company as follows, viz.: \$500 between October 1, 1880, and January, 1881; \$107,257.25 during 1881; \$34,702.50 in 1882; \$12,136.50 in 1883; and \$9,945 in 1884, aggregating \$164,561.25. This premium was, at first, set upon the credit side of the company's ledger, or placed to the credit of construction, and afterwards, as shown by the annual report for 1884, (page 15) it was included in the amount of \$1,105,276.97, charged to depreciation, and deducted from road-bed and equipment account. This premium was received by reason of the rate of interest which the bonds bore, and the ample security provided for their payment. Earnings were charged with the payment of that interest on account of which said premium was earned or received; and it would therefore seem to be proper to credit earnings or income with the amount of such premium. If income is burdened with a rate of interest which secures a profit on the bonds, then income is entitled to the benefit of that profit, just as it would be entitled to the profits made on any contract by the company. In crediting such premium to earnings and profits, there is no increase of the bonded debt, nor improper enlargement of the company's construction account. It is apparent that 5 per cent. bonds, secured as these were, could have been negotiated at par. In carrying 6 per cent., earnings are charged with the extra burden of \$39,240 annually. It is, therefore, reasonable and proper that income should have the benefit of the profit which has been derived from the extra charge placed upon such income. The experts differ in opinion as to the proper disposal to be made of such premiums on bonds, and there is no uniformity in the practice of railroads in respect to such profits. In the judgment of this court, such premiums, in the present case, as between the two classes of stockholders, should have been credited to income during the respective years in which the same was received.

Next, as to the steel-rail account. At the close of 1880 the mileage on the main line of the road was 317.17 and 90.40 miles of sidings. Of the main line 200 miles were laid with steel rails. At the close of 1881 there were 345.16 miles in the main line and 111.29 in sidings and spurs, 283 miles of which were laid with steel rails (being an increase of 83 miles) during 1881, (page 5, annual report for 1881.) At the close of 1882 the main line and sidings amounted to 485.62 miles

laid with steel rails, being an increase in steel rails over 1881 of 19.72 miles. At the close of 1883 the main line was 361.31 miles; sidings and spurs 175.17; total 536.38 miles, with 341.31 miles on main line and 18 miles on branches laid with steel rails, being an increase in steel mileage over 1882 of 56.59 miles. At the close of 1884 there were 369.91 miles laid with steel rails, an increase over 1883 of about 10 miles. At the close of 1885 the main line, sidings, branches, and spurs amounted to 543.12 miles, of which 373.88 miles were laid in steel, an increase over 1884 of 3.97 miles of steel rails. Now, with the exception of some comparatively small amounts expended in 1884-85 on the yards at East Saginaw, Flint, and Evart, not a single dollar was charged to construction, or for betterments on the main line of the company's road for the years 1881 to 1885 inclusive. During that period about 15,772 tons of steel rails were purchased and paid for out of earnings. While the accounts of the company are in much confusion on that subject of these steel rails, it appears from defendant's Exhibit G that the cost of these rails, with freight and fittings, after deducting what was on hand at close of 1885, amounted to about \$900,346.10, while the total amount charged to construction as against this expenditure for the same period was only \$540,616.81, and this was on the construction account for branches, sidings, spurs, and yards. Earnings were burdened with the difference, exceeding \$350,000. Brown, the road-master, places the cost of steel rails during said period at \$737,063.82. If from this is deducted the \$540,616.81, charged to construction there will be left \$196,547.01, which was borne by earnings for purchase cost of steel rails. The practice of the management was to remove the old iron rails from the main track, and use these in laying sidings, as required, and to put new steel rails in the main track in place of the old iron rails taken up. The difference between the cost of the new steel rail laid down on the main line, and as laid down, and the value of the old iron rail taken up, was charged to operating expenses, under the head of repairs to roadway, or "track repairs." Thus, in the report for 1881, it is stated that 4,000 tons of steel rails were laid down on the road. The cost of this, less the value of old rails removed, was fixed at \$133,779.09, which was charged to operating expenses, as "track repairs." The purchase cost of this 4,000 tons of steel rails, with fittings, to say nothing of the expense of making the change, was \$240,000. In 1882 a similar charge was made to operating expenses for steel rails put down, to the amount of \$31,224.56. During that year there were laid 1,697 tons of steel rails which cost \$36,365. In 1883 the increase in steel-rail mileage on main track and sidings was 56.59 miles. Counting 38 tons to the mile, and the cost of steel rails at \$37 per ton, this increased cost of steel rails alone was \$184,257.04. For 1884 the cost of the steel rails used on the main line was about \$32,560; and in 1885 about \$12,926.32, aggregating \$371,850 for steel-rail betterments, which was charged to operating expenses, and taken out of earnings. The complainants' expert, Jones, makes this expenditure for 1881, 1882, and 1883, as shown by defendant's Exhibit G, amount to \$250,465. By taking the total

cost of steel rails and deducting therefrom the amount charged to construction, old scrap rails sold, and what was on hand at the close of 1885, he makes this expenditure amount to \$277,035.41, which, in the judgment of the court, is a most reasonable estimate; below, rather than above, the actual outlay for steel rails used in improving the track. The old iron rails, together with some light-weight steel rails taken from the main line, were used in sidings, spurs, and branches. A portion of these were charged to construction account, the old rails being charged at their estimated value. But a considerable portion of such sidings, spurs, and branches, as shown by the road-master, Brown, were made at the expense of earnings. The extension of sidings and spurs from October 1, 1880, to December 31, 1881, thus charged to operating expenses, was something over 12 miles, of which the estimated cost, as made by the road-master, was \$45,430. For 1882 there were 2.41 miles of net extension made at the expense of earnings, involving an estimated expenditure of \$9,640. In 1884 there were 4.29 miles of net increase in such extensions, involving, as estimated by the road-master, an expenditure of \$16,690. In 1884 the net increase of such sidings was 3.82 miles, involving an expense of \$11,460; and in 1885 there was a net increase of sidings to the extent of 2.59 miles costing \$5,400, aggregating, during the five years, \$88,890. If the whole cost of the steel-rail betterments placed upon the road had been charged to construction account, as it should properly have been, as between the two sets of stockholders, then the items making up this aggregate of \$88,890 might properly have been borne by earnings as operating expense; but, instead of doing this, the road-bed, or track, is improved by substituting new steel rails for old iron rails; the difference in their value is charged to operating expense, and taken out of earnings; and then, when the old rail is used for sidings and spurs, it is charged sometimes, when the management think proper and so direct, to construction, and at other times no charge is made to construction, and the whole expense of the change, and the entire cost of the siding or spur is made to fall upon the earnings. The "repairs," which article 4 of the charter provided should be paid out of net income, did not, as between the preferred and unpreferred, or provisional stockholders, warrant this method of dealing with the earnings of the company. It was neither just nor fair towards the latter class. Its effect was, not to keep the track in repair,—in the same state of efficiency as it existed in on October 1, 1880,—but to improve and enhance its value at the expense of earnings, which are thus reduced, and the provisional stockholders correspondingly postponed in coming into the company. If necessary to the assertion of complainants' rights, this court would order the whole steel-rail account to be charged to construction, and earnings credited back with all that has been expended therefrom for or on account of steel rails and steel improvements. But, without changing the account to that extent, the conclusion of the court is that at least \$250,000 should be charged to construction on account of steel rails laid in the main tracks, and for outlays connected therewith, such as cost of work train, transportation of materials, etc., and that this

sum should be credited back to earnings; and further, that earnings should be credited, and construction charged, with the \$88,890 expended on sidings, as above stated. The expert testimony in the case warrants these changes, which are, moreover, within the true meaning and reasonable intent of the charter provisions of the company, on which the rights of both classes of stockholders depend.

Again, in 1883 two steamers owned by the company were enlarged and made more efficient, at a cost of \$40,286.44, which was paid out of and charged to earnings. This change was made in the steamers to meet the demands of a new class or character of business, which sprang up shortly before, across Lake Michigan to Milwaukee. It was an addition of substantial and permanent character, which increased the value of the steamers to that extent, and the cost of the change should, in the opinion of the court, be charged to construction. It was actually charged to operating expenses, and taken out of earnings. This should be corrected by crediting that amount back to earnings for the year 1883. In 1884 there was a charge against expenses for depreciation on these steamers amounting to \$6,000. In 1885 there was a like charge for depreciation, and also a charge of \$2,500, as depreciation on dining-halls, the three charges making \$14,500. These sums were not actually expended out of earnings, but were estimated and charged against operating expenses. This was not proper. No depreciation account was either kept or warranted by the charter as between the two classes of stockholders, and, no expenditure having actually been made to meet such depreciation, the estimated amount thereof could not properly be deducted from earnings, or net income. *U. S. v. Railway Co.*, 99 U. S. 459. The sum of \$6,000 should therefore be credited back to earnings for 1884, and \$8,500 for 1885.

In the spring of 1884, \$142,000 was expended, under the orders of the board of directors, for 8 new freight engines and 200 coal cars. The funds for this purchase were raised by loan, which was paid off by the company at the rate of \$3,000 per month, and the sum so paid, in addition to interest on the loan, was charged to operating expenses, and withdrawn from earnings. See Reports for 1884, pp. 8, 23, for 1885, p. 8. This was clearly an improper charge against operating expenses. The outlay was not for the repair or renewal of old, but for the purchase of new, equipment, and should have been charged to construction. Fifteen thousand dollars were thus wrongfully charged in 1884, and \$36,000 in 1885. These amounts should be credited to earnings for said years, respectively, and be charged to construction account.

During the years 1882, 1883, and 1884, earnings were charged with interest on temporary loans to the extent of \$24,958.90. Whether these constitute a proper charge against net income or earnings, under the provisions of article 4 of the charter, admits of considerable question; but in the view which the court takes of other items of the company's accounts, as between construction and operating expenses, it is not necessary to pass upon the point. So, too, in reference to the sum of \$4,225.28, charged to profit and loss on an old claim brought over from

assets of the receiver. There are various other items which complainants insist, and which the experts testify, should not be charged to operating expenses, or which should go to construction, or be credited to earnings, but they need not be specially noticed, except as to dividend on the company's securities. A word of explanation is necessary as to this source of income. The whole \$6,500,000 of preferred stock was not actually issued. Only \$6,342,000 was issued, leaving in the hands of the company \$158,000 of said preferred stock, the dividend on which the management credited to net income or earnings, as dividends on the entire \$6,500,000 were charged against such earnings. If 7 per cent. annual dividends are to be charged on the whole preferred stock of \$6,500,000, then the company should credit earnings annually with \$11,060, being 7 per cent. on the \$158,000 of stock still held by the company; or, in stating the account of earnings over operating expenses, said dividend should be charged only on the preferred stock actually issued, amounting to \$6,342,000, making the annual dividend charge \$443,940, instead of \$455,000, as shown by the reports. The result will be the same under either method. It appears that the company's net earnings for the period from October 1, 1880, to December 31, 1880, was \$132,584.69. If there is added to this the sum of \$500,—the premium on bonds sold during that period,—we have the sum of \$133,084.69 of income to be carried forward as applicable to dividends for 1881. Then, taking the net earnings and adding thereto the corrections, or credits due to earnings, as above indicated, the account for the several years will stand as follows:

Amount over from 1880 and applicable to dividends,	-	\$183,084 69
Net earnings, as reported by company, for 1881,	\$244,037 94	
Add: Premium on bonds sold that year,	- 107,257 25	
Relaying track with steel rails,	- 133,779 09	
Spurs and main line sidings,	- 45,430 00	
Balance on Co. securities not cred.,	- 2,357 50	
		<hr/> 532,861 78
Total applicable to dividends,	- - -	\$665,946 47
Less 7 per cent. dividend on \$6,500,000 of preferred stock,		455,000 00
		<hr/>
Surplus carried to January 1, 1882,	- - -	\$210,946 47
1882.		
Surplus for 1881 brought over to 1882,	- - -	\$210,946 47
Net earnings reported for 1882,	- \$438,989 89	
Add: Premium on bonds sold 1882,	- 34,702 50	
Relaying track with steel rails,	- 31,224 56	
Spurs and sidings made out of earnings,	- 9,640 00	
Bal. of dividend on Co. stock,	- 647 00	
		<hr/> 515,203 95
Total applicable to dividends in 1882,	- - -	\$726,150 42
Less 7 per cent. dividend on \$6,500,000 preferred stock,	-	455,000 00
		<hr/>
Surplus carried to 1883,	- - -	\$271,150 42

1883.			
Surplus from 1882,	-	-	\$271,150 42
Net earnings reported for 1883,	-	\$488,799 13	
Add: Premium on bonds sold in 1883,	-	12,186 50	
Relaying track with steel rails,	-	65,000 00	
Spurs and sidings made out of earnings,	-	16,960 00	
Enlargement of steamers,	-	40,286 44	
			<u>628,182 07</u>
Total applicable to dividends in 1883,	-	-	\$894,332 49
Less dividend of 7 per cent. on \$6,500,000,	-	-	<u>455,000 00</u>
Surplus carried to January, 1884,	-	-	\$439,332 49
1884.			
Surplus from 1883,	-	-	\$439,332 49
Net earnings reported for 1884,	-	\$400,308 40	
Add: Premium on bonds sold 1884	-	9,945 00	
Relaying track with steel rails,	-	10,000 00	
Spurs and sidings made with earnings,	-	11,460 00	
Equipment renewals,	-	15,000 00	
Depreciation on steamers, charged to expenses,	-	6,000 00	
			<u>452,708 40</u>
Total applicable to dividends in 1884,	-	-	\$892,040 89
Less 7 per cent. dividends on \$6,500,000,	-	-	<u>455,000 00</u>
Surplus carried to January 1, 1885,	-	-	\$437,040 89
1885.			
Surplus from 1884,	-	-	\$437,040 89
Net earnings reported for 1885,	-	\$272,451 77	
Add: Relaying track with steel rails,	-	9,996 35	
Spurs and sidings made with earnings,	-	5,400 00	
Equipment and renewals charged to expenses,	-	36,000 00	
Depreciation of steamers and dining-hall,	-	8,500 00	
Dividend on Co. securities,	-	4,740 00	
			<u>337,088 12</u>
Total applicable to dividends in 1885	-	-	\$774,129 01
Less 7 per cent. dividend on \$6,500,000,	-	-	<u>455,000 00</u>
Surplus January 1, 1886,	-	-	\$319,129 01

If, as the experts testify, the expenses of work trains engaged in construction, and freight on material used for construction, should be charged to construction account, and corrections were made in that respect, the annual balance, after deducting the 7 per cent. dividend, would be still larger than as above given. It thus appears that, independently of the surplus land funds, the earnings or net income of the road, if the accounts between construction and operating expenses had been properly kept, in conformity with the provisions of the charter, and according to the rights of the two classes of stockholders, as therein defined, were amply sufficient, after paying interest on the company's

entire bonded debt, repairs, and expenses of equipment and renewals, to pay the annual dividends of 7 per cent. on \$6,500,000 of preferred stock for the five years in question. But, when the large surplus land fund is taken into consideration, it is difficult to see any reason for not declaring and paying that dividend for five consecutive years, except a deliberate purpose to keep the provisional certificates holders out of any voice or vote in management of the company, or to indefinitely postpone their admission. The 5 per cent. deficiency in dividends for the five consecutive years under consideration on the \$6,500,000 of preferred stock actually issued amounts to \$317,100. This could have been readily withdrawn from the surplus land funds if earnings had been inadvertently diverted to construction, and the management had desired to replace the amount, so as to make it applicable to dividends; or, if improper charges to earnings had not been made from year to year, as already shown, the deficiency would not have existed. While the earnings have been thus misapplied or diverted, the policy of the management has been steadily in the line of permanent improvements, and large enhancement in the value of the company's property. Its equipment has been greatly enlarged, its main tracks, sidings, spurs, and branches have been extended, and its general efficiency not merely maintained, but largely increased. When the company took possession in October, 1880, the road-bed and equipment were valued at \$9,671,958.90. On the 31st December, 1880, that valuation had increased to \$10,311,193.38. At the close of 1881 the valuation of road-bed and equipment had increased, as reported by the general manager, to \$12,281,853.02. At the close of 1882 it had grown to \$12,966,601.64. At the close of 1883 it was reported at \$13,506,231.94. At the close of 1884, after deducting \$1,116,070.45, charged off to depreciation, the valuation stood at \$12,657,430.55, and on December 31, 1885, it was placed at \$12,512,928.81. If the arbitrary deduction had not been made in 1884, the valuation at the close of 1885 would have stood at \$13,628,999.26, making an increase since October 1, 1880, of \$3,957,040.36; an amount exceeding the provisional certificates now seeking admission as unpreferred stock in the company. These valuations are independent of the large surplus lands and land funds. Look at the condition of the company from another standpoint. Its total funded debt is \$5,299,000, while the preferred stock actually issued is \$6,342,000, making its total capitalization \$11,641,000. It has 361.64 miles of main line, and 115.72 miles of business producing tracks in addition; making 477.38 miles of roadway, on which there is of capital and funded debt only \$11,641,000, or less than \$25,000 per mile. The capitalization and funded debt of other railroads in the state of Michigan, it is said, will average about \$45,000 to the mile. Under these circumstances, neither the company nor the preferred stockholders who control its management, which has been conducted more with a view to the permanency and security of their own interests than with regard to the rights and interests of the common or unpreferred stockholders, can rightfully longer exclude the latter from their charter share in the corporate enterprise. This suit is practically a contest between

the two classes of stockholders. The preference class is in control, and is interested in keeping the other out. This result has been so far effected by expending the company's earnings and income in permanently improving the property, or for other purposes than those contemplated by article 4 of the charter, whereby net income applicable to dividends has been reduced, while the valuation of the company's road-bed and equipment has steadily increased. The preferred class, in control, select the management. This management, or directory, are more than mere agents of the company. They occupy a fiduciary relation towards the unpreferred class of shareholders, in respect to the rights conferred upon them in and by the company's charter. They neglect or deliberately disregard the duties and obligations growing out of such trust relation, and then attempt to shield themselves, or defend their conduct on the ground that they were only discharging the company's duty to the public. The facts of the case do not sanction this defense.

The court, having been compelled carefully to examine the evidence, which is quite voluminous, and analyze the company's accounts, so as to determine the rights of the parties, and being fully satisfied from this investigation of the accounts that the foregoing statement in respect to the yearly income applicable to dividends is substantially correct, it is not deemed necessary to refer these matters to a special master for a report, and thereby further delay the final disposition of the case. The conclusions of the court on this branch of the case are that complainants are entitled to the relief sought; that they are entitled to be admitted into the defendant company as regular stockholders of the common or unpreferred class; that this right accrued to them and to others similarly situated on January 1, 1886; that a sufficiency of surplus land funds is in the hands of the land trustees, and subject to the control of the company to pay, or make good, the deficiency of $1\frac{1}{2}$ per cent., or \$95,110, on dividends for 1881; $\frac{1}{2}$ per cent., or \$31,710, on dividends for 1882; and 3 per cent., or \$190,260, on dividends for 1885, upon the preferred capital stock actually issued, amounting to \$6,342,000; and the defendant company should be required to pay over to the preferred stockholders, *pro rata*, out of said surplus land funds or other funds at its disposal, said annual deficiencies, so as to make up to said preferred stockholders their full 7 per cent. dividends for five consecutive years, and thus comply with the conditions, as the company and its management should have done, on which the provisional certificate holders were entitled to be admitted; and, further, that the defendant company, its officers and agents, should be enjoined from depriving complainants, or those in like state with them, of their rights as common stockholders, in voting or otherwise, and from applying the income and earnings of the company, without the consent of said common stockholders, to improvements of a permanent character; all of which is accordingly ordered and decreed, with the further direction that the defendant corporation, its officers and directors, be ordered to issue regular certificates for common or unpreferred stock in the company to complainants and other holders of provisional certificates, severally, according to their respective holdings of

the latter certificates, and upon the production and surrender of the same.

In the case of *Parker et al. v. Flint & Pere Marquette Railroad Company and the Port Huron & Northwestern Railway Company et al.* the same provisional certificate holders as in the other suit seek on behalf of themselves and others with like interests to restrain the Flint & Pere Marquette Company from purchasing the stock and franchises of the Port Huron & Northwestern Railway Company, alleging that such purchase is not authorized by law; that it would be *ultra vires*; that it would involve a very large expenditure of money, inasmuch as the Port Huron & Northwestern Railway Company is a narrow-gauge road, in bad condition, and would require heavy outlays to render it of any practical benefit to the purchasers, and that such outlays and expenditure would be drawn from earnings and income of the Flint & Pere Marquette Railroad Company, which, under article 4 of its charter, should be applied to dividends; and, generally, that the purchase would deplete the revenues of the latter road, seriously affect their rights, and that they should, if it is legal, have a voice and vote on the question of such purchase. The Port Huron & Northwestern Railway Company filed an answer, saying, in substance, that negotiations were pending for the purchase or acquisition of its road by the Flint & Pere Marquette Company; that the method of effecting that would be such as would be legal under the laws of Michigan, without explaining what method was proposed. The Flint & Pere Marquette Company demurred, and thereby admitted the allegations of the bill. On the argument questions were raised as to the character of this suit, which sought, in addition to restraining said purchase, the same general relief sought in and by the first case. The court is of the opinion that the Port Huron & Northwestern Railway Company was neither a necessary or proper party to the litigation or questions involved in either of these suits; that this last bill was properly a supplemental bill. It was filed without leave, as required by equity rule 57; but it was filed November 28, 1887, for the purpose of enjoining a transaction which was about to occur, as alleged, on November 30, 1887, so that the provisions of rule 57 could not be conformed to. This bill will be dismissed as to the Port Huron & Northwestern Railway Company, with costs. The court will now order it to stand, and to be treated as a supplemental bill in the original suit, as may be done under the authorities. *Story*, Eq. Pl. §§ 882-905; *Neale v. Neales*, 9 Wall. 1; and *Graffam v. Burgess*, 117 U. S. 195, 6 Sup. Ct. Rep. 686.

The Flint & Pere Marquette Railroad Company admits the allegations of this supplemental bill by its demurrer, and thus presents the legal question whether, under the laws of Michigan, it can purchase the stock and franchises of the Port Huron & Northwestern Railway Company; and, if so, can it, as against the common or unpreferred stockholders, apply its income, either in paying for the interests purchased, or in improving and altering the property so acquired? It is now well settled that the proposed purchase of the stock, property, and franchises of the Port Huron & Northwestern Railway Company, as alleged in the supple-

mental bill, whereby the latter company would be absorbed by the purchasing company, cannot be legally made in the absence of lawful authority from the state of Michigan. *Pearce v. Railroad Co.*, 21 How. 442; *Thomas v. Railroad Co.*, 101 U. S. 71; *Branch v. Jesup*, 106 U. S. 478, 1 Sup. Ct. Rep. 495; *Railroad Co. v. Railroad*, 118 U. S. 290, 6 Sup. Ct. Rep. 1094. Do the laws of Michigan authorize or sanction such purchase? Under the general railroad law of the state (act 1873, § 29) railroad companies are allowed to consolidate upon certain terms, when they form continuous or connecting lines. This contemplates the formation of a new corporation; and the assent of the stockholders in each company, or a majority thereof, is requisite to the consolidation. This statute is not applicable here. The bill charges, not a purpose to consolidate with the Port Huron & Northwestern Railway Company, but to purchase the latter's stock, property, and franchises, and to use the same as part and parcel of the purchasing company, and thus to bring the acquisition within the operation of its own charter. The consolidation statute does not authorize one company thus to acquire and absorb another. By section 28 of the general railroad laws of 1873 (1 How. St. § 3342) it is provided that one railroad corporation may subscribe to the capital stock of any other company organized under said act, with the consent of the latter; and by the acts of 1869 (1 How. St. § 3413) and 1873 (1 How. St. § 3403) one railroad company is authorized to aid another having an unfinished road, and to make running arrangements; and, where their lines are connected, may enter into arrangements for their common benefit, "consistent with and calculated to promote the objects for which they were [respectively] created." It is manifest, without discussion, that these statutory provisions do not authorize one railway corporation to acquire the stock and franchises of another completed company, with the intention of exercising the franchises of the latter, which is the case presented by the supplemental bill. Again, the complainants, being now entitled to admission into the Flint & Pere Marquette Railroad Company, as common stockholders, under and according to the provisions of its charter, and it being alleged and admitted by the demurrer that their interests and rights will be injuriously affected by the proposed purchase and acquisition of the Port Huron & Northwestern Railway Company, they have the right to invoke the interposition of this court in preventing the consummation of the transaction until they have an opportunity of expressing their assent or dissent thereto; for, if the transaction can be lawfully made in any way, it would still be an enlargement and extension of the corporate purposes and objects of the company, as defined in its charter, as to which they have the right to express their assent or dissent. The proper time to do this is before, and not after, the transaction is completed. *Black v. Canal Co.*, 24 N. J. Eq. 455.

In the opinion of the court the preliminary injunction should be granted on the case made out by the supplemental bill, admitted by the demurrer, and disclosed in the course heretofore pursued by the company's management towards the common stockholders. The demurrer of de-

defendants is overruled, and the injunction is accordingly ordered, with leave at any time hereafter, when the common stockholders shall have been admitted into their rights as ordered and decreed in the main case, to move for a modification or dissolution of the same. The supplemental bill will be dismissed as to the Port Huron & Northwestern Railway Company, with costs to be taxed against complainants. The remaining costs in both cases will be taxed against the Flint & Pere Marquette Railroad Company.

CENTRAL TRUST Co. *et al.*, (BALLOU, Intervenor,) *v.* WABASH, ST. L. & P. RY. Co. *et al.*

(Circuit Court, S. D. Illinois. 1888.)

1. MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANTS.

An expressman and baggageman was killed in a collision, while in the discharge of his duty on defendant's passenger train, through the negligence of the employees of defendant's freight train. *Held*, that they were not fellow-servants.¹

2. DEATH BY WRONGFUL ACT—DAMAGES.

Intestate left a widow, but no children or descendants of children. He was about 30 years old; had been earning \$55 a month; had been in defendant's employ several years; was temperate, industrious, living with and supporting his wife. He left no estate, and his widow was without means of support. Damages assessed at \$4,000.

In Chancery.

W. P. Black, for intervenor.

George B. Burnett, for receiver.

ALLEN, J. In the matter of the intervening petition of Julia A. Ballou, administratrix, to be allowed damages for the death of her husband, William A. Ballou. On the 16th day of August, 1887, the intervening petition of Julia A. Ballou was filed in this case, for the purpose of obtaining damages for the alleged unlawful killing of her husband by the Wabash, St. Louis & Pacific Railway Company. Subsequently the case was argued before the district judge, and submitted upon the following agreed state of facts:

"It is hereby stipulated and agreed by the parties to this action that a jury be, and the same is hereby, waived, and said cause submitted to the court for determination upon the following stipulation as to facts: That the said Julia A. Ballou was duly appointed administratrix of William A. Ballou by the county court of Vermillion county, Ill., on the 2d day of July, 1887; said county court of Vermillion county having jurisdiction of said proceedings for the making of said appointment. That the said William A. Ballou, deceased, came to his death on the 28th day of October, A. D. 1886, from an injury received in a collision on said Wabash, St. Louis & Pacific Railway, on the date

¹As to who are fellow servants, see *Wolcott v. Studebaker*, 34 Fed. Rep. 8, and note, *McMaster v. Railway Co.*, (Miss.) 4 South. Rep. 59.

last aforesaid, in the county of Madison, in the state of Illinois; and that said deceased was not guilty, in the matter which resulted in his death, of any negligence or misconduct whatever, nor was he in any measure responsible for the collision in which he was killed. That the facts in reference to said collision and to employment and position of the deceased are as follows, to-wit: That the deceased was an expressman and baggageman in the employment of the receivers of said Wabash, St. Louis & Pacific Railway, train No. 46, engine No. 1168, which passenger train was at the time running east between Gillham and Edwardsville Junction, in Madison county, Ill., at the rate of about thirty miles per hour. He was in his car in the performance of his regular duties. This was about 11:55 at night. Said passenger train had the right of way upon the track. Under the rules and regulations of the receivers, it was the duty of the employes in charge of the second section of freight train 77, going west, to side-track and hold said train at Edwardsville Junction, until said passenger train 46 arrived at said station, and passed said freight train; but instead of so doing said freight train was by said servants propelled out upon the main track moving west at the rate of twenty miles an hour, and at some time between 11:45 and 12 o'clock at night met and collided with said passenger train, the result of the collision being the instant killing of said deceased. Both of said trains were the property of said railroad, being operated by the servants and employes of said receivers, and subject to their control. Said deceased had no control whatever over the motion or operating of either train, and said collision was occasioned by the negligence of the said servants of the said railway company in charge of the said freight train being upon the main track of the said railroad on the time of said passenger train, which, at the time, had the right to the road, and in violation of the rules and regulations of the receivers of said railway company, as hereinbefore stated. That said William A. Ballou died intestate, leaving the administratrix, his wife, and no children or descendants of children surviving him. That at the time of the death of the said William A. Ballou he was about thirty years of age; was then earning \$55 per month wages; had been in the employ of the company for several years; was temperate and industrious. That he left no estate. That up to the time of his death he was living with his said wife, supporting her, and that she had and has no estate or means of support. And it is further stipulated that, if there be a finding in this case upon the facts above stipulated in favor of the administratrix, the court shall assess such damages in favor of the intervenor for the pecuniary loss sustained, as in the opinion of the court is warranted by the facts and stipulations and the law."

Under the agreement no issue of fact is presented, but the sole question is whether liability under the law attaches to the receiver of the railway corporation for causing the death of William A. Ballou under the admitted facts and circumstances connected with the killing. The court is relieved from the examination of any question of contributory negligence, for, according to the stipulations, deceased at the time of his death was on the east-bound passenger train, in the discharge of his duties as expressman and baggageman, and wholly free from any fault whatever. The liability of the receiver of the railway corporation is denied because of the relation deceased sustained to it at the time of his death; and the court is earnestly asked to apply the rule that the employer is not liable to one servant or laborer for an injury resulting from the carelessness or negligence of another servant or co-laborer. This rule has undergone many interpretations and expositions in England

and this country, sometimes conflicting; but happily the flexibility of the principles of the common law enables courts generally to adjust the application of the principle in harmony with justice and sound reason. One of the earliest cases announcing the doctrine was decided in England in 1837, (*Priestley v. Fowler*, 3 Mees. & W. 1,) and followed in this country in 1842 by the case of *Farwell v. Railroad Corp.*, 4 Metc. 49, in which Chief Justice SHAW lays down the rule that "he who engages in the employment of another for the performance of specified duties for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal contemplation, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness or ignorance of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master." This statement of the rule is believed to be too broad to well express the law upon the subject as it exists in this country at this time, for it in effect wholly exempts the master from responsibility for any injury resulting from the negligence of any fellow-servant who may be engaged in the same employment. Reference should be had, in determining the liability of the master, to the nature or character of the duties of the servant or agent at the time of the imputed or admitted negligence; and a distinction must be drawn and maintained between a servant or agent with the powers of the principal or master, and one who is simply employed to perform mere executive details. In the former case the agent or servant represents the master, and his negligence is the negligence of the master as fully as though he was personally present. while in the latter a different rule might obtain. The language of CHURCH, C. J., in *Flike v. Railroad Co.*, 53 N. Y. 549, sustains this view:

"The true rule, I apprehend, is to hold the corporation liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with the performance. As to such acts, the agent occupies the place of the corporation, and the latter should be deemed present, and consequently liable for the manner in which they are performed."

In *Corcoran v. Holbrook*, 59 N. Y. 517, *Flike v. Railroad Co.*, is fully approved. The supreme court of Illinois, in a recent case, when considering the question as to what was essential to constitute a co-employee, in order that the master might be exempt from liability on account of injuries sustained by one resulting from the negligence of the other, in an able opinion by Chief Justice SCHOLFIELD, held "that ruling requires that the servants of the same master, to be co-employees so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, shall be directly co-operating with each other in a particular business, *i. e.*, the same line of employment; or that their usual duties shall bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution. The idea is that the relation between the servants

must be such that each as to the other, by the exercise of ordinary caution, can either prevent or remedy the negligent acts of the other, or protect himself against the consequences; and, of course, where there is no right or opportunity of supervision, or where there is no independent will, and no right or opportunity to take measures to avoid the negligent acts of another without disobedience to the orders of his immediate superior, the doctrine can have no application." *Rolling-Mill Co. v. Johnson*, 114 Ill. 57. In *Railroad Co. v. Keary*, 3 Ohio St. 201, the supreme court of that state, in discussing the distinction to be made in their relation to the common principal between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence, said:

"For this purpose the conductor is employed, and in this he directly represents the company. They contract for and engage his care and skill. They commission him to exercise that dominion over the operations of the train which essentially pertains to the prerogative of the owner; and in its exercise he stands in the place of the owner, and is in the discharge of a duty, which the owner, as a man, and a party to the contract of service, owes to those placed under him, and whose lives may depend on his fidelity. His will alone controls everything, and it is the will of the owner that his intelligence should be trusted for this purpose. This service is not common to him and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely separate and distinct, although both necessary to produce the result. It is his to command, and others to obey and execute. No service is common that does not admit a common participation, and no servants are fellow-servants when one is placed in control over the other."

The supreme court of the United States in *Railway Co. v. Ross*, 112 U. S. 877, 5 Sup. Ct. Rep. 184, and in *Hough v. Railway Co.*, 100 U. S. 218, sustain the doctrine laid down in 3 Ohio St. *supra*; and this view seems to be in harmony with authority to be found in the text-books. Mr. Wharton, in his work on the law of negligence, section 232a, observes:

"It has sometimes been said that a corporation is obliged to act always by servants, and that it is unjust to impute to it personal negligence where it is impossible for it to be negligent personally; but if this be true, it would relieve corporations from all liability to servants. The true view is that as corporations can only act through superintending officers, the negligences of those officers, with respect to other servants, are the negligences of the corporations."

In the light of these authorities the contention that the deceased and the conductor and engineer of the freight train were fellow-servants in the sense that would shield the corporation from liability for their gross negligence must be rejected. The employes of the freight train having it in charge represented the corporation at the time of the collision resulting in the death of petitioner's husband, and their admitted negligence I hold to be the negligence of the corporation to the same extent as if it

were a natural person, actually present and superintending the train when the deceased was killed. The damages of intervening petitioner will be assessed at \$4,000.

HENRY L. CRANE BOOT & SHOE CO. v. TRENTMAN *et al.*

(Circuit Court, D. Indiana. March 29, 1888.)

SALE—RESCISSION BY SELLER—TENDER OF MONEY PAID—REFLEVIN—DISPOSITION OF TENDER AFTER JUDGMENT.

M. bought goods on false representations as to his solvency, and, having disposed of \$900 worth of them, transferred his whole stock to defendant in payment of prior debts. The seller, having tendered both to defendant and M. \$400 paid by the latter on his purchase, brought replevin against both, and deposited the sum in court. *Held* that, defendant not being a *bona fide* purchaser as against plaintiff, plaintiff was entitled to said sum in part payment of the \$900 worth of goods disposed of by M.

At Law. On motion for return to defendant of money brought into court to keep good a tender.

The facts are not in dispute. The plaintiff, a corporation engaged in the wholesale shoe trade at Cincinnati, had sold goods to the value of \$2,540.50 to Miller, a retail dealer at Fort Wayne. Miller, when he made his purchases of the plaintiff, was insolvent,—the principal part of his indebtedness being to Trentman,—and obtained credit upon his purchases of the plaintiff by means of representations in respect to his solvency which entitled the plaintiff, on learning the facts, to reclaim the goods, and this action (in replevin) was brought for that purpose against both Miller and Trentman; the latter having purchased Miller's entire stock of goods, paying therefor by crediting the price upon his demands against Miller. With this stock of goods Trentman came into possession of shoes or other goods sold by the plaintiff to Miller of the value of \$1,640; the remainder (\$900 worth) having been sold or disposed of by Miller before the sale to Trentman. Before bringing the action the plaintiff tendered to Miller, and also to Trentman, the sum of \$400, paid by Miller on his purchases, and demanded of each a return of the goods. Miller having died, trial was had, and a verdict and judgment rendered against Trentman for a return of that portion of the goods found in his possession, or the payment to the plaintiff of \$1,640.50, the assessed value thereof. Upon these facts counsel for Trentman say:

"Our contention is that, this being an action of replevin on the law side of the court, there could be no action maintained without a rescission of the contract under which the goods replevied were obtained. In order to such rescission, it is settled that whatever was received upon the contract must be tendered. The plaintiff has recognized this rule, and proved upon the trial a tender both to the fraudulent vendee and to Trentman, who purchased the goods of him, and has followed this up by bringing the money into court. That such tender must be made and kept good in such an action is settled in

Indiana, and by abundant authority elsewhere. In *Haase v. Mitchell*, 58 Ind. 213, the action was against a subsequent purchaser, and it was held that such action could not be maintained without first rescinding the contract by tendering back whatever thing of value had been received upon it. This being necessary, our position is that the tender in this case was properly made to Trentman, as all the rights of Miller had been acquired by him. If the goods are to be replevied from him on the theory that he stands in Miller's shoes, he must be regarded as occupying that position for all purposes, or at least to the extent that, if he must give up the goods, he has the right to receive whatever Miller might have received.

"After looking through the cases cited by the plaintiff, we still insist that the position originally taken by us is correct, and is not rendered untenable by any reason given or authority cited by opposing counsel. We simply contend that, this being an action at law in replevin, there must be a complete restoration of all the plaintiff received, in order to maintain the action, and that where the original vendee has parted with all his rights for a valuable consideration to a vendee innocent of any fraudulent purpose, such remote vendee has the right to have returned to him whatever plaintiff would have been obliged to return to his grantor. That there are exceptions to the rule requiring restoration of what has been received we grant, but we have seen no authority which, in our judgment, leads to the conclusion that this case is such an exception. If Trentman acquired Miller's rights, we maintain that it is not competent for Miller's administrator to make any waiver that could affect the rights of Trentman."

Counsel for plaintiff say, in substance:

That in an action of replevin the court, though a court of law, "has power to modify or shape the judgment so as to meet the equities of the case." *Dilworth v. McKelvy*, 30 Mo. 152; *Boutell v. Warns*, 62 Mo. 350; *Jones v. Evans*, Id. 382; *White v. Graves*, 68 Mo. 222; *Dougherty v. Cooper*, 77 Mo. 535; *Montieth v. Printing Co.*, 16 Mo. App. 453; *Heaps v. Jones*, 23 Mo. App. 621; *Duval v. Mowry*, 6 R. I. 479; *Nichols v. Michael*, 23 N. Y. 273. See, also, *Albright v. Griffin*, 78 Ind. 182. That as against Trentman, or any transferee of the goods after they had passed from the possession of the original purchaser, a tender was not necessary. *Stevens v. Austin*, 1 Metc. 558; *Thayer v. Turner*, 8 Metc. 552; *Tapley v. Forbes*, 2 Allen, 23; *Kinney v. Kiernan*, 49 N. Y. 176; *Town of Springport v. Bank*, 84 N. Y. 409; *Ladd v. Moore*, 3 Sandf. 589; *Pearse v. Pettis*, 47 Barb. 276; *Higham v. Harris*, 108 Ind. 254, 8 N. E. Rep. 255; *Higby v. Whittaker*, 8 Ohio, 198; *Frost v. Lowry*, 15 Ohio, 200; *Warner v. Vallily*, 13 R. I. 483. The money is in the custody of the court, and before it can be obtained the court must be convinced that the party claiming it is entitled to it. As decided in the case of *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. Rep. 27, the plaintiff might proceed by petition in the original action, or bring his bill on the equity side of the court. But, whichever method is adopted, the result must be the same.

Morris, Newberger & Curtis, for plaintiff.

Harrison, Miller & Elam, for defendant Trentman.

WOODS, J., (after stating the facts as above.) The general rule is well established that one who would disaffirm a contract must do so totally, and therefore must return whatever he had received upon it. But at the same time he is entitled to reclaim whatever he had parted with, and consequently his tender or offer to return need not be absolute, but upon condition, either express or implied, that he shall receive back his own,

not in part only, but entirely; and if this cannot be done, or is refused, he may withhold the tender, and bring it into court for final disposition, as justice may require. And if he prevails in the action, but does not obtain thereby complete relief, it would seem that he ought to be made good out of the money or property so tendered and brought into the control of the court. It would be a defective system of justice or procedure which could not afford such relief. Under the maxim that the law does not require a vain thing to be done, a tender before bringing suit will not be deemed necessary if the vendee has parted with the goods in whole or in part, or in any way has put it beyond his power to make restitution; and it will be enough if the plaintiff bring into court whatever, if mutual restitution had been practicable, he would have been bound to surrender. But, as against a third party who has come into possession of the disputed property as a transferee of the original purchaser or wrongful taker, it seems to be well established by the authorities cited, and I think consistently with principle, that neither a tender before suit nor a bringing into court is necessary. Of course a rescission is necessary. The action, whether against the vendee or his transferee, is commenced and proceeds on that theory; but, the latter not being interested (as the decisions show) in the subject of tender, the mere bringing of the action against him is, as to him, a sufficient declaration of the plaintiff's election to rescind, without previous declaration or notice to that effect, though a previous demand for the property may be necessary in order to put such transferee in the wrong. In *Town of Springport v. Bank*, 84 N. Y. 403, the doctrine of the cases on this point is stated in this way:

"Even in such cases (for rescission) a third party, whose title depends upon a contract claimed to have been rescinded, cannot set up a want of tender by the plaintiff to the original party of the return of what the plaintiff had received under the original contract. For instance, when a sale of goods is rescinded by the vendor on the ground of fraud, and he reclaims the goods from a transferee of his vendee, the transferee cannot defend on the ground that the securities received by the vendor from the original vendee have not been tendered back to him. *Kinney v. Kiernan*, 49 N. Y. 165, 172. In such a case the title to the securities reverts to the original vendee on the rescission, but the right to insist upon their return is his, and not that of his transferee of the goods. *Stevens v. Austin*, 1 Metc. 558; *Pearse v. Pettis*, 47 Barb. 276."

The question here, however, is not whether a tender was necessary, but, one having been made and kept good by the bringing of the money into court, what shall be done with the money? The proposition that "Trentman acquired Miller's rights," or "stands in Miller's shoes," in respect to the property in question, is manifestly not true in fact, because, of the goods sold by the plaintiff, Miller had disposed of two-fifths before the transfer to Trentman; and, besides, the evidence does not show whether the terms of the transfer were such, between themselves, as to give Trentman any claim to stand in the place of Miller; and if the point were conceded, yet Trentman, not standing in the position of an innocent purchaser of the goods as against the plaintiff, cannot through Miller assert any right which Miller could not; and with the proceeds of plaintiff's goods in his possession to the value of \$900, not paid for except

with this money, Miller in good conscience could assert no right, as his administrator has conceded, and as some of the cases cited show. See, especially, *Pearse v. Pettis*, *supra*. In the judgment of the court, even without the consent of Miller's administrator, this money should be returned to the plaintiff; but with that consent, on the authorities, and, as it seems to me, upon principle, there can be no doubt about it. So ordered.

LEAVITT, Consul, v. UNITED STATES.

(District Court, S. D. New York. March 29, 1888.)

1. CLAIMS AGAINST UNITED STATES—APPROPRIATIONS—AUTHORITY OF EXECUTIVE DEPARTMENT—ACT OF MARCH 8, 1887.

Though an executive department has no authority to bind the government in excess of appropriations, yet where an appropriation has been made by congress for a general purpose contemplating a multitude of acts to be done by the department, its agency is general within those limits; and where persons act in good faith under orders of the department, no excess of authority in giving orders above the prescribed limits will be presumed, and the burden of proving this defense is upon the government, when the facts are peculiarly within its power, and the creditor was not in circumstances to ascertain them.

2. SAME—CONSULS—EXPENDITURES UNDER DIRECTIONS.

The government having appropriated \$10,000 to enable the state department to participate in the World's Industrial Exposition, at New Orleans, the department sent to the petitioner, then consul at Nicaragua, a circular letter, "suggesting" that he procure certain characteristic articles as souvenirs of his consulate for the exposition, referring to an appropriation by congress, and stating that dependence should not be placed upon voluntary contributions. A few articles were accordingly purchased by the petitioner, and forwarded to the representative of the department, and accepted. A year and a half afterwards, when his bill was presented, he was told that the appropriation was exhausted. Upon suit in this court under the provisions of the act of March 8, 1887, *held*, that the reasonable construction of the circular was a request or order to procure the articles at the expense of the government.

3. SAME—DUTY OF CONSUL.

Held, also, that there was no presumption that this order when made was an illegal act, or in excess of the appropriation; that the consul was in no situation to inquire into the extent of previous orders issued by the department; and had then, and has now, the right to rely on the presumed authority of the department under the appropriation, until the contrary is proved.

4. SAME.

The fact that the appropriation was found a year and a half after to be exhausted, is not such proof. The petitioner was therefore held entitled to judgment, as on an authorized and binding contract with the government.

(*Syllabus by the Court.*)

Consul's Claim for Reimbursement.

Leavitt, Peters & Whittaker, for the petitioner.

Stephen A. Walker, U. S. Dist. Atty., and *Abram J. Rose*, Asst. U. S. Dist. Atty., for the United States.

BROWN, J. On the 17th of August, 1887, Humphrey H. Leavitt, the petitioner above named, filed his petition in this court pursuant to the

provisions of the act of March 3, 1887, (24 St. at Large, c. 359, p. 505,) to recover of the United States the sum of \$72, alleged to have been expended by him in January, 1885, as United States consul in Nicaragua, by the direction of the department of state, in procuring certain articles for the World's Industrial Exposition at New Orleans. A copy of the petition was duly served upon the United States attorney, and sent to the attorney general, as directed by the said act. The United States district attorney appeared and defended, and the cause was tried before the court without a jury, as required by section 2. I find the following facts:

FINDING OF FACTS.

(1) That the petitioner was the first appointee of the consulate at Managua, Nicaragua; that he qualified in August, 1884; arrived at Managua in the latter part of September of that year, and thereupon entered upon and performed the duties of his consulate, until relieved by his successor in 1886. (2) In December, 1884, he received, inclosed in a dispatch from the department of state, the following circular letter:

"CIRCULAR.

"DEPARTMENT OF STATE.

"WASHINGTON, D. C., November 17, 1884.

*"To the Consular Officers of the United States—*DEAR SIR: Referring to the previous circulars issued from this department respecting the contributions requested on the part of the consular corps in behalf of the World's Exposition, I have the pleasure, in behalf of the department, to express appreciation of the very general response in reply thereto. It seems, however, that some of the consuls have construed the request to be of a more extended nature than intended, and have hesitated in action because means and time seem not to justify the effort to obtain a large number of contributions, or articles of importance and bulk. There is ample time, but the appropriation is an act of congress. I beg to suggest that a souvenir which may characterize the industries or peculiarities of the consulate will be most acceptable, even though of the smallest degree, or in minute shape, if appropriate and attractive; and it is not desired that consuls should depend upon voluntary contributions. It gives me pleasure, also, to advise that the inauguration of this grand enterprise will not take place until the 15th of December; and, lasting as it does until the 1st of June, 1885, there is ample time for every consul to forward some striking representation; in view of which fact, please ship by freight. I have the honor to be, dear sir, very respectfully yours, etc.,

"CHAS. S. HILL, Representative Department of State."

—And that the petitioner did not receive any other circular or letter upon the same subject. The original of said circular letter is filed in the archives of the consulate at Managua. (3) That pursuant to the suggestion of the above circular letter, the petitioner, in January, 1885, purchased various articles characteristic of the industries and peculiarities of his consulate, of the value of \$72, and paid therefor, which he at once forwarded addressed to Charles S. Hill, representative of the World's Exposition at New Orleans, care of Houghwout Howe, U. S. Despatch Agent, New York, pursuant to previous instructions to that effect. (4) That the articles so purchased were received, and placed under the di-

rection of the department of state in the exposition at New Orleans, and that an award of merit was subsequently presented to the petitioner by said Hill, in the state department, for the exhibit thereof made. (5) That said Hill was duly appointed, and acted as representative of the department of state in the matters concerning the said exposition. (6) That in 1886, upon the petitioner's return from Nicaragua, the bill for the above articles was presented, with his accounts, to Mr. Sinclair, the chief of the consulate bureau, by whom he was referred to said Hill in respect to said purchase; that thereupon his account, with vouchers in triplicate, was made out and delivered to said Hill, as directed by him, by whom the petitioner was told that a check would be sent him for the amount as soon as the deficiency bill had passed; that the appropriation by the act of congress had been exhausted; and that they expected to pass a deficiency bill very shortly; that afterwards, in answer to a demand of payment, the following letter was received from the department of state:

"DEPARTMENT OF STATE.

"WASHINGTON, August 11, 1886.

"*H. H. Leavitt, Esquire, No. 280 Broadway, New York*—SIR: A copy of your letter of the 13th ultimo, relating to the articles furnished by you for the late exposition at New Orleans, has been sent to Mr. Hill, who was the representative of this department at that exposition. I am, sir, your obedient servant,
JOS. D. PORTER, Assistant Secretary."

(7) That by act of July 7, 1884, (23 St. at Large, c. 332, p. 207,) there was an appropriation by congress "to enable the several executive departments * * * to participate in the World's Industrial and Cotton Centennial Exposition to be held at New Orleans," of various sums of money; among others, "for the state department, ten thousand dollars." (8) That when the petitioner's bill was presented for payment, in July or August, 1886, the above appropriation had been exhausted. It does not appear at what time prior thereto the appropriation was exhausted; nor whether at the time the circular letter above mentioned was sent to the petitioner, or was received and acted on by him, the amount of said appropriation had been covered in previous orders.

Upon the foregoing facts, it is to be observed, that the first section of the act of March 3, 1887, gives the court of claims jurisdiction to hear and determine "all claims founded upon * * * any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable." Section 2 confers upon the United States district courts concurrent jurisdiction "as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars;" such causes to "be tried by the court without a jury." Upon the facts above found, it is contended in defense that the circular letter of October 17, 1884, does not purport to direct or authorize consuls to make any purchases
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at the charge of the United States; and, second, that if it does authorize such purchases, it is not binding upon the government, because the department of state had no authority to authorize such a debt to be contracted in the absence of appropriations therefor. Sections 3679 and 3772 of the Revised Statutes in effect prohibit any expenditure or contract in behalf of the government in excess of appropriations therefor, except in the war and navy departments, for specific purposes. *Bradley v. U. S.*, 98 U. S. 104, 112. I cannot doubt that the proper construction of the circular letter of November 17th is that the consuls to whom it was addressed were desired to procure by purchase on account of the United States, to a limited extent, characteristic articles as souvenirs of their respective consulates. The circular says: "It is not desired that the consul should depend upon voluntary contributions." It ends: "Please ship by freight." The preceding paragraph says: "There is ample time; but the appropriation is an act of congress." The suggestion and the request, coming from the department of state, were practically equivalent to a direction or command. The reference to the appropriation as "an act of congress" would be altogether misleading if the circular had been intended by the department to be understood by the consuls as a request to pay for the articles out of their own pockets. Ten thousand dollars had in fact been already appropriated by congress for the especial use of the state department in this matter, as was presumably known to the petitioner. The subsequent treatment of the matter by the department, and by Mr. Hill, as its representative, also shows clearly that the expense of procuring such articles was not designed to be at the consul's personal charge. The expenditure made by the consul was certainly moderate; and it is not claimed to have been in excess of the "suggestion" or intent of the circular. In purchasing the articles the petitioner relied, and, in my judgment, had a right to rely, upon the construction of the circular, above given. Upon this transaction there was, therefore, an implied contract with the government to reimburse him for the amount paid; and the circular itself was also equivalent to a "regulation of an executive department" upon this particular topic, and within the first section of the act above stated, unless the department had no authority to make such a contract, or to issue such a circular at the time it was forwarded to the petitioner.

Counsel for the government contend that not only the sections of the Revised Statutes above referred to, but the various acts of congress authorizing government participation in the exposition, show at every step that the government was not to be bound, and that the various departments had no authority to bind it, beyond the precise sums appropriated. The principle is, doubtless, correct, (*Bradley v. U. S.*, *supra*;) but the proofs, I think, are not sufficient to warrant its application as a bar of the petitioner's recovery in this case.

It is not claimed that the circular of November 17, 1884, and the petitioner's purchase of articles under it, were not properly within the appropriation of \$10,000 for the state department made by the act of July 7th, unless the obligations already contracted were in excess of that sum.

There is no proof, however, as to the amount of obligations contracted by the state department under that appropriation before the circular was forwarded to the petitioner, and acted on by him. Mr. Hill had timely notice of the petitioner's purchase, as appears by his letter as representative of the state department from New Orleans dated February 26, 1885. The things purchased were received, not only without objection, but "with his sincere thanks in behalf of the department." In these circumstances, and in the whole proofs, there is no intimation that the purchase of these articles at that time made the expenditure run up in excess of \$10,000.

The authority to the department was a general authority up to the limit of \$10,000. It was a general agency within that limit, and for the purposes contemplated. The act of congress contemplated and provided for a multitude of acts and expenditures, not in the aggregate exceeding that sum. Whether or not that limit had been previously passed was a matter not possible to be known by the petitioner, and even now scarcely ascertainable by him; but peculiarly within the knowledge of the principal, the defendant here. In such a case, where the authority is general up to an assigned limit, as against a person dealing with the agent in good faith and without means of knowledge, the burden of proof at least should be held to be upon the principal to show that that limit had been passed, if he wishes to deny the authority of the agent upon that ground. Such I think are all the analogies of the law. Inasmuch, also, as sections 3679 and 3772 of the Revised Statutes prohibit any department or public officer from making any expenditure or contract in excess of appropriations, a violation of these provisions of law is not to be presumed; certainly not a violation by the department of state, until the fact affirmatively appears. The petitioner, upon receiving the circular, was in no situation, as above stated, to question the authority of the department to issue it, or to authorize the desired expenditure. It would have been a singular proceeding if, before acting upon the circular, the petitioner should have endeavored to verify the authority of the state department by an inquiry into the number and amount of previous or contemporaneous orders. Such inquiries would be likely to be deemed meddlesome and insubordinate, and followed by speedy removal from office. He had a right to rely upon the presumption that the head of the department was acting within the prescribed limits of his authority. Under such circumstances, when he brings suit for the moneys expended in pursuance of virtual instructions, there is, it seems to me, special reason why the same presumption should prevail, until the contrary appears by proof of facts sufficient to show that, at the time when the orders were given and acted on, the limits of the agent's authority, *i. e.*, the expenditure authorized by congress, had been passed. There is no such proof in this case. The circular and the request to the consul must, therefore, be deemed duly authorized at the time, and binding, as an implied contract with the government. The cases cited, in which the government has been held not bound, were where the appropriation was for a single specific purpose; and the contractor had full knowledge of the limitation.

Curtis v. U. S., 2 Ct. Cl. 144, 152; *Trenton Co. v. U. S.*, 12 Ct. Cl. 147. The fact that the appropriation was found to be exhausted a year and a half afterwards, when the bill and the consul's accounts were presented for payment, does not constitute such proof. If authorized at the time it was issued and acted on, it could not be invalidated by the payment of subsequent charges or expenses to the extent of the appropriation. *Trenton Co. v. U. S.*, 12 Ct. Cl. 147, 159. The mere fact that when the bill was presented for payment there was no appropriation remaining, is, therefore, no bar to the present action. Section 10 of the act of March 3, 1887, provides as follows: "From the date of such final judgment or decree interest shall be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree;" a specific recognition of the fact that a judgment may be rendered, in a proper case, although there is no present appropriation for its payment.

CONCLUSION OF LAW.

Upon the above facts the petitioner is entitled to judgment against the United States for the sum of \$72, and \$14.21 interest, amounting to \$86.21, together with the costs provided by section 15 of the act of March 3, 1887 to be taxed. A stay of 60 days is allowed after service of a copy of this decision on the United States attorney.

SOUTH COVINGTON & C. S. RY. CO. v. GEST.

(Circuit Court, S. D. Ohio, W. D. March 31, 1888.)

1. JUDGMENT—RES ADJUDICATA—WHO CONCLUDED.

The trustee under a mortgage executed by a Kentucky street-railway corporation filed a bill in the chancery court of that state to foreclose. To these proceedings G., who resided in Ohio, and who was the manager and a large stockholder of the company, was made party by a "warning order," and an attorney appointed by the court to defend his interests, according to the laws of Kentucky. Pending suit, G. sold out his interest in the concern, including certain unpaid and overdue coupons secured by the mortgage which he warranted to be a first lien, to a purchaser who bought with the view, known to G. at the time, of bidding in the property and franchise at the foreclosure sale. The purchaser intervened, and set up the assignment from G., who did not appear, save as a witness in behalf of his assignee. The court ruled that the coupons had been paid, and that their holder was not entitled to come in under the mortgage. *Held*, in an action in the federal court in Ohio by the purchaser against G. for damages for breach of warranty, that the Kentucky court, being a court of competent jurisdiction, and the proceeding *in rem*, its finding as to the coupons was *res adjudicata*, and that G. was estopped to set up their validity as a defense to the action.

2. CORPORATIONS—BONDS AND MORTGAGES—COUPONS—PAYMENT.

G. agreed with B., a bondholder, and also the largest stockholder in a street-railway company, to take his holdings if B. would put G. into control. B. thereupon got the company to give him its notes for \$15,000, which was about the amount of its pressing debts, in consideration for which he undertook to pay off the outstanding claims. These were made up in the main

of mortgage coupons, and the understanding was that B. was to hold these coupons, when taken up, as collateral security, and that, as fast as the notes were paid, coupons to a proportionate amount were to be surrendered. G. was then installed as manager, and the notes turned over to him. He raised the money on them, and paid it to B., who then gave him the coupons. Of these coupons—\$18 in number—but 193 belonged to B.'s bonds. The remainder had been paid when presented at the company's office, but they had passed into B.'s hands without the knowledge or consent of the former holders. G. took up the notes for \$15,000 as they fell due, and the company then paid him the difference between their value and that of the coupons in consideration of their surrender, it being agreed that the coupons should thereafter belong to G. absolutely. *Held*, that as against the other bondholders secured by the mortgage, the coupons had been paid, and that G., who had sold them with a warranty that they were a lien under that mortgage, was liable in damages to the purchaser for a breach thereof.

3. SAME—CONFUSION OF ACCOUNTS.

After G. had gotten control of the company, as indicated, he chose his own directors, in the main from his own family and his clerks, and exercised absolute and exclusive authority over its finances and business for many years. He kept no separate account in bank of the company's funds, but deposited all money earned by it to his own individual account, and paid coupons and current bills that were presented for settlement in cash or in checks drawn upon the same account. *Held*, in the absence of proof that the moneys used to take up the coupons were individual funds, and in view of the fact that those who presented them for payment did so under the belief that they were to be canceled, that the coupons had been paid, and that G., who had sold them with a warranty that they were a lien under the mortgage executed to secure the bonds from which they were cut, was liable in damages to the purchaser for a breach thereof.

4. SAME—ADVANCES BY PRESIDENT—RESOLUTIONS OF DIRECTORS.

The president of a street-railway company, who was practically its sole owner, sold certain of its mortgage coupons under a warranty that they were unpaid. As a matter of fact they had been paid by the corporation, but the president, claiming to have advanced the money to pay them out of his own funds, procured the passage of a resolution by the directors who were controlled by him, subrogating him to the rights of the original holders. *Held*, in an action for breach of the warranty, that the resolution was no defense; its recitals being false, and entitled to no more weight than the statements of the president himself to the same effect.

5. JUDGMENT—ASSIGNMENT—SALE.

An agreement for the sale of the vendor's interest in a street-railway company recited that he "hereby sells and agrees to deliver * * * the following securities: Three judgments against said company for \$4,708.85, \$1,283.12, and \$1,029.53, respectively, which have been paid by him, and which he now holds against the company," reciting the facts as to said judgments fully and correctly. The first two amounts represented money which the vendor, who was largely interested in the company, had paid a surety on the company's appeal-bond, who had been compelled to make them good. The surety had thereupon assigned and transferred to the vendor "all right, title, and benefit in and to the said sum." The last amount was a partial payment made by the vendor on a judgment against the company. The agreement contained no warranty as to these judgments. *Held*, that the fact that the judgments had not been entered to the use of the vendor was not ground for recovery of damages by the vendee.

6. SALE—BREACH OF WARRANTY—DAMAGES.

In an action for a breach of warranty in the sale of mortgage coupons, where there is no evidence as to the market value of the coupons at the date of sale, the price paid by the purchaser will be considered the market price, and that is the measure of damages.

7. SAME—DECEIT—DAMAGES.

In an action to recover damages for fraudulent misrepresentation and concealment of material facts in the sale of mortgage coupons, the price paid by the purchaser with interest thereon is the measure of damages, where there is no evidence as to the market value of the coupons at the time of sale.

8. LIMITATION OF ACTIONS—EXCEPTIONS—FRAUD.

In Ohio, "limitations" is not a good plea to an action to recover damages for fraudulent misrepresentation and concealment of material facts in the sale of mortgage coupons, where the suit was commenced within four years after the fraud was discovered.

At Law.

Simrall & Mack and John C. Benton, for plaintiff.

George Hoadly and Remelin & Remelin, for defendant.

JACKSON, J. This is a suit to recover damages for breach of warranty and for fraudulent misrepresentations by defendant in the sale to plaintiff of 768 coupons of the first mortgage bonds of the Covington Street-Railway Company, and of certain judgments against said company. The intervention of a jury having been waived, the cause was tried by the court under a stipulation of parties, made part of the record, which requires the court to make a special finding of the facts, on which its judgment shall be rendered. In conformity with that requirement, the court, after a careful examination of the evidence, finds the material and relevant facts to be as follows, viz.:

First. After negotiations commenced in the summer of 1881, and continued through the fall of that year, a certain contract was completed and executed between the parties therein named as follows:

"This agreement, made and entered into this 17th day of February, 1882, by and between Erasmus Gest, party of the first part, Anthony D. Bulloen, E. F. Abbott, John A. Williamson, and John G. Isham, of the second part, and William A. Goodman, of the third part: Witnesseth, that the party of the first part hereby sells and agrees to deliver, as hereinafter specified, to the party of the second part, the following securities: (1) 1,677 shares (which said Gest guarantees is the majority) of the capital stock of the Covington Street-Railway Company, each of the par value of one hundred dollars. (2) 768 past due and unpaid coupons cut from the first mortgage bonds of said company, each for thirty-five dollars. Some of these coupons, having been mislaid, are to be delivered with the others as soon as found, and the said Gest agrees to make a thorough search for them at once. In case of the failure to find them, he assigns his right to collect them, and guarantees that such right is perfect, and agrees to indemnify the party of the second part against any liability to their production and claim of ownership by others, and to furnish them sufficient evidence of his ownership of the same, by his own oath or otherwise, at any time upon demand. The amount of such mislaid coupons does not exceed \$3,500, exclusive of interest. The total amount of accrued interest on the 768 coupons is computed approximately at about \$3,159 on the 1st of October, 1881. (3) Decree against Malcolm McDowell and others, for purchase money of stable lot, and for sale thereof, which said Gest now holds against the company, amounting in all to \$2,551.05, upon which interest to the 1st of October, 1881, to-wit, \$1,652.35, being added, makes the amount of the decree on that date \$4,203.40. (4) Lot on Pike street, near Lewisburgh, purchased at the cost of five hundred dollars from one Perkins. (5) 78 mules and horses now in use upon the Covington Street-Railway, or in the stables of said company; original cost being \$10,212. (6) Judgment in favor of Amos Shinkle, trustee, against said company, on the past due coupons, case No. 1,397, Kenton chancery court, for \$1,282.12, which has been paid by said Gest, and which he now holds against the company,

which, with interest to October 1, 1881, amounts on that day to \$1,802.95. (7) Judgment in favor of the city of Covington against said company for \$1,029.53, with interest from June 25, 1881, which has been paid by said Gest, and is now held by him against said company. (8) Judgment in favor of Amos Shinkle, trustee, with interest from November 18, 1881, \$4,703.35, against said company, which has been paid by said Gest, and is now held by him against said company. (9) Claim of E. Gest against the Covington Street-Railway Company for that part of moneys advanced by said Gest in behalf of the company, and paid in settlement of license claim with the city solicitor, Clement Bates, which was fairly chargeable to the Covington Street-Railway Company, estimated approximately at the sum of \$1,200. (10) Bonds of the Covington Street-Railway Company, secured by mortgage to A. S. Winslow, trustee; principal \$40,000, with all interest thereon, none having been paid. These bonds are transferred without recourse upon Erasmus Gest. (11) Cash due Erasmus Gest on current account January 1, 1882, \$1,922.48. The foregoing property is to be transferred and delivered to William A. Goodman on the 1st day of March, 1882, or on the first day thereafter that said Gest's counsel, George Hoadly, may be in the city of Cincinnati, able to attend to business, if said Gest, on account of the absence of said counsel on said 1st day of March, shall desire to postpone said delivery until the return of said counsel.

"In consideration of the premises, said parties of the second part agree to pay to said Gest in money on March 10, 1882, the sum of thirty-five thousand dollars, less whatever part, if any, of the said sum of \$1,922.48 said Covington Street-Railway Company may have repaid to said Gest in the course of its current transactions with him before or on March 1, 1882. In further consideration of the premises, said parties of the second part agree that immediately after the adjournment of the present session of the Kentucky legislature they will cause all the property, real and personal, wheresoever situated, and of whatsoever composed, of the Newport Street-Railway Company to be conveyed to the South Covington & Cincinnati Street-Railway Company, free from all debts and incumbrances, and by a perfect title, except to the extent of fifty thousand dollars bonded debt outstanding against the same, and that, at the time of such sale and conveyance, the South Covington & Cincinnati Street-Railway Company shall execute and deliver to William A. Goodman, as trustee, its deed of mortgage, properly executed and recorded, conveying by a perfect title, except as aforesaid, all its property, real and personal, wheresoever situated, and of whatsoever composed, including such property so acquired from said Newport Street-Railway Company, in trust to secure the punctual payment of the principal and interest of its two hundred and fifty bonds, for the principal sum of one thousand dollars each, dated March, A.D. nineteen hundred and twelve, (1912;) said bond and mortgage to be in a form satisfactory to the counsel of said Gest. Of these bonds, fifty, with the coupons thereon, shall be retained by said Goodman, trustee, to be exchanged from time to time, and so as to bring about the extinguishment and cancellation of the present mortgage debt of the Newport Street-Railway Company, which said parties of the second part agree to procure to be done as soon as practicable. Twenty-five of said bonds, with the coupons thereon, are to be delivered to said Erasmus Gest, and the remaining one hundred and seventy-five of said bonds, together with all the securities transferred by said Erasmus Gest, are to be held by said William A. Goodman, trustee, in escrow, upon the following terms and conditions, viz.: The whole of said bonds, except as hereinafter stated, and of said securities, are to be held by said Goodman—(1) As security for the payment to said Erasmus Gest of the sum of thirty-five thousand dollars, with interest from the 1st day of March, 1882, within six months from the day of the adjournment of the Kentucky legislature; but

the said Goodman may permit said horses and mules to be used by said purchasers, they exercising ordinary diligence in the care thereof. (2) Upon the completion of such payment to said Gest of said sum of thirty-five thousand dollars and interest, the residue of said bonds, except as hereinafter stated, and all of said securities so transferred by said Gest, are to be transferred by said Goodman to the South Covington & Cincinnati Street-Railway Company as its absolute property. (3) The parties of the second part having given, contemporaneously with the execution of this paper, to the said Gest, an option for the exchange of other coupons not held by him, secured by the first mortgage of the Covington Street-Railway Company for cash and bonds of the South Covington and Cincinnati Street-Railway Company, as in said agreement of option is more specifically described, it is agreed that, notwithstanding the provisions aforesaid for the security of said Gest, said Goodman may deliver out of said one hundred and seventy-five bonds any which may be required by the terms of said option, in case the same shall be exercised in whole or in part."

"In consideration of the premises said Gest agrees and undertakes that the property of the Covington Street-Railway Company, so far as he knows or believes, is free from indebtedness, except that transferred by him by the terms of this contract, and as follows: (1) First mortgage for the principal sum of \$100,000; also coupons, including those due January 1, 1882, and including interest to that date on the past due coupons to the approximate amount, believed by him to be correct, of thirty-five thousand five hundred and ninety-eight dollars (\$35,598.) (2) A disputed claim pending in the court of appeals, on behalf of the city of Covington for about six hundred dollars, against which said parties of the second part are to protect the surety for said company. (3) A claim pending on appeal in the court of appeals, for a trustee's fee,—about one hundred dollars,—against which said parties of the second part are to protect the surety of said company. (4) Part of the first item above—\$35,598—is embraced in a suit recently brought by Charles W. West, in the circuit court in Kenton county, which is not additional to the said first item. (5) Whatever court costs may be due upon the lawsuits pending or determined in Ohio and Kentucky in which the said Covington Street-Railway Company is or has been engaged. (6) Whatever claims lawfully exist, all of which are disputed by said Gest, in behalf of the city of Cincinnati, or of the city of Covington. (7) Amounts due on current account to the Cincinnati Street-Railway Company, or for supplies, which said Gest agrees is less than the amounts due to the Covington Street-Railway Company from the Newport Street-Railway Company, the Cincinnati Street-Railway Company, and the amount of supplies on hand. (8) Said Gest will pay all sums due from the Covington Street-Railway Company to its lawyers in Kentucky and Ohio for their services and expenses up to March 1, 1882, and the several pending litigations in which said company is now engaged shall thereafter be controlled by the party of the second part free from any claim for lawyers' fees and expenses up to that day, but without recourse upon said Gest for any lawyers' fees or other expenses after said day. Said William A. Goodman agrees to accept the trusts aforesaid, and to perform the duties thereby required, together with those imposed upon him by this contract.

"In witness whereof the said parties herein above first named have hereunto, and to a duplicate hereof, set their hands and seals the day and date hereinabove first written.

[Signed]

"E. GEST.

[Seal.]

W. A. GOODMAN.

[Seal.]

"E. F. ABBOTT.

[Seal.]

JOHN A. WILLIAMSON.

[Seal.]

"A. D. BULLOCK.

[Seal.]

JOHN G. ISHAM.

[Seal.]

"In presence of GEO. HOADLY."

While the negotiations, which terminated in said contract of February 17, 1882, were pending, Gest sent to the agent of plaintiff a list of the property, rights, and interests which he proposed to sell, fixing a valuation on each item thereof, which together aggregated about or a little over \$90,000. The sale and purchase were of specific articles or specially designated and described property, on each item of which a separate and distinct valuation was placed; and by the terms of the contract there was to be paid for the 768 coupons of \$35 each and interest thereon, the sum of \$35,039, and for the three judgments in question the sum of \$7,079.52. No valuation was placed upon the \$40,000 bonds of the company, referred to in the tenth claim of the contract as the "Winslow Mortgage Bonds." They were never in fact issued by the company, and did not belong to said Gest, nor were they sold by him. He held them for the company, and simply turned them over for the protection of the purchasers against the accident or contingency of their getting into the hands of innocent holders.

Second. The evidence established, and the court so finds, the fact that in this contract with and purchase from said Gest, the said Abbott, Williamson, Bullock, and Isham were acting as the agents and for the benefit of the South Covington & Cincinnati Street-Railway Company, which was the real principal in the transaction, and that this was known to and understood by said Gest. Said contract was fully performed by said purchasers, the South Covington & Cincinnati Street-Railway Company, (except in one particular, relating to the indemnity of a surety on an appeal-bond of the Covington Street-Railway Company, which Gest subsequently paid, and which he sets up as an offset or counter-claim in connection with a claim for \$800 on past due coupons cut from bonds issued by plaintiff.) Said Gest accepted this performance by and from the South Covington & Cincinnati Street-Railway Company. The court accordingly finds that the plaintiff, as the real principal in said contract, has the right to maintain this suit, and in so doing is not asserting a derivative right acquired by transfer or assignment from said Abbott, Williamson, Bullock, and Isham, as claimed by defendant.

Third. Prior to the execution of said contract, Amos Shinkle, the trustee under the mortgage made by the Covington Street-Railway Company in 1867, to secure its first mortgage bonds and interest thereon as the same matured semi-annually on January 1st and July 1st each year after their issuance, had in December, 1881, at the instance of certain holders of past due coupons, instituted a foreclosure suit in the chancery court of Kenton county, Ky., against said Covington Street-Railway Company, which was a corporation chartered and organized under the laws of Kentucky, was located in the city of Covington, and was invested with full authority to issue its bonds, and secure their payment by mortgage upon its property and franchises. The bonds issued by it in 1867 were 100 of \$1,000 each, with interest warrants or coupons attached, at the rate of 7 per cent. per annum, payable semi-annually on above dates at the Bank of America, New York. Said E. Gest, together with all other

known and unknown holders of first mortgage bonds or coupons of said company, who were or might be entitled to share in the proceeds of the mortgaged property, were made defendants in said foreclosure proceedings. Gest, being a non-resident of Kentucky, residing at Cincinnati, Ohio, was not personally served with process, but under and in conformity to the laws of Kentucky the court made a "warning order" as to him, and appointed an attorney to represent him and his interests in the suit, and he was duly notified on or about December 3 or 4, 1881, of the proceeding and of the appointment by the court of an attorney to represent him, but he took no steps in relation to the suit. It was fully understood by said Gest and by the representatives of the South Covington & Cincinnati Street-Railway Company, with whom he was negotiating said sale of his interests in said Covington Street-Railway Company, that this suit by the trustee, Shinkle, would result in a foreclosure of the latter's mortgage, and the sale of its property and franchises. It was also understood by said Gest that the object and purpose of the South Covington and Cincinnati Street-Railway Company in purchasing his 768 coupons "as past due and unpaid coupons cut from the first mortgage bonds" of said company, then being proceeded against, was to obtain and secure as many and as large an amount of liens on the mortgaged property as possible (with the view and to the end of becoming the purchasers thereof at the foreclosure sale when made.) This was also the object and purpose in buying the three judgments included in the contract, two of which were founded or based upon past due coupons. After acquiring said 768 coupons and judgments under the contract of February 17, 1882, the South Covington & Cincinnati Street-Railway Company, in proper time and manner, as the assignee of said Gest, duly intervened in said foreclosure proceedings, and set up its rights as a lien claimant by virtue of said coupons and judgments so bought of E. Gest. The holders of other bonds and unpaid coupons contested the validity of said liens as against the property or themselves. Said E. Gest was examined as a witness on behalf of the South Covington & Cincinnati Street-Railway Company, and in support of its claim to an equality of lien on the mortgage property with other holders of bonds and coupons. He testified as to his connection with the mortgagor company, and generally as to how he had acquired said 768 coupons and judgments. Other testimony was taken on the subject, and the special commissioner to whom the matter was referred, on November 9, 1883, filed his report in the cause, to the effect that said judgments and said 768 coupons were not valid and concurrent liens on the mortgaged premises with the bonds and coupons held by other parties to the cause, and said report was duly confirmed by the court. The mortgage was duly foreclosed, and the proceeds of sale were distributed *pro rata* on the bonds and coupons recognized and declared liens by the court, to the exclusion of said 768 coupons and judgments sold by said Gest to the South Covington & Cincinnati Street-Railway Company. Gest's testimony in that cause first disclosed to the plaintiff and its agents the manner in which he had obtained the possession of said 768 coupons.

Fourth. Pending the negotiations for their purchase, he had not informed Williamson, Abbott, Bullock, and Isham or any agent of plaintiff, how he had acquired said coupons. He stated that no questions were asked him on that subject; that no necessity arose for his telling; and that "for me to have told him [Williamson] would have been to obtrude upon him something that would not suggest itself to me, and wholly unnecessary." He represented to the agents of the purchaser during the pendency of the negotiations for their sale and purchase that they were valid and unpaid obligations of the Covington Street-Railway Company; that they were the coupons of the first mortgage bonds of the company, and that they were the same kind of liens as were the first mortgage bonds. When these representations were made, on which plaintiff relied, and closed the purchase, with the view and for the purpose of enforcing them as liens on the mortgaged property,—which purpose was known to the defendant,—the said Gest, as he now states "really didn't believe that they were a first lien," but were only a valid indebtedness, "good in common with any other floating debt of the company." The fact is established that he withheld for the purchaser the information on which this belief as to their not being first liens was based, and which proved to be well founded where the effort was made to enforce them as such; and that, while suppressing this important fact, known to himself, but not to the buyer, he made affirmative representations, not merely as to their validity as a debt against the company, but as to their being unpaid coupons, and having the same kind of lien as the first mortgage bonds. The court finds that these representations were made and were untrue; that they misled the purchaser, and formed an inducement to his purchase; that said Gest did not believe said coupons were first liens, or any liens, upon the mortgaged premises; that he was fully aware of the facts which deprived them of their lien right as against other holders of bonds and unpaid coupons; and that, in the concealment of these facts, and in the making of representations that they were first liens, contrary to his belief, he committed a fraud upon the purchaser. This fraud was not discovered by the plaintiff until the fall of 1883, when the testimony of said Gest and others was taken in the foreclosure proceeding. The court further finds that the description of the 768 coupons in item second of the contract as "past due and unpaid coupons cut from the first mortgage bonds of said company," read in the light of the surrounding circumstances, and the object of their purchase, constituted a warranty that they held the same position towards the company and the mortgaged property as other outstanding overdue coupons of said bonds, and stood upon the same footing in respect to the lien of the mortgage made to secure their payment. The plaintiff understood the representation as meaning that these "unpaid coupons cut from the first mortgage bonds" were of the character that entitled them to share equally with all others in the security provided by the mortgage. The defendant knew, or had every reason to suppose, that the plaintiff or its agents understood the terms in that sense. If this language was of doubtful import, the court would give to it that construction and meaning which de-

defendant knew plaintiff placed upon it, under the well-settled rule that, where the language of a promisor or vendor may be understood in more senses than one, it is to be intended in the sense in which he has reason to suppose it was understood by the other contracting party. Whether given words are used in an enlarged or a restricted sense, other things being equal, that construction should be adopted which is most beneficial to the party acting upon them. Every intendment is to be made against a construction of a contract which would enable one party to entrap another, or create a snare. *White v. Hoyt*, 73 N. Y. 505; *Hoffman v. Insurance Co.*, 32 N. Y. 405; *Potter v. Berthelet*, 20 Fed. Rep. 240; and *Smeltzer v. White*, 92 U. S. 395. The court finds that said 768 coupons were not unpaid coupons entitled to share equally with other past due coupons in the mortgage security; that, as against other bonds and coupons outstanding, they constitute no lien upon the property and franchises mortgaged; and that they were, when sold by defendant, and are now, wholly worthless, and of no value as lien securities against the Covington Street-Railway Company, either to plaintiff or any one.

These facts are established both by the decree of said Kenton chancery court denying the right to share in the proceeds of the mortgaged property, on which the court held they were not liens, and by the evidence in the present suit.

1. As to the foreclosure proceedings and decrees therein. The chancery court of Kenton county, Ky., had full and complete jurisdiction of the subject-matter of the suit, which sought no personal decree against said Gest, who was made a party defendant, and duly notified of the proceedings, and of the fact that the court had, in conformity to law, appointed an attorney to represent him and his interests in the mortgaged property. In such foreclosure suits, which are in the nature of proceedings *in rem*, the priority of liens is a proper matter to be settled by the court. Adverse rights between co-defendants may be determined in such cases by the court, and a party who had an opportunity to assert his rights will be bound by the decree. *Corcoran v. Canal Co.*, 94 U. S. 741. Gest, having been made a defendant, had the right to make defense, file pleadings, examine and cross-examine witnesses, and appeal from the judgment of the court relating to and affecting his interests in the subject-matter. He was actually examined as a witness in the cause in support of the validity or concurrent lien of coupons he had sold and warranted to plaintiff as first mortgage liens, and which he knew were then being contested and disputed by other lienholders. He was in complete privity with the proceedings,—was fully represented therein by attorney duly appointed, and by his assignee, who purchased *pendente lite*, and then intervened, set up and asserted *bona fide*, so far as the record discloses, the very rights and interests which said Gest had claimed and sold. Under such circumstances Gest is not to be regarded as a stranger to the cause. Being made a defendant, being directly interested in the subject-matter of the suit so far as related to the liens of the coupons he held at the date of its commencement, and thereafter sold with warranty, having full knowledge of its pendency, and knowing that the lien right

or claim of his vendee was disputed, it would seem that, under the principle laid down in *Robbins v. Chicago*, 4 Wall. 657, he should be concluded by the decree in that cause on the the question as to whether said 768 coupons were unpaid or constituted valid liens on the mortgaged property of equal rank with other past due and unpaid coupons. The principles announced in *Pennoyer v. Neff*, 95 U. S. 714, are not in conflict with this conclusion.

But aside from the decree in that foreclosure proceedings, and assuming that the action of the court in excluding said 768 coupons from participation in the mortgaged property is not conclusive of the question as to their not being unpaid or non-lien coupons, the evidence in the present case on that subject establishes the fact that they were not acquired, held, and owned by said Gest in a way to entitle him or those deriving title from him to claim or assert them as valid and subsisting liens on the mortgaged property of the company as against other holders of first mortgage bonds and unpaid coupons thereof. The court finds that 313 of said coupons were obtained by said Gest in the manner and under the circumstances following, viz.: In September, 1870, C. S. Bushnell, who owned a majority of the Covington Street-Railway Company's stock, and 48 of its first mortgage bonds, held 192 unpaid coupons belonging to his own bonds, and 110 coupons which had been taken up by C. R. Russell, the secretary and treasurer of the company, with funds advanced by said Bushnell. These 110 coupons were not sold or transferred by the holder, who presented them at the company's office for payment, and received the money on them from its said treasurer without any knowledge or information, so far as the record shows, and as most of them swore, that said Russell was assuming to take them up for said Bushnell. Aside from his own 192 coupons there were then outstanding for the years 1869 and 1870 only 11 coupons, which matured July 1, 1870, held by C. H. Kellogg. The company at this time was indebted to M. M. Benton in the sum of \$150, and to A. L. Greer \$1,389.36, being a balance on lot purchased of him, and which he was then seeking to enforce by said suit in the circuit court of Kenton county, Ky. In this condition of affairs said Bushnell and the defendant entered into an arrangement by which it was agreed that Gest should purchase Bushnell's stock, (about 1,677 shares out of a total of 2,500,) provided it could be so arranged that said Gest should have the entire and absolute control of the company, and the benefit of such paper as Bushnell could obtain from the company with which to take up its debts then outstanding. Bushnell thereupon proposed to the company, which he really controlled, that he would provide for its outstanding liabilities, if the company execute and deliver to him its three negotiable promissory notes for \$5,000, each, payable in two, three, and four years, respectively, and would appoint Erasmus Gest its superintendent, treasurer, and general managing agent. The company accepted this proposition October 3, 1870, and on the same day, by formal resolutions of its board of directors, appointed said Gest its superintendent, treasurer, general managing agent, and defined his duties as follows:

"Said E. Gest is to have entire control of the receipts and disbursements of the moneys of the company, as well as general management of the road, and while so acting it shall be his duty to take proper care of all the property placed under his care and in his control; from time to time to employ suitable and capable persons to discharge all the duties necessary for the aforesaid case and the economical operating of the railroad of said company. He shall keep accurate accounts of all moneys by him or those under him and of all the moneys expended by him on account of the operating of said road, and make full report thereof in writing to the board of directors of said company as often as once every four months. And he shall hold any net surplus, after discharging liabilities, including coupon interest as it falls due, subject to the order of the board. Said notes (for \$5,000 each) to be delivered upon the delivery of said Bushnell to this company an agreement to take up and hold the coupons and floating debt as collateral to said notes, and he shall surrender the evidences of the payment of the floating debt as fast as the said notes shall be paid off, and shall deliver coupons in proportion as fast as paid off. The agreement of the said Bushnell shall specify the debts assumed to be paid and the amount of each debt."

The company executed its three notes for \$5,000 each at two, three, and four years, bearing 7 per cent. interest, payable to its own order, which were properly indorsed and delivered to said Bushnell, who contemporaneously therewith, executed and delivered to the company his written agreement and undertaking, as follows:

"Know all men by these presents, that on this 3d day of October, A. D. 1870, the Covington Street-Railway Company has executed three (3) notes of five thousand dollars (\$5,000) each, payable to its own order, and indorsed by said company, and due respectively in two, three, and four (2, 3, and 4) years from this date, bearing seven (7) per cent. per annum interest, payable semi-annually at the Bank of America in New York city, and delivered the same to C. S. Bushnell, of New Haven, in the state of Connecticut, in pursuance of a proposition to the said railway company by said C. S. Bushnell, and accepted by said company at a meeting of its board of directors this day held, whereby said Bushnell proposes to take up and hold for redemption fifteen thousand dollars (\$15,000) of the present indebtedness of said railway company, to be surrendered to said company from time to time as said notes are paid off.

"In pursuance of said agreement, and in consideration of the execution and delivery to him of said three (3) notes, said C. S. Bushnell now hereby agrees and binds himself with and to said street-railway company at once to pay off and take up the following debts of said railway company to-wit: 65 coupons due January 1, 1869; 100 coupons due July 1, 1869; 48 coupons due January 1, 1870; 100 coupons due July 1, 1870; 313 coupons in all of \$35 each, and the interest now due on said coupons since their maturity; and also a debt now sued upon in the Kenton circuit court of Covington, Ky., by A. L. Greer, amounting to the sum of \$1,889.36, and also to Mr. M. M. Benton the sum of \$150,—in all amounting, by calculation, this day to the sum of fifteen thousand dollars (\$15,000.) Said Bushnell is to be allowed to hold said coupons or portions of them as hereinafter set out as collateral security for the payment of said notes, but said coupons are to be surrendered as follows: Said Bushnell binds himself to surrender to said company, upon payment of the first notes aforesaid, evidence of the payment of the said debts and coupons amounting to the sum of five thousand dollars, (\$5,000,) and upon the payment of the second note, others of the said coupons amounting to the sum of \$5,000, and upon the payment of the third note, the entire bal-

ance of said coupons, in all said debt and coupons amounting as of this date to the sum of fifteen thousand dollars (\$15,000.)

"In witness whereof, I, the said C. S. Bushnell, have hereunto set my hand and seal this 3d day of October, A. D. 1870."

When said contract was executed, and the notes delivered, which appears to have been done on October 3, 1870, the following entry was made on the company journal:

"Sundries to bills payable, \$15,000; real-estate account, \$1,389.86; expense account, \$150; past due coupons account, \$13,460.64. Gave C. S. Bushnell three notes at 2, 3, and 4 years from October 3, 1870, payable to the company's order, and indorsed in blank by the president and secretary, for \$5,000; the notes drawing interest at 7 per cent. per annum, payable semi-annually at the Bank of America, New York; proceeds to be applied as above."

In pursuance of their previous understanding and agreement, the notes of \$5,000 each so issued by the company and delivered to Bushnell, were then indorsed by said Gest individually, and used in raising the \$15,000, which formed the consideration he was to pay Bushnell for his stock and interest in the company. On the 14th of October, 1870, said Bushnell, through C. R. Russell, the late secretary and treasurer of the company, turned over to said Gest 254 of the aforesaid coupons, gave a due bill for the 48 coupons of January 1, 1869, which were then in the east, and also gave him \$385 in money or check to take up the 11 Kellogg coupons of July 1, 1870, making the 313 coupons which by the contract Bushnell was to take up and pay off. The 11 coupons of July 1, 1870, were paid said Kellogg by the proper officers of the company, and regularly entered upon the books of the company as paid by it. These 11 coupons were never sold or assigned by Kellogg, nor were they ever purchased either by Bushnell or Gest. These 313 coupons for the years 1869 and 1870 were not sold by Bushnell to E. Gest, but were turned over to him under this agreement, as the party who was to take up said three notes for \$5,000 as they matured. Gest was fully informed of the contract between the company and said Bushnell, under and by the terms of which the proceeds of the notes were to be applied in taking up and paying off the company's outstanding liabilities, including said 313 coupons. These notes were subsequently, at their respective maturity, taken up by said Gest. The interest thereon was paid by the company; and, after being taken up by said Gest, he collected from the company interest thereon at the rate of 8, 9, and 10 per cent. semi-annually until October 31, 1876, when an agreement between said Gest and the company was made, as follows:

"In the matter of the indebtedness of the company to C. S. Bushnell in the sum of \$15,000 evidenced by three promissory notes of \$5,000 each, dated October 3, 1870, and payable in one, two, and three years from their dates respectively, it was agreed that the holder of said notes should surrender them up to the company for cancellation, in consideration of the payment to him by the company of the sum of twenty-five hundred and five dollars and sixty-four cents in cash, being the difference between the value of the said notes and the securities heretofore held by him as collaterals for the payment of

said notes, (said notes intended to cover the floating debt of the company at that time;) said securities being 313 coupons of the company's bonds of \$35 each, amounting to ten thousand nine hundred and fifty-five dollars, (\$10,955;) also a note made to A. L. Greer, secured by mortgage on the stable lot for thirteen hundred and eighty-nine 86-100 dollars; and the Benton claim against the company of one hundred and fifty dollars, paid by the company. Said coupons and mortgage claimed to be held by him absolutely from this date, and not collaterally as heretofore. The interest on these 313 coupons paid to this date."

The said notes were thereupon surrendered by said Gest to the company, and the 313 coupons were thereafter claimed by him as his absolute property. While said notes were outstanding, and before their maturity, it is clear that the 313 coupons in the hands of said Gest, and obtained under the circumstances stated, constituted no liability against the company, much less a lien on the mortgaged property as against other holders of its first mortgage bonds or coupons thereof. Bushnell had realized money on the notes, nor is it at all material that the money thus realized formed to some extent or entirety the consideration for the sale of his stock, as between him and said Gest; and this money in his hands was applicable to the payment of said 313 coupons which he undertook to pay off with the proceeds thereof. With the receipt of that money said coupons, as between him and the company, were paid. The coupons were not turned over to the party or parties who purchased or discounted and held the notes before maturity, but they were delivered up to E. Gest, who was then the sole managing and financial agent of the company, and the proper officer to receive and cancel the same as no longer subsisting liabilities of the company. When therefore, on October 31, 1876, he made the arrangement with the company to surrender the notes and hold the coupons absolutely, they constituted nothing more than newly-issued evidences of debt. Other holders of first mortgage bonds and outstanding coupons due or to become due could not be affected by the substitution, nor could said coupons be reinvested with the lien, which had once ceased, even for a moment, to exist. If the company had placed in Bushnell's hands \$15,000 in cash, to apply as he contracted to apply the proceeds of the company's negotiable notes, and the transaction had been conducted precisely as it was, there could be no doubt that when the coupons to be taken up with such funds came into his hands or the hands of Gest, they should *eo instante* be regarded as paid. The giving of negotiable paper on which to raise such funds—which paper is used by Bushnell without incurring any personal liability therefor or thereon—in no way changes the principle, or distinguishes the case from that of placing actual money in his hands. The court accordingly finds as a fact established by the evidence that said 313 coupons were not unpaid coupons of the first mortgage bonds of said company; that they constituted no lien upon its property and franchises mortgaged to secure said bonds and interest, especially against other holders of bonds and unpaid coupons; and that in their sale by defendant to plaintiff they were not only warranted to be unpaid and subsisting liens, but were so represented to plaintiff's agents during the negotiations

for their purchase, contrary to defendant's actual belief under a knowledge of the facts which fully justified his opinion, and which were not disclosed.

The remaining 455 coupons, included in the 768 sold to plaintiff under the contract of February 17, 1882, are fully identified by the agreement of parties, (pages 27 and 28 of the record,) showing their respective numbers, the particular bonds from which they were cut, and the several dates at which they matured. They were obtained by said Gest under the following circumstances, viz.: After acquiring a majority of the company stock, Gest selected his own directory, which consisted mainly of his brother, his nephew, and his clerks; took practically the exclusive control of the company, and exercised absolute authority over its business and finances. During his connection with the company as superintendent and sole managing and financial agent,—extending from October, 1870, to February 17, 1882, inclusive,—earnings of the road to the amount of \$682,996.91 were received by him. These moneys were in no instance and at no time deposited to the credit of the company, or to the credit of said Gest as agent or treasurer of the company, but were treated as his own funds; were deposited to his individual credit just as other private funds; and when needed to meet the bills and debts of the company were drawn and paid out on his individual checks. Coupons and current bills for supplies furnished the company were paid in the same manner by his individual checks on the deposits in bank there made, which included both his individual funds and those derived from the receipts and earnings of the company. The earnings of the company were received, used, and appropriated by said Gest as being entirely his own, and were checked out and applied by him as he deemed proper. He took charge of the receipts and earnings of the company, blended them with his private funds, kept them in the hands of his private clerks, and on deposit in bank as his individual and absolute moneys, and dealt with them as such. The coupons maturing from and after July 1, 1870, to July, 1874, inclusive, were taken up, sometimes with cash paid therefor by Gest's clerk into whose hands the company's daily earnings first came, and in some instances by the individual checks of said Gest. These coupons were surrendered to the company and canceled, and are not in controversy in this case. These coupons were presented and paid at the company's office in Cincinnati. Certain coupons were presented for payment in 1871 at the Bank of America in New York, and protested for non-payment, no funds being then or afterwards placed there to meet said coupons; and thereafter said Gest, as the officer of the company, charged with the duty of applying the company's receipts to the payment of its liabilities, including past due coupons, gave notice to holders of bonds to present their coupons for payment after maturing at the company's office in Cincinnati, and in pursuance of this direction they were duly presented there. In 1873 several holders of coupons—Bullock, Lewis, Cook, Sherlock, and Kellogg—refused to transfer their coupons, or to receive the money therefor and surrender them, except upon the condition that they were canceled on the company's books. On March 13,

1873, Kellogg wrote from New York to J. J. Gest, the agent, and brother of E. Gest, and secretary of the company, as follows:

"DR. SIR: Yours of the 6th inst., after detention in Covington,—then in Madison,—at length reached me here this morning. In response I can only say that myself together with other Cincinnati bondholders have placed our coupons in the hands of Jno. R. Sage, Esq., for settlement or collection, which step was taken with a view to cancel, instead of transferring, the coupons. I refer you to Mr. Sage, with whom you can no doubt make satisfactory arrangements. Hereafter I can regularly send you coupons through bank, and hope that our future business relations may be mutually pleasant.

[Signed]

"CHARLES H. KELLOGG."

The coupons were accordingly taken up, canceled, and handed over to the company by said Gest or his clerk, Fuller. These coupons, maturing after July, 1870, and before January 1, 1875, Gest claims to have purchased from the holders thereof, and to have been by him surrendered to the company from time to time, as it was in funds to take them up. This claim is not supported by the evidence, nor by the contemporaneous entries upon the books of the company, or the annual reports of said Gest. On the contrary, the fact is fully established that they were never sold to him, but were, in the first instance, paid directly to the holders thereof, who surrendered them to the company. Between January 1, 1875, and February 17, 1882, past due coupons to the number of 455 were presented for payment at the company's office in Cincinnati, and were taken up by said Gest or his clerks in some instances with cash and in others with his individual checks on banks in which he had made the commingled deposit of his own and the company's funds, in the same way that the coupons maturing before January 1, 1875, had been paid and taken up. The evidence establishes the fact that these 455 coupons were in no instance sold or transferred by the several holders thereof to said Gest, nor were they aware that he was buying or claiming to be the purchaser of them. The holders in every instance presented them for payment, and when they received the money on and for them, supposed they were paid and taken up by the company. They neither knew or had reason to know or believe that said Gest was taking up and holding said coupons on or for his individual account. Gest never so informed them, and there was nothing brought to their notice during the period of said transaction from which they should reasonably have inferred that the coupons were being bought by Gest rather than paid by the company. The funds used in taking up these 455 coupons, whether by cash or by Gest's private check, consisted of the improperly blended and commingled moneys of the company and of said Gest. The state of his account with the company at the several and respective dates on which said coupons were taken up as aforesaid is not disclosed, and there is nothing to show that there were not at said respective dates funds of the company in his hands properly applicable to the payment of said coupons. These coupons were cut chiefly from bonds held by certain parties in New Haven, Conn., called in the record the "New Haven Holders," to whom Bushnell had transferred his 48 bonds in the latter part of 1870, and by Bullock, Cook, Lewis, Sherlock, and Garrick, and Charles

H. Kellogg, 331 of said 455 coupons being cut from the bonds of said Kellogg. The proof clearly establishes that Kellogg never sold or intended to sell or transfer said coupons to said Gest, as claimed by the latter, and such is the established fact in reference to the other holders. Said holders, nor either or any of them, were ever informed that Gest was claiming or asserting the right to take them up for his private benefit and account. There were no circumstances connected with their payment calculated to give the holders any notice of such fact, or that Gest was acting in the premises otherwise than as the financial agent of the company, whose duty it was to take up said coupons for and on account of the company. The holders were postponed from time to time in obtaining payment by the statement of Gest and his clerks that they must wait till the company earned the money with which to pay their coupons, and in most instances they were paid off in installments, or, as expressed by one witness, in "driblets." These coupons were not canceled, but were held by said Gest till sold and transferred under said contract of February 17, 1882. In view of Gest's relation to the company; of his duty as its financial agent, to receive and apply its earnings to the payment of its debts, including coupons as they matured; of the fact that said earnings were not only received by him, but were mingled, blended, and confused with his private funds; and of his failure to show how his accounts stood with the company at the several dates when said coupons were taken up,—there is no presumption of ownership arising from his retention or holding possession of said coupons. If, however, such an inference could properly be made, the court finds as a fact clearly established by the evidence that said Gest did not become the owner of said 455 coupons by purchase, transfer, or assignment from the holders thereof, either before or after the maturity of the same, and that in his hands said coupons, if not actually paid with the funds of the company, constituted nothing more than vouchers for sums paid out by him for or on behalf of the company. The court further finds that, pending the negotiations for their sale and purchase, the said Gest made the fraudulent representations in regard to them already noticed, and by the contract under which they were transferred to plaintiff warranted them to be unpaid coupons belonging to himself, and entitled equally with all other outstanding coupons and first mortgage bonds to a first lien on the mortgage security, as above explained. The court accordingly finds that these 455 coupons were not unpaid in the way warranted or untruthfully represented by said Gest, and that as to them as well as the 313 coupons already referred to, there has been a breach of warranty, and such fraudulent representations as entitles the plaintiff to recover on both of said grounds.

After negotiations had been commenced for the purchase of his interests in the company, said Gest, on the 18th June, 1881, procured the passage by the board of the following resolutions:

"Whereas, the board of directors of this company, by a resolution passed on the 3d day of October, 1870, appointed Erasmus Gest, Esq., general superintendent of all its affairs, with power to collect and disburse moneys, pay

debts, and attend generally to the management and control of the company's business; and, whereas, the said Gest has continued to act as such general superintendent from that time to the present, and is still so acting, and has, at the instance and request of this company, and in order to protect its credit and to save its property, paid out of his own means large sums of money to defray expenses incidental to the operating of its railway, and has at various times purchased and paid for, and now holds, coupons or interest warrants and other obligations and liabilities of the company to a large amount; and, whereas, all of said payments and purchases were made by said Gest with the understanding that he should be with respect to the same entitled to all the rights and remedies belonging to the original holders of said debts, obligations, and liabilities: Now, therefore, resolved, that the said Erasmus Gest be and is hereby substituted for and in the place of the original holders and owners of all the debts, coupons, obligations, and liabilities heretofore paid and purchased by him as aforesaid, and he shall be entitled to have and to enforce for the collection of the same all the liens and other securities held by such original holders or owners; and in case he shall hereafter pay off or purchase any other debt, obligation, or liability of this company, he shall, as to such debts, obligation, or liabilities be substituted for the original holders thereof, and be entitled to the benefit of all liens and remedies belonging to them, it being the intention hereby to execute the agreement and understanding heretofore existing between said Gest and this company, and to continue the same in full force so long as he shall make payments and purchases as aforesaid.

"No other business, upon motion adjourned.

"J. HENRY GEST, President.

"Jos. J. GEST, Secretary."

—Which is relied on by defendant as establishing his ownership of said coupons. But the resolutions, passed after most of said coupons were actually taken up, cannot have that effect, for its recital, so far as they relate to his purchase of said coupons are not true in point of fact, and are not entitled to any more weight than his own statement. It was passed at his instance and to serve his purpose. It neither changes nor controls the actual facts as herein found by the court.

In the latter part of October, 1881, Amos Shinkle, trustee as aforesaid, recovered in the chancery court of Kenton county, Ky., two judgments against the Covington Street-Railway Company, for \$1,282.12, and the other for \$4,703.35, on past due coupons for the use and benefit of C. W. West, the holder of the coupons involved in the suit. These two judgments were paid in November, 1881, by William Ernst, the company's surety on the appeal or *supersedeas* bonds given in the progress of the cause. Said Ernst became surety at the instance and request of said Gest, who furnished or refunded to Ernst the amounts paid by him in satisfaction of said judgments. At the time of tendering payment of said judgments, said Ernst moved the court to subrogate him to the rights of the complainants therein against the company. This was opposed by complainants, and was denied by the court. These judgments were thereupon paid, and Ernst, having been refunded the sums advanced by him, soon thereafter assigned and transferred to said Gest "all right, title, and benefit in and to the payment" so made by him. The city of Covington in the fall of 1881 also obtained a judgment against

the company, on which said Gest for and on behalf of the company made a partial payment of \$1,029.53. These three judgments were transferred to plaintiff under the contract of February, 1882. That contract contained no warranty on the part of said Gest as to said judgments, nor does the evidence establish any misrepresentation on his part in regard to them. He assigned and transferred what he undertook to sell. The written transfer which he made, and which plaintiff accepted without objections, recited the facts as to said judgment fully and correctly. Plaintiff is not, therefore, entitled to any recovery in report to said judgments.

On the foregoing facts the court is of the opinion that this case is clearly distinguishable from, and is not controlled by, the decision of the supreme court in the case of *Ketchum v. Duncan*, 96 U. S. 671; that it falls rather within the principle laid down and applied in the cases of *Com. v. Canal Co.*, 32 Md. 501; *Haven v. Depot Co.*, 109 Mass. 88; *Trust Co. v. Railway Co.*, 63 N. Y. 311. It may be that, upon an adjustment of the accounts between said Gest and the company, (the Covington Street-Railway Company,) said 768 coupons would not be treated as extinguished in law and in fact as between them. They might possibly be regarded as between him and said company as vouchers or evidences of amounts advanced or paid out for on behalf of the company. But as against other valid and subsisting lien claimants, such as the first mortgage bonds and unpaid coupons, they clearly had no concurrent equity or right to share in the mortgaged property or its proceeds.

The conclusion of the court is that plaintiff is entitled to a recovery against the defendant in respect to the 768 coupons, both upon the breach of warranty and for the fraudulent representations and suppression of the truth, by means of which plaintiff was induced to make the purchase, was deceived and misled, to its injury. There being no evidence as to the market value of the coupons at the date of sale, the price paid by the purchaser will be considered the market value in estimating the damages under the breach of warranty, as held by the supreme court in the case of *Smeltzer v. White*, 92 U. S. 395, and cases there cited. These coupons were tendered back to the attorneys of the defendant on the 16th July, 1886, who declined to accept them, and thereafter plaintiff brought them into court to be surrendered and delivered up to the defendant as the court might order and direct. The measure of damages in the cause of action based upon the fraudulent misrepresentation and concealment of material facts on the part of defendant, will, under the circumstances of the case, be the price for the coupons and interest on said sum.

The plea of the statute of limitations to the amended petition setting up this second ground of recovery is not well taken, as said amended petition was filed within four years after the fraud was discovered by the plaintiff.

The court finds and adjudges that the defendant is entitled to the set-off claimed in his answer, viz., \$1,067.20, with interest thereon from June 16, 1883; \$150, with interest since March 1, 1884; and \$150, with interest since September 1, 1884; the two last amounts being for coupons

of bonds issued by plaintiff and which the defendant will be required to deliver up to the clerk of this court for cancellation. Judgment will be rendered, and is hereby directed, in favor of the plaintiff against the defendant for the sum of \$35,039, being the amount paid for said 768 coupons, with interest thereon at the rate of 6 per cent. per annum from July 1, 1882, which is about the average date of payment. The set-offs allowed defendant will be credited on, and be deducted from, the amount of this judgment, and the plaintiff will have execution against the defendant for the balance with costs of suit.

To each and all of said findings and conclusions of law the defendant excepts.

FOTHERINGHAM v. ADAMS EXPRESS Co. et al.

(Circuit Court, E. D. Missouri, E. D. April 12, 1888.)

1. COURTS—FEDERAL—FOLLOWING STATE LAWS.

The provisions of 1 Rev. St. Mo. 1879, §§ 1791, 1793, 1794, providing that members of the grand jury may be compelled to disclose the names of witnesses who have appeared before it, and the evidence heard in the grand jury room, only (1) when it is necessary to show whether the testimony of a witness on the trial of an indictment is consistent with or different from that given before the grand jury; and (2) when a person is on trial for perjury committed before that body, establish much more than a rule of evidence. They are declaratory of the public policy of the state, and as such are binding on the federal courts sitting in the state.

2. WITNESS—COMPETENCY—GRAND JURORS—MALICIOUS PROSECUTION.

Under 1 Rev. St. Mo. 1879, §§ 1791, 1793, 1794, relating to grand juries and their proceedings, a member of that body can be called upon to disclose the names of witnesses who have appeared before it, and the evidence heard in the grand jury room, only (1) when it is necessary to show whether the testimony of a witness on the trial of an indictment is consistent with or different from that given before the grand jury; and (2) when a person is on trial for perjury committed by him before that body. *Held*, that the plaintiff, in an action for malicious prosecution, could not show by a member of the grand jury that found the indictment at the instigation of the defendant what testimony was given before that body at that time.

At Law.

Action for malicious prosecution for causing the plaintiff to be indicted and prosecuted in the courts of the state for stealing \$60,000. On the trial the plaintiff's counsel called one of the grand jurors, who had served on the grand jury by which the indictment was found, and proposed to show by him what testimony had been given before the grand jury when the indictment was found.

C. P. & J. D. Johnson, Thomas B. Harvey, and Henry M. Bryan, for plaintiff.

Martin, Laughlin & Kern, for defendants.

THAYER, J. Bearing upon the question that was raised last evening, I read sections 1791, 1793, and 1794 of the Missouri Revised Statutes:¹

Section 1791: "Members of the grand jury may be required by any court to testify whether the testimony of a witness examined before such jury is con-

¹ 1 Rev. St. Mo. 1879, c. 24, pp. 302, 303.

sistent with or different from the evidence given by such witness before such court, and they may be required to disclose the testimony given before them by any person upon a complaint against such person for perjury, or upon his trial for such offense." Section 1793: "No grand juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify as a witness in relation thereto. * * * Any juror violating the provisions of this section shall be deemed guilty of a misdemeanor." Section 1794: "In charging grand jurors, the court shall apprise them of the provisions of the last three sections in relation to disclosures, and in what cases and under what circumstances any disclosures may or may not be made."

It might seem from a casual reading of section 1793 that a grand juror might be required to disclose testimony given before a grand jury whenever the court, before whom he is called to testify, requires him to do so. But in the case of *Tindle v. Nichols*, 20 Mo. 326, where these identical sections which I have just read were under consideration, it was held that the words "except when lawfully required to testify as a witness," as used in section 1793, have reference to section 1791, and that grand jurors can only be lawfully required to testify as to matters which occurred before that body in the two instances mentioned in section 1791. That case was an action of slander, and the defendant in the case had proposed to show by grand jurors what a certain witness had stated before the grand jury. The court held that disclosures of that kind in such an action were prohibited, although offered to support a plea of justification. The case of *Beam v. Link*, 27 Mo. 262, was, like the case now on trial, an action for malicious prosecution, and it was held that a grand juror could not be called as a witness even to show that a certain person had testified as a witness before the grand jury. These cases are an authoritative exposition of the meaning of the statute in question, and they have never been overruled or criticised. The case of *State v. Grady*, 12 Mo. App. 361, does not impugn the authority of the two cases last cited to any extent, whether the point actually decided be considered or the reasoning of the court in arriving at its decision. In that case a motion had been filed to quash what purported to be a true bill of indictment on the ground that the grand jury had returned an indictment without hearing any evidence whatever. It was very properly ruled that a grand juror might be called to establish that such was the case. The offer, it will be observed, was not to show what witnesses had testified before the grand jury, or what their testimony had been, but to show that no testimony whatever had been heard, and consequently that the indictment was a nullity, and that it would be a violation of the legal rights of the accused to put him on trial on such a bill, inasmuch as the laws of the state require indictments to be based upon testimony produced before the grand jury. The same court which decided the case of *State v. Grady*, in an earlier case, *Zimmer v. McLaran*, (digested, but not fully reported in 9 Mo. App. 591,) according to my recollection, distinctly affirmed the doctrine of *Tindle v. Nichols*, that grand jurors could not be called upon in an action for malicious prosecution to disclose evidence that had been given before the grand inquest. It must, accordingly, be taken as

the settled law of this state, as construed by its highest court, that grand jurors can only be called upon to disclose the names of witnesses who appear before them, and the evidence heard in the grand jury room in two instances: *First*, when it is necessary to show whether the testimony of a given witness on a trial of an indictment is consistent with or different from that given before the grand jury; and, *second*, when a person is on trial for perjury committed by him before the grand jury. In all other cases the statute prohibits grand jurors from disclosing testimony or the names of witnesses. The case of *Sharpe v. Johnston*, 76 Mo. 669, contains nothing in opposition to this view. The court in that case was not considering the question now under consideration. Many cases will afford an opportunity to enforce the rule laid down in the case of *Sharpe v. Johnston*, without invading the grand jury room.

It was suggested last evening that even though the law of the state is as above declared, that it is not obligatory on this court, inasmuch as the statute simply declares a rule of evidence which is only binding on the state courts. I do not agree with that view. In a certain sense the statute establishes a rule of evidence, but it is also declaratory of the public policy of the state with reference to proceedings had before grand juries impaneled in its own courts. In the absence of an act of congress making such testimony as that now offered competent in this court, and requiring such evidence to be here heard in suits between private parties, this court should be governed in its rulings upon the admissibility of such testimony by the laws in force in the state where its sittings are held. It would not be lawful, in my opinion, to permit the proceedings before a grand jury impaneled in one of the state courts to be inquired into and made public in this court, when the laws of the state expressly prohibit such investigation, and such disclosures in the state courts. The case of *U. S. v. Farrington*, 5 Fed. Rep. 343, which has also been cited as showing what the rule is elsewhere, it will be observed, was a decision in a federal court upon a motion to quash an indictment returned by a federal grand jury. That case did not involve any consideration of the question of the propriety or the power of the court in a suit between private parties to require grand jurors impaneled in a state court to make disclosure of their proceedings in a federal court, in opposition to the laws of the state. The court in that case was dealing with the proceedings of its own grand jury, and with the constitutional right of the accused to be tried upon an indictment that had been properly and fairly found and returned. I will further add that nearly all the decisions that have been cited from other states also arose on motions made by the accused to quash an indictment that had been found in violation of the rights of the accused. But whatever the practice may be elsewhere, the rule in this state is well settled, and is regulated by a statute which determines under what circumstances grand jurors may or may not be called upon to divulge testimony given before them.

For the reasons before stated, I feel bound to respect the laws of the state on the subject, no matter what the practice may be elsewhere.

In re BENSON.

(Circuit Court, S. D. New York. April 9, 1888.)

1. FORGERY—PRINTED THEATER TICKETS—EXTRADITION.

A printed theater ticket in the usual form, and stamped upon its face with an inscription in the style of a seal setting out the name of the manager, in printed characters, is the subject of forgery at common law, and under the treaty of extradition between the United States and the republic of Mexico of December 11, 1861, (12 St. at Large, 1199;) "printing" being "writing" in the legal sense of that term, and a signature by impression from a stamp being a valid signature.

2. SAME.

The fact that such a ticket expresses no consideration, and contains no promise to admit the holder to the performance for which the ticket is sold, does not render it void upon its face. It is, "if genuine, the foundation of a legal liability," and so is the subject of forgery.

3. EXTRADITION — INTERNATIONAL — APPLICATION — DOCUMENTARY EVIDENCE—AUTHENTICATION.

Where the documentary evidence submitted on the hearing of an application for extradition is not accompanied by a certificate of the principal diplomatic or consular officer of the United States resident in the requiring country, stating clearly that it is properly and legally authenticated so as to entitle it to be received in evidence in support of the same criminal charge in the tribunals of that country, as required by the act of congress of August 8, 1862, (22 St. at Large, 215,) oral proof that the authentication is proper may be given before the commissioner by an expert; and one who has served as a judge and practiced law for 32 years, in the requiring country, is an expert for such purpose.

Habeas corpus in re the application for the extradition of George Benson, *alias* Charles Bourton, *alias* Mayer, under the provisions of the treaty of extradition between the United States and the republic of Mexico of December 11, 1861. The application and the arrest were made under the first and second articles of that treaty, which, so far as they affect this proceeding, are as follows:

"Article 1. It is agreed that the contracting parties shall, on requisition made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons, who, being accused of the crimes enumerated in article third of the present treaty, committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found within the territories of the other: provided, that this shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country, in which the fugitive or the person so accused shall be found, would justify his or her apprehension and commitment for trial if the crime had been there committed." "Art. 3. Persons shall be so delivered up who shall be charged, according to the provisions of this treaty, with any of the following crimes, whether as principals, accessories, or accomplices, to-wit: * * * forgery, including the forging or making, or knowingly passing or putting in circulation, counterfeit coin or bank-notes, or other paper current as money, with intent to defraud any person or persons," etc. 12 St. at Large, pp. 1200, 1201.

The allegations of the complaint were briefly as follows:

That Henry E. Abbey was, in 1886, engaged in the business of manager of theatrical and operatic and concert troupes and companies; that there was in the City of Mexico at said time a theater known as the "Teatro Nacional,"

and that in September, 1886, said Abbey engaged the same for the purpose of giving operas and concerts therein for one month from December 15, 1886, to January 5, 1887, and deposited the sum of \$500, on account of rent; that said Abbey, on or about December 1, 1886, advertised said operas and concerts in the City of Mexico; "that thereupon said George Benson, *alias* Charles Bourton, *alias* Mayer, being in the City of Mexico in the republic of Mexico, did, on or about the 1st day of December, 1886, at the City of Mexico, in the republic of Mexico aforesaid, and within the jurisdiction thereof, with intent to defraud said Henry E. Abbey and divers persons then and there residing in the City of Mexico in the republic of Mexico, and the public of the republic of Mexico, fraudulently, feloniously, and wickedly falsely make and forge and utter, knowing it to be forged, an instrument or writing purporting to be the act of another, by which certain rights and property were purported to have been created, in that, at the time and place aforesaid, the said George Benson, *alias* Charles Bourton, *alias* Mayer, did forge the name and signature of the said Henry E. Abbey to a certain ticket of admission to one of said operas or concerts about to be given as aforesaid in the said Teatro Nacional, wherein and whereby the said Henry E. Abbey purported in consideration of a certain sum of money to admit the holder of said ticket to said opera or concert; by which false making the said Henry E. Abbey was purported to be bound and affected in his property, and by which false making an obligation on the part of said Henry E. Abbey to admit the holder of said ticket to said opera or concert was purported to be created; and that thereupon the said George Benson, *alias* Charles Bourton, *alias* Mayer, sold said ticket to a certain person in the City of Mexico, who thereupon paid to said George Benson, *alias* Charles Bourton, *alias* Mayer, the consideration demanded by him for the same; that by said false making and forging as aforesaid, divers persons then and there residing in the City of Mexico and the said Henry E. Abbey were prejudiced in their rights and property."

The tickets of which the forgery was alleged were, save as to date and location of seats, all in one or the other of the following forms:

Teatro Nacional.		Number.	
Adelina Patti.			
Henry E. Abbey Company.			
First Boxes.			
Teatro Nacional.		Great Teatro Nacional.	
Adelina Patti.		Adelina Patti.	
Henry E. Abbey Company.		Henry E. Abbey Company.	
		First Boxes.	

These tickets were all stamped upon their face with the following inscription in the form of a seal:

Empressa
Patti.
January 4, 1887.
Mexico.
Henry E. Abbey.

The relator was arrested in the city of New York January 14, 1888, and sued out this writ.

Peter Mitchell, for relator.

"Forgery, at the common law, is the false making, or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal sufficiency, or the foundation of a legal liability." 2 Bish. Crim. Law, (7th Ed.) § 528; 1 Barb. Crim. Law, (8d Ed.) 178; 4 Bl. Comm. 247; *Alia*.

Prin. Crim. Law; 3 Chit. Crim. Law, 1022. "Forgery is the false making or alteration of any written instrument whereby another may be prejudiced, with intent to deceive and defraud." 2 East, P. C. 840. "Forgery, at common law, has been defined as 'the fraudulent making or alteration of a writing to the prejudice of another man's right,' or more recently as 'a false making *malò animo* of any written instrument for the purpose of fraud and deceit;' the word 'making' in this last definition being considered as every alteration of or addition to a true instrument." 2 Russ. Crimes, §§ 708, 709. It is manifest that this ticket is a false token, and not a forgery at common law, as the following cases will clearly demonstrate: *King v. Jones*, 1 Leach, 204-206; *Rea v. Mitchell*, Fost. Cr. Law, 119-121; *Rea v. Pateman*, Russ. & R. 455; *Rea v. Moffatt*, 1 Leach, 431; *Reg. v. Closs*, 1 Dears. & B. Cr. Cas. 460, (1858;); *In re Windsor*, 10 Cox, Crim. Cas. 121; *In re Tully*, 20 Fed. Rep. 812-818; *Reg. v. White*, 2 Car. & K. 404. "The rule established by the adjudication in this state, [New York,] and after a thorough consideration of the question is that if the instrument be invalid on its face it cannot be the subject of forgery, because it has no legal tendency to effect a fraud." *Cunningham v. People*, 4 Hun, 457; *People v. Shall*, 9 Cow. 778; *People v. Fitch*, 1 Wend. 198; *People v. Wilson*, 6 Johns. 320; *People v. Stearns*, 21 Wend. 409; *People v. Harrison*, 8 Barb. 560; *People v. Mann*, 75 N. Y. 484; 2 Bish. Crim. Law, (7th Ed.) § 546; 1 Whart. Crim. Law, (9th Ed.) § 696; *Com. v. Ray*, 3 Gray, 441; *Reg. v. Boulton*, 2 Car. & K. 604; *State v. Humphreys*, 10 Humph. 442; *Com. v. Ayer*, 3 Cush. 151; Steph. Dig. Crim. Law, p. 288, art. 336. To claim that the printed name of "Henry E. Abbey Company," in circular form, is a forgery of a private seal is far-fetched reasoning. A seal at common law is an impression upon wax, wafer, or some other tenacious substance, capable of being impressed. *Warren v. Lynch*, 5 Johns. 289; 3 Co. Inst. 169; Brooke, Abr. "Faits," 17, 80; *Barns v. Smith*, 2 Leon, 21; *Meredith v. Hinsdale*, 2 Caines, 362; *Foundery v. Hovey*, 21 Pick. 417; Répert. mot *Sceau*; *Bank v. Craft*, 3 McCord, 523; *Blery v. Haines*, 5 Whart. 563. It appears that the Penal Code, under which the complaint was formulated in Mexico, was not adopted until several years after the ratification of the treaty of December 11, 1861. There is no evidence, therefore, tending to show that the relator committed the crime of forgery according to any Mexican law, which was in force at the time the treaty went into effect.

S. Mallet-Prevost and De Lancy Nicoll, for respondents.

In extradition proceedings "the complaint need not be drawn with the formal precision and nicety of an indictment for final trial, but it should set forth the substantial and material features of the offense." *In re Heinrich*, 5 Blatchf. 414; Spear, Ext. 250; 1 Bish. Crim. Proc. § 231; *People v. Hicks*, 15 Barb. 158; *Payne v. Barnes*, 5 Barb. 465; *In re Herres*, 33 Fed. Rep. 165. The fabricated ticket was the subject of forgery at common law. 4 Bl. Comm. 24; 3 Co. Inst. 169; *Rea v. Coogan*, 2 East P. C. 853; *Rea v. Taylor*, Id. 653; *Rea v. Jones*, 1 Leach, 366; *Rea v. Parkes*, 2 Leach, 775; 2 Russ. Crimes, 709; 2 Bish. Crim. Law, § 523; 1 Whart. Crim. Law, §§ 653, 680, 682; 3 Chit. Crim. Law, p. 1023; Barb. Crim. Law, (2d Ed.) pp. 114, 115. It is enough if the instrument was calculated to defraud. 1 Whart. Crim. Law, §§ 694, 745; *Grant & Hoppers' Cases*, 2 City H. Rec. 142. When a writing, like a theatre ticket, is so incomplete in form as to leave it uncertain in law, whether it is valid, it may be shown to be valid by averment and proof of extrinsic facts. 2 Bish. Crim. Law, § 537; 1 Whart. Crim. Law, § 740; Archb. Crim. Pr. 574, note; *Rea v. Martin*, 1 Moody, Cr. Cas. 483; *Rea v. Houseman*, 8 Car. & P. 180; *Rea v. Vaughan*, Id. 276; *Rea v. Boardman*, 2 Moody & R. 151; see, also, *People v. Harrison*, 8 Barb. 560; *Com. v. Costello*, 120 Mass. 367. That the ticket, and the name of Henry E. Abbey stamped upon

it, was printed instead of written does not affect the question, for forgery may be committed by printing as well as by writing. 2 Bish. Crim. Law, §§ 525, 527; *People v. Rhoner*, 4 Park. Crim. R. 166; 1 Whart. Crim. Law, § 675; *Com. v. Ray*, 3 Gray, 441; *Rea v. Smith*, Dears & B. Cr. Cas. 567; *Rea v. Rinaldi*, 9 Cox, Crim. Cas. 391; Chit. Cont. (10th Amer. Ed.) 72; *Schneider v. Norris*, 2 Maule & S. 286; *Wheeler v. Lynde*, 1 Allen, 402. Section 5 of the act of congress of August 3, 1882, (22 U. S. St. 215,) provides "that in all cases where any depositions, warrants, or other papers, or copies thereof, shall be offered in evidence upon the hearing of any extradition case under title 66 of the Revised Statutes of the United States, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing, if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped; and the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any deposition, warrant, or other paper or copies thereof, so offered, are authenticated in the manner required by this act. The certificate provided for by the act is conclusive proof on the question of authentication; but it is not the only proof that may be offered upon that point. Authentication in regard to original papers may be made by oral proof given here. *In re Fowler*, 18 Blatchf. 437, 4 Fed. Rep. 303; *In re McPhun*, 30 Fed. Rep. 57; *In re Wadge*, 15 Fed. Rep. 865, 16 Fed. Rep. 833, and 21 Blatchf. 800. For the purpose of proving the law of Mexico in relation to the authentication of copies of original documents, and the admissibility of these as evidence of the crime of forgery in the tribunals of Mexico, the prosecution offered in evidence copies of the Penal Code of Mexico and of the Code of Criminal Procedure. These copies were furnished by the consul general of Mexico at New York, were taken from his office, and purport to be issued by the authority of the government of Mexico. Under the provisions of those Codes, the copies attached to the application for the extradition of the relator are declared to be admissible in evidence solely by virtue of their being public instruments and irrespective of the nature of their contents. This view of the law is supported by the testimony of the experts examined on the subject. These experts were John W. Foster, a lawyer by profession, who had been minister from the United States to Mexico for many years, and Ignacio Alas, sometime a judge of the superior court of Mexico, and for 32 years a member of the bar of that country. Their testimony was to the effect that the papers in question were properly and legally authenticated so as to entitle them to be received by the tribunals of Mexico as evidence of the crime of forgery.

LACOMBE, J. 1. The first point raised by the relator is that the theater ticket which is the subject of the charge was wholly printed, and not written. Counsel cites from Blackstone, Bishop, Best, and Russell definitions of the crime of forgery at common law, which describe it as the false making, etc., of a writing or a written instrument. It was elementary law, however, long before Blackstone's day, that printing is writing in the legal sense of the term, and an instrument, the words of which are printed either wholly or in part, is equally valid with an instrument written by a pen. Signature by impression from a stamp was no doubt infrequent when its use by Mr. Crawford, secretary of the treasury, was approved, but the necessities of modern business have made it a common practice, and of its validity under the common law there can be no doubt. *Vide* law dictionaries of Burrill and Abbott under word "writing;" 2 Bl.

Comm. 297; 1 Op. Atty. Gen. 670; *Saunderson v. Jackson*, 3 Esp. 180; *Same v. Same*, 2 Bos. & P. 238; *Clason v. Bailey*, 14 Johns. 490; *Henshaw v. Foster*, 9 Pick. 812; and cases cited on the argument.

2. The relator next contends that forgery at common law cannot be predicated of such a ticket as this because it did not contain a contract. There was no consideration expressed in it, nor did it contain any promise. The very definitions, however, which he cites under his first point speak of the written instrument as one which, "if genuine, might apparently be of legal efficacy, or the foundation of a legal liability," or "by which another may be prejudiced." It is not necessary that the subject of forgery be shown to be a complete executory contract expressing a consideration. Instruments of evidence by which a contract is proved may be forged just as well as the contract itself if wholly expressed in writing. See opinion of Judge Brown, in this circuit, in *Re Tully*, 20 Fed. Rep. 812. There is a line of authorities, many of which are cited by the relator, which hold that where the forged instrument purports to be a contract, and is void on its face, it is not the subject of forgery. Thus, in *King v. Jones*, 1 Leach, 204, the bogus bank-note was void on its face. It would not have been a bank-note if genuine, and no outside testimony could have made it such. In *Re Mitchell*, Fost. Cr. Law, 119, the forged order was held not to be an order within the terms of the special statute under which the prisoner was indicted. Here, as relator contends the case must be decided by the rules of the common law. In *Rex v. Pateman*, Russ. & R. 455, the bogus instrument was unsigned, and therefore, if genuine, did not purport to be a promissory note. In *King v. Moffatt*, 1 Leach, 431, the bill of exchange, if real, would not have been valid because it failed to comply with statutory requirements. No evidence could make it valid. In *Queen v. Closs*, 1 Dears. & B. Cr. Cas. 460, the court merely held that a picture was not a document or writing. In *Re Windsor*, 10 Cox, Crim. Cas. 121, the prisoner was discharged because the false entries which he made did not purport to be made by another. In *People v. Savage*, 5 N. Y. Crim. Rep. 543, where defendant was charged with forging and altering a pawn ticket, the conviction was reversed because the district attorney and the court were apparently satisfied with the soundness of the contention of prisoner's counsel that by the Penal Code of New York, under which the trial was had, the definition of forgery is much narrower than at common law. In *People v. Martin*, 36 Hun, 462, the railroad bonds were unsigned, and the same was the case in *Cunningham v. People*, 4 Hun, 457. In *People v. Fitch*, 1 Wend. 198, the prisoner altered the date of an order drawn by him, accepted, paid, and theretofore returned him. In *People v. Wilson*, 6 Johns. 320, the bank-note being for less than one dollar, its circulation was forbidden by statute. In *People v. Harrison*, 8 Barb. 560, the acknowledgment was defective on its face. In *People v. Mann*, 75 N. Y. 484, the prisoner, a county treasurer, signed his own name to the obligation. Conviction was reversed because the instrument did not purport to be the act of another. It was false assumption of authority, not forgery. It is, moreover, well settled by authority that where the

forged instrument is not void on its face, but only incomplete or uncertain, extrinsic evidence may be introduced showing its validity. Such an incomplete instrument may be the subject of forgery. There is nothing upon the face of these tickets which proclaims them void. They are in the usual form of such instruments which do not ordinarily contain the expression of a consideration, or a distinct agreement expressed in words to admit the holder. None the less the holders of them, if genuine, would find them of legal efficacy if, the performance being given, they were arbitrarily refused admission, and came into court to enforce their rights. In addition to the numerous authorities in support of these propositions cited in the complainant's brief it will be sufficient to refer to *People v. Stearns*, 21 Wend. 409; *Com. v. Ayer*, 3 Cush. 151; *McCrea v. Marsh*, 12 Gray, 211; *Drew v. Peer*, 93 Pa. St. 234; *Wood v. Leadbitter*, 13 Mees. & W. 838; *Taylor v. Waters*, 7 Taunt. 374; *Burton v. Scherpf*, 1 Allen, 133; *Magovern v. Staples*, 7 Lans. 145.

3. The relator contends that the documentary evidence submitted was not accompanied by a certificate of the principal diplomatic or consular officer of the United States resident in Mexico, stating clearly that it is properly and legally authenticated, so as to entitle it to be received in evidence in support of the same criminal charge by the tribunals of Mexico. The certificates are undoubtedly defective, but Judge BLATCHFORD, in *Re Fowler*, 18 Blatchf. 437, 4 Fed. Rep. 303, held that authentication may be made by oral proof given here. See, also, *In re McPhun*, 30 Fed. Rep. 57; *In re Wadge*, 15 Fed. Rep. 364, 16 Fed. Rep. 332. The evidence in support of the certificates in this case, which was given by the witness Alas, was, under the rules laid down in these cases, competent and sufficient.

THE SEA WITCH.¹

TEBO v. THE SEA WITCH.

(District Court, S. D. New York. March 22, 1888.)

SHIPPING—DOMESTIC LIENS—REPAIRS—AUTHORITY OF OWNER OR AGENT—STATE STATUTES.

The yacht *Sea Witch* was owned by one W., who had authorized B. to procure her sale. B. in turn employed a yacht broker, and negotiations were had for a sale to one F. About July 1st B.'s authority was revoked by W., who, on the 2d of July, made an informal written instrument of sale to claimant. B. and the broker, however, continued their negotiations with F., and about the 8th of July came to a verbal agreement with him for a sale, after which the broker, at F.'s request, ordered libellant to do caulking on the yacht. The verbal agreement between F. and the broker was never ratified by the owner, and the work on the vessel was stopped by claimant. Specifications were filed to secure the lien, and this libel filed to enforce it. *Held*, that the repairs were made without the authority of the owner or agent, or any one authorized to charge them; no lien was therefore created on the vessel, and the libel should be dismissed.

¹ Reported by Edw. G. Benedict, Esq., of the New York bar.

In Admiralty.

Wilcox, Adams & Macklin, for libellant.

Goodrich, Deady & Goodrich, for claimant.

BROWN, J. Between July 6 and 12, 1887, the libellant performed certain labor on the domestic yacht *Sea Witch*, in hauling her out, cleaning her bottom, and doing some caulking, amounting to \$193.59. Specifications were duly filed to secure a lien under the state law, and this libel was filed to enforce it. The defense is that the repairs were made without the authority of the owner, and not, as required by the statute, upon any contract of the "master, owner, charterer, builder, or consignee, or by the agent of either of them." The evidence shows that the yacht was owned by one Wathen. She had been lying for a long time unused in a basin at Twenty-fifth street, Brooklyn. Wathen had authorized one Bond, as agent, to procure a sale of the yacht, who had employed a Mr. Hubbe, a yacht broker, for that purpose. Negotiations were had with one Freeman, and, while these negotiations were pending, Bond, at Freeman's request, authorized the yacht to be hauled out for examination. The evidence indicates that Bond's authority was revoked at least by the 1st of July. On July 2d the owner made an informal written instrument of sale to the claimant. Bond and Hubbe, however, continued their negotiations with Freeman, and on the 8th came to a verbal understanding with him for a purchase; and either then, or soon afterwards, Hubbe, at Freeman's request, ordered the caulking to be done. A few days afterwards Freeman told Bond he was making repairs amounting to about \$200, and Bond said that no doubt the trade would go through, and it would be all right. The next day the claimant appeared at the basin, and drove off the men engaged by or for Freeman, upon the yacht; and his verbal bargain with Bond was never ratified by the owner. Upon these facts I cannot find that the repairs, or the caulking, were contracted for either by the owner or the agent of the yacht, or by any one authorized to charge them. The case is different from that of *The John Furron*, 14 Blatchf. 24. In that case full possession and apparent ownership had been conferred upon the person who had contracted the debt. Here there was no such possession transferred; no act of the owner tending to mislead the libellants; no apparent right of possession was given to Freeman or to Hubbe, and there was no authority or semblance of authority from the owner to Hubbe to order any repairs. Notwithstanding, therefore, the inequity of the claimant's obtaining the benefit of the caulking without paying for it, I do not see any legal ground on which I can aid the libellant in the recovery of his debt.

As respects the charge for hauling out, the evidence shows that that was ordered by the agent of Wathen while he was owner, and before Bond's authority was canceled. For that item in the bill amounting to \$25, I think the libellant is entitled to recover, with interest and costs. The rest I am constrained to disallow.

GREENWELL v. Ross *et al.*

(Circuit Court, E. D. Louisiana. March 26, 1888.)

1. SHIPPING—CHARTER-PARTY—BREACH OF CONTRACT.

A charter-party provided that the charterer should have the option of canceling it, if the ship was not ready for a cargo of "lawful merchandise" on or before a certain day, and that he should have notice of such readiness. It appeared that at 2:50 P. M. of the day fixed, and while the ship was hunting a landing, so that notice could not be speedily delivered, the charterer first gave notice of his intention to ship grain, which was shown to be "lawful," but not "general merchandise," requiring special preparations to make a ship ready for it. The ship was ready for a cargo of "general merchandise," and the requisite notice given the charterer at 4:12 P. M. of the day fixed. *Held*, that the ship complied with the charter-party, and that the charterer's refusal to furnish cargo was a breach of contract, the notice of intention to ship grain not being in reasonable time.

2. SAME—REFUSAL TO LOAD—MEASURE OF DAMAGES.

In an action for refusal to furnish cargo according to the terms of a charter-party, libellant may recover for difference of freight between a cargo obtained and that contracted for, less freight refused because of space occupied by extra fuel required to make a longer voyage, but not for expenses incurred to fix defendant's liability, the ship being unconditionally refused, nor for demurrage, when the ship was loaded in less time after the contract was repudiated than was allowed by the charter-party.

3. SAME—OFFER TO LOAD AT LOWER RATE.

In an action for refusal to load a ship according to the terms of a charter-party, where defendant afterwards offered to take the ship at a lower rate, the difference between the two rates will be taken as the measure of damages, the case offering no better, and such a course being fair to both parties.

In Admiralty. Libel for damages. On appeal from district court. Libel for damages for breach of charter-party, by Thomas George Greenwell against Ross, Keen & Co.

Jas. McConnell, for libellant.

E. W. Huntington and *Joseph P. Hornor*, for claimant.

PARDEE, J. The charter-party contains, among others, the following stipulations, to-wit:

"That the vessel shall, with all convenient speed, sail and proceed to New Orleans, or as near thereto as she can safely get, and there load under the rules and regulations of the New Orleans Maritime Association, from the said merchants, their agents or assigns, as customary, a full and complete cargo of lawful merchandise at the option of the charterers. Fourteen weather working days are to be allowed charterers for loading said vessel, which time is to commence on the day after the vessel is ready with clean-swept holds to receive cargo, and written notice (with surveyor's certificate of readiness attached) given of same to charterers. Should the vessel not be ready for cargo, at New Orleans, on or before the 28th December, 1883, the charterers or their agents have the option of canceling this charter."

These provisions, taken together, show that under the contract the ship could be refused, provided that the vessel should not be ready for cargo at New Orleans on or before the 28th December, 1883; that the ship was to be loaded under the rules and regulations of the New Orleans Maritime Association with a full and complete cargo of lawful merchan-

dise at the option of the charterers; and that the time for loading was to commence from the day after the ship should be ready with clean-swept holds, and written notice thereof, with surveyor's certificate attached, should be given to charterers. From the evidence in the case there is a distinction to be noticed between general merchandise and lawful merchandise. Grain is included in the latter and not in the former. It is also to be noticed that for a cargo of grain special preparations as to readiness for cargo are required. As the vessel was to be in New Orleans ready for cargo on or before the 28th December, 1883, under penalty of cancellation of the charter-party, at the option of the charterers, and as the character of the cargo was also at the option of the charterers, it would seem that under the contract it was the duty of the charterers to give reasonable notice to the ship of the kind of cargo intended to be shipped, if the cargo intended was such as to require special preparations, in order that the ship should be ready to receive it. The ship was in New Orleans on December 28th, 1883, ready to receive a cargo of general merchandise, and charterers were notified thereof, in writing, at 3:50 P. M., and again notified in writing at 4:12 P. M. of that day; the latter notice having attached surveyor's certificate of readiness for general cargo, the latter executed at 3:45 P. M. If the time of day at which this latter notice was served cuts any figure in the case, (which I am inclined to doubt, for the option of canceling retained by the charterers does not refer to the rules of the New Orleans Maritime Association, and the loading, not the arrival, was to be governed by said rules,) then I think it clearly established by the evidence that the delay was imputable to the charterers in not selecting an available landing; and that, even under these circumstances, the notice was given in time.

It seems under the evidence that the first written notice given by the charterers of any intention to ship grain was at 2:50 P. M. of the 28th, at the time that the ship was hunting a landing, and when it could not be speedily delivered; and was not in reasonable time to prepare the ship for grain, if notice of readiness, with surveyor's certificate, was required to be given in writing, and was also required to be given to the charterers previous to 4 P. M. of that day. The evidence is somewhat conflicting as to any verbal notice being given of an intention to furnish grain for the part or the whole of the cargo. The conversations of defendant Ross with Foster, clerk of the ship's agents, even if expressing a fixed purpose to furnish a cargo of grain, cannot be considered as notice to the ship; and by Mr. Ross' evidence, he was not then clear in his statements to Foster. He says in his examination in chief: "The night of the 27th I told Mr. Foster that if I had to load the *Lemuria*, that I intended to ship grain on her." On cross-examination he says he told Foster that he should give her a part cargo of grain. This is indefinite, and, if the conversation took place as stated, it bound the charterers to nothing, much less the ship. The next verbal notice claimed by the charterers was in conversation between Mr. Ross and Mr. Hall on the 28th December, sometime between 12 o'clock M. and 2:30 P. M. I do not find that Mr. Ross testifies specifically as to what was said in this conversation, but

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that, in general terms, he gave notice of intention to load the steamer with grain. Mr. Hall testifies that Mr. Ross in conversation said that he might give her grain, but that the written notice of 2:50 P. M. was the first information that he had of the positive intention of the charterers to load the ship with grain. The entire evidence on the subject of verbal notice leads me to the conclusion that at no time previous to 2:50 P. M. of the 28th did the charterers communicate to the ship's agents any positive intention to ship grain, and even to doubt whether they had any such intention in their own mind. This conclusion is supported by the fact that in the written note of 9:50 A. M. nothing is said in regard to cargo. And it may be said with regard to this notice, that while it intimates that at that time no wharf had been engaged for the *Lemuria*, Lincoln, of the firm of Ross, Keen & Co., testifies that at 7 o'clock on the morning of the 28th he had procured an assignment from the harbor-master for the *Lemuria* outside of the "*Hector*," and within an hour, to-wit, by 8 o'clock, he had reported the fact to the office. The conduct of the parties, and the conflicting evidence in the case, is only explainable by the fact that rates of freight had fallen since the charter-party was executed; the ship had been delayed, her agents and master were making strenuous efforts to save the charter-party, while the charterers were anxious to cancel the charter-party, and were throwing such obstacles in the way as a technical construction of the charter-party would seem to permit. On the whole case I conclude, as did the district judge, that in substantial compliance with the charter-party, the ship *Lemuria* was at New Orleans ready for cargo on the 28th day of December, 1883, and that it was a breach of contract for the charterers to refuse to furnish cargo according to the terms of said charter-party.

The damages claimed by libelant for this breach of contract are made up of the difference in freight as per freight list actually obtained, and freight as per charter-party, to which is added the difference in commissions, insurance, and in price of coal at New Orleans and at Halifax, three days' demurrage, notaries' fees, court fees, and stenographer's charges, all amounting to \$3,024.12. Undoubtedly the difference of freight between the cargo obtained and the one contracted for furnishes the best rule for the ascertainment of the amount of damages. To be conclusive on the parties, however, the cargo obtained and the voyage should be substantially the same as provided for in the charter-party. These conditions do not exist in this case. The charter-party provides for a voyage to a direct port in the United Kingdom or on the continent, with deviation to Halifax for coal; and that the vessel should take sufficient coal at New Orleans to steam all the way from New Orleans to Halifax, and no more; and that the whole of said steamer, including all securely covered spaces on deck, and any ballast tanks arranged for cargo, with the exception only of the captain and officers' cabins, engine and boiler houses, engine-room, ordinary side bunkers, the necessary room for the accommodation of the crew, and the storage of the sails, cables, and provisions, shall be for the sole use, and at the disposal of the charterers for cargo. The voyage actually made, and for which cargo was obtained, was di-

rect to Liverpool, without deviation to Halifax, and much cargo space (as specified in charter-party) was necessarily taken up by the additional amount of coal required to steam all the way to Liverpool. The libelants' bill shows that this additional amount of coal amounted to 200 tons, and the evidence shows that freight was turned away from the vessel, and that that amount of space utilized would have realized about \$1,000 additional freight charges. The stipulation in regard to coaling at Halifax was in favor of charterers, and to the detriment of the ship, as it increased the cargo's space, and necessarily prolonged the voyage, with port charges at Halifax. The less price of coal at Halifax was a point in favor of the ship, but the advantage was offset by port charges and expenses.

Under this state of facts I am at a loss to understand how the libelant can claim as a part of his damages the difference in price of coal at New Orleans and at Halifax. Nor do I understand why the damages should be enhanced by notaries' fees, court's fees, and stenographer's charges. The libelant was at liberty to incur such expenses; but, as the ship was unconditionally refused at 4:12 p. m. of the 28th, such expenses to fix liability were wholly unnecessary. Any other view would defeat libelant entirely, for the notice of 2:50 p. m. of the 28th required the ship to get ready for a part cargo of grain, and she was never so fitted and tendered. Under the charter-party the cargo was to be loaded under the rules of the New Orleans Maritime Association, and 14 weather working days were allowed in which to load the vessel. Under this contract and the said rules, weather working days do not include Sundays, nor holidays, nor days on which business is interrupted by weather; and said rules provide further that rain during working hours previous to noon shall prevent that day from counting; rain after noon previous to 4 p. m. shall prevent that half of the day from counting. Under the evidence, and applying the said rules, and counting December 29th as the first day, the loading of the *Lemuria* after the charter was repudiated, did not consume 14 weather working days, so that it would seem that the repudiation of the charter gave rise to no claim for damages by way of demurrage.

There is evidence in the record that after the repudiation of the charter, the defendants offered the agents of the ship £40 (5 shillings less than price in the charter-party) per net registered ton, other conditions similar to previous charter-party. This offer was not accepted by the agents of the ship. It is urged in this case, by the libelant, that this offer shows that the charterers refused the vessel for no other reason than the decline in freights. The defendant Ross testifies: "We made this offer for the express purpose of limiting any loss that might arise should a lawsuit be entered for damages, which we were informed was intended." The district judge took this offer as made in good faith, and as the best guide, under the circumstances of the case, in fixing the damages to which the libelant was entitled for breach of contract. It certainly is a guide to which the defendants cannot object. If we take libelant's bill and eliminate therefrom the amounts charged for coal and demurrage,

and deduct \$1,000 for loss of cargo by taking coal in New Orleans,—three deductions which should certainly be made,—we have nearly the same amount as we obtain if we take the offer of the defendants, above stated, as determining the damages. Therefore, as the amount of damages as determined by the said offer is fair to the defendants, not unjust to the libelant, is the best the case offers, and was approved by the district judge, it will be taken in this court as the basis for a decree. This fixes the libelant's damage at 5 shillings sterling per net registered ton of the ship. Let a decree be entered in this case in favor of the libelants for \$1,296, with 5 per cent. interest thereon from January 15, 1884; the defendants and their sureties to pay the same, together with the costs of the district court; the libelant to pay the costs of transcript and of this court.

THE BALTIMORE.¹

NEW YORK & C. S. S. Co. v. THE BALTIMORE.

(District Court, S. D. New York. March 22, 1883.)

1. COLLISION—STEAMER AND FERRY-BOAT—CROSSING COURSES.

The steamer C., while coming down the North river, and approaching her wharf in New York city, was run into by the ferry-boat B., which was nearing her slip in New York on her trip from Jersey City. Each vessel signaled her intention to pass ahead of the other, and each kept on her course until within some 200 feet of the place of collision, when both reversed. *Held*, that the C. was in fault (1) for not avoiding the B., which was on her starboard hand, and not signaling in time; (2) for attempting to pass to the left, when that course was not necessary, without a previous understanding by signal with the ferry-boat; and (3) for not reversing sooner. *Held*, that the ferry-boat was also in fault, though she had the right of way, for not stopping and backing when the purpose of the C. to go ahead became clear, and it was manifest that the C. could not, or would not, by her own efforts, avoid collision.

2. SAME—ENTERING SLIPS—RULES.

Ferry-boats must observe the usual rules of navigation when not so near their slips that observance of such rules will occasion embarrassment in entering.

In Admiralty. Libel for damages.

H. D. Van Orden, for libelant.

Biddle & Ward, for claimant.

BROWN, J. At about half past 7 in the morning of September 15, 1886, as the libelant's side-wheel steamer Catskill, was coming down the North river and approaching her wharf at the foot of Jay street, she came in collision with the ferry-boat Baltimore, which was coming up from the Jersey City ferry to her slip at Desbrosses street. The starboard bow of the ferry-boat struck the starboard bow of the Catskill about 50 feet

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

from her stern, and penetrated her side about seven feet, doing her very considerable damage, for which this libel was filed. The place of collision, as I find, was about 500 feet off the end of pier 27, new number, at the foot of Hubert street, and about 650 feet below the Desbrosses-Street slip, and about 1,100 feet above the pier at the foot of Jay street, where the Catskill was to land. Each side claims that its own boat was stopped at the time of the collision. I am satisfied, however, that this was not the case as respects either. The Catskill, until she had passed Desbrosses-Street ferry, was running at the rate of 10 or 11 knots, being then about six or seven hundred feet off the ends of the piers, and heading for her pier at the foot of Jay street. After passing that slip, she gave a signal of two whistles to the ferry-boat, indicating that she would pass ahead of her; she next gave different signals to three or four other boats which were lower down in the river; and then, on perceiving that the ferry-boat was not giving way, she gave the order to stop and reverse her engines when within about 200 feet of the place of collision. The ferry-boat was coming up the river, heading for the end of the second pier below her slip. The Catskill was observed a third of a mile distant. Three separate signals of one whistle, each at short intervals, were given, indicating that she would go ahead of her. No answer was heard until they were quite near. The order to reverse was given about 200 feet only from the place of collision, and only three and a half or four turns of the engine backward were obtained before they struck. These circumstances, with the character of the wound, leave no doubt that both vessels had considerable headway at the moment of collision. Both boats had long been accustomed to run on their respective lines; the course and intention of each were perfectly understood by the other. Each has invoked in its own favor the ruling in the case of *The John S. Darcy*, and *The Isaac L. Fisher*, 29 Fed. Rep. 644, claiming she had a right to be unobstructed while making her slip or wharf. I do not think that rule is, in the present case, applicable to either; for the reason that the place of collision was not immediately adjacent to the landing place of either, and because both could have pursued the ordinary course of navigation, according to the rules, without causing embarrassment to either in making her slip. The place of collision was, as I have said, some 1,100 feet above the wharf of the Catskill, and some 650 feet below the slip of the Baltimore. The Catskill could have passed to the right without difficulty; and the Baltimore could, without the slightest embarrassment, have stopped, and gone astern of the Catskill, as, too late, she endeavored to do. I cannot find, therefore, that there was in fact any special circumstances which, under the twenty-fourth rule of navigation, made a departure from the ordinary rules necessary.

The primary obligation rested upon the Catskill to keep out of the way, as she had the Baltimore on her starboard hand. She was in fault—*First*. For not signaling to the Baltimore earlier than she did. This was first done at less than half the distance required by the inspector's rules. *Second*. She was further in fault for undertaking to pass to the left when that course was not necessary and without having first had a

common understanding by an acquiescing signal from the Baltimore; when she was not sufficiently in advance to enable her to pass ahead of the Baltimore without danger, or without assistance from the latter. The maneuver was, therefore, at her own risk. *The City of Hartford*, 11 Blatchf. 72, 74; *The Fanwood*, 28 Fed. Rep. 373; *The Vanderbilt*, 20 Fed. Rep. 650; *The Nereus*, 23 Fed. Rep. 448. Third. For not reversing sooner when the ferry-boat was seen approaching near at considerable speed, and the danger of collision was manifest.

As respects the Baltimore, the case is similar to many others, in which, notwithstanding the primary fault is that of the vessel bound to keep out of the way, the other vessel is also held in fault for not stopping and backing as soon as the purpose of the former vessel to go ahead was clear, and when it was manifest that the other could no longer, by her own efforts, avoid collision. *The Columbia*, 25 Fed. Rep. 844; *The Frisia*, 28 Fed. Rep. 249; *The Fanwood*, Id. 373; *The Aurania*, 29 Fed. Rep. 99. So long as the vessel bound to keep out of the way has clearly time and space enough to do so, and there are no certain indications of any contrary intent, the other vessel has a right to presume that the former will do her duty, and is not bound, under rule 21, to stop and reverse. When that limit is passed, rule 21 requires immediate stopping and reversing, if necessary to avoid collision. The pilot of the Baltimore in this case did not stop till much beyond that limit. He had special reason to be upon his guard, because there were several vessels below, to which the Catskill was obliged to pay attention; and because he got no response to several of his own signals to the Catskill. The course of the Catskill was plain. She was nearing the shore, evidently making for her wharf, and unless she sheered to the westward some considerable time before reaching the place of collision, which she did not do, it would be difficult for the ferry-boat even to reach her slip by going through the comparatively narrow passage to the right, or to the eastward of the Catskill. The Catskill, instead of sheering to the westward, as she might have done to make room for the Baltimore to pass easily to the right, manifested from the first a contrary intention; she continued on her course to run ahead of the Baltimore at rapid speed. The pilot of the Baltimore saw what she was doing, and knew, or ought to have known, her intentions; but he did not reverse until within about 200 feet of the place of the collision, long after the course and the intention of the Catskill to cross his bow were plain. The pilot knew that by backing earlier he could not possibly do any harm, nor in the least thwart the purpose of the Catskill. The right of way is not a right to run into unnecessary collision. *The Non Pareille*, 33 Fed. Rep. 524, and cases cited; *The Beryl*, 9 Prob. Div. 137. Notwithstanding the fact, therefore, that the primary fault was the Catskill's, in presuming that the ferry-boat would give way to her, and in attempting to run ahead upon that expectation, the ferry-boat must also be held to blame. The great stake in the lives and property of innocent persons forbids any relaxation of the rule that requires, in the face of an impending collision, that each boat shall take such timely and suitable measures to avert it as are

within her power, without reference to the original so-called right of way. The damages and costs must therefore be divided. The libellant is entitled to a decree for half his damages and costs; and a reference may be taken to compute the amount, if not agreed upon.

THE LOUISIANA.¹

THE NEW ORLEANS.

MILLARD *v.* THE NEW ORLEANS. NATIONAL STORAGE CO. *v.* THE LOUISIANA. VAN WIE *v.* SAME. NEW YORK HARBOR TOW-BOAT CO. *v.* SAME.

(*District Court, S. D. New York. March 24, 1888.*)

SALVAGE—FIRE ON PIER—TOWING VESSELS INTO STREAM—APPORTIONMENT OF AWARD.

On the afternoon of January 29, 1887, a fire broke out on the bulkhead adjoining piers 8 and 9, North river, in the city of New York, and spread with great rapidity along pier 9. The steam-ship *Louisiana* lay moored on the northerly side of this pier, and the steam-ship *New Orleans* on the southerly side, and both vessels caught fire. Two tugs hauled the *Louisiana* into the stream, and two others assisted in putting out the fire. Two other tugs hauled out the *New Orleans*; one of them rendering but slight service was not a party herein. The steam-ships were in great danger if they remained long at the pier. There was at no time any special peril to the tugs. The *Louisiana* and cargo were worth from \$300,000 to \$400,000; the *New Orleans* was worth \$180,000. The above suits were brought by the various owners of the tugs to recover salvage. *Held*, that the *Louisiana* should pay \$2,000 as salvage to the four tugs which assisted her, viz., \$1,400 to those that hauled her out, and \$600 to the others; and that the *New Orleans*, whose danger was greater, though her value less, should pay the same to the libellant's tug; the awards to be divided three-fourths to the owners, one-fourth to master and crew.

In Admiralty. Libel for salvage.

George H. Bruce, for storage company.

Wilcox, Adams & Macklin, for Millard.

John E. Parsons, for claimants.

BROWN, J. The above libels were filed to recover for salvage services rendered to the steam-ships *Louisiana* and *New Orleans* on the afternoon of January 29, 1887. At about 4 o'clock of that day a fire broke out among some bales of cotton upon the bulkhead that adjoins piers 8 and 9, North river. The *New Orleans* lay moored, bows out, on the southerly side of pier 9; the *Louisiana*, bows out, moored on the northerly side. The fire spread with great rapidity along pier 9, and both steamers caught fire, and were considerably damaged. The cost of repairing the *New Orleans* was about \$15,000; the *Louisiana*, about \$7,500. Both were hauled out as soon as possible; the steam-tugs *Communi-paw*,

¹Reported by Edw. G. Benedict, Esq., of the New York bar.

Lewis Pulver, Geo. H. Starrs, and Baltic, taking part in the removal of the Louisiana, and in putting out the fire, and the steam-tug Edwin H. Millard, and another tug not represented in this action, in hauling out the New Orleans. The testimony taken is voluminous, and the views of the parties as to the merits of the claims are widely divergent. It would be unprofitable to refer here to the details of the testimony. The Louisiana was partly loaded, and the value of the ship and cargo at the time was from \$300,000 to \$400,000; the value of the New Orleans was about \$130,000. Next to the value of the vessels, the most important element was the imminent danger to which they were exposed. On this point I have no doubt that there was the most urgent necessity for immediate removal. Neither could have remained where they were without at least very heavy damage. The Louisiana, while she lay next the burning pier, though she had large means, in pumps and hose, for putting out fire, could not have used them effectively there. Several tugs were sent instantly to the seat of danger upon telegraphic calls for assistance; others happened to be near at hand, whose services were called for, and instantly rendered. These services were continued from one to two hours. Three tugs, the Chancellor, Cheney, and Bayonne, which had first endeavored to assist the New Orleans, had failed, when the Millard came to her assistance. It is doubtful whether any other competent tugs at that moment were present and available for her use, except the Lennox, with which a settlement was made without litigation. Others appeared shortly after. The situation was such that there was no immediate or considerable danger to the tugs in rendering assistance to either vessel; and the evidence, I think, shows that at least shortly after the tugs here represented commenced their services a number of other tugs arrived ready and anxious to render any aid desired. Two others, the Fletcher and the Garrett, seem to have been present about the time the Millard arrived. But considering that the officers of the New Orleans had been pressing for immediate help; that the previous efforts of the Chancellor, the Cheney, and the Bayonne had been ineffectual, it must be inferred that the Fletcher and the Garrett, if there at the time the Millard arrived, or before, were either unwilling to take hold, or were deemed insufficient; otherwise it is not credible that their services would not have been used. The suggestion that the New Orleans could safely lie on the south side of the slip in the berth where the Chancellor had been, and from which the latter had fled in haste, and that removal to that berth was all that was desired or needed by the New Orleans, I regard as chimerical. The Communipaw was the first to come to the rescue of the Louisiana, and the Pulver soon followed; they together pulled her away by a hawser from the burning dock. The Baltic and the Starrs soon went alongside; they were necessary to keep her from drifting away with the tide or against other vessels; and both, at the master's request, played upon the fire and assisted in putting it out; the Starrs being most serviceable for that purpose, but arriving later. Although there was no special danger to any of the tugs in rendering their assistance, there is always some danger to tugs in going in the immediate vicinity of burn-

ing wharves or ships, from a variety of causes. The ordinary insurance is thereby forfeited, in case of loss while rendering such services. The element of danger to the tugs cannot be wholly ignored. The chief considerations, however, in this case, in favor of the tugs, are the urgent necessity of immediate aid to the steam-ships, and the certainty of very large loss unless they had been towed away at once. Every minute's additional delay in the removal of the steamers would probably have cost them from \$500 to \$1,000 additional damage. On the other hand, there was no considerable difficulty or danger to the tugs or to the men in rendering their services; and very shortly after these tugs came, other tugs arrived, which would have been glad to render similar, though somewhat later, services.

The general principles that should guide in making up a salvage award are stated by Mr. Justice BRADLEY in the case of *The Sukote*, 5 Fed. Rep. 99, as follows:

"Salvage is the reward granted for saving the property of the unfortunate, and should not exceed what is necessary to insure the most prompt, energetic, and daring effort of those who have it in their power to furnish aid and succor. Anything beyond that would be foreign to the purpose and principle of salvage. Anything short of it would not secure its objects."

Bearing this principle in mind in both its aspects, I find, upon all the evidence, that \$2,000 will be a just award to be paid by the Louisiana. Though the New Orleans was of much less value, she was in greater danger, from the strong north-east wind that blew the fire directly towards her. I allow \$2,000 to be paid by her to the Millard, in addition to the small sum already paid in settlement with the Lennox for the minor service of the latter. The sum to be paid by the Louisiana will be divided among the several tugs that assisted her as follows: To the Communipaw, \$800; to the Pulver, \$600; to the Starrs, \$300; and to the Baltic, \$300. Of the amounts awarded to each tug, three-fourths will be paid to the owners, and one-fourth to the master and crew, in the following proportions: Four parts thereof to the master or pilot; two parts to the mate or foreman; the same to the chief engineer, and one part to each of the other hands. See *Markham v. Simpson*, 22 Fed. Rep. 743.

Decrees, with costs, may be entered accordingly.

RUMBALL v. PUIG.¹

(District Court, S. D. New York. March 28, 1888.)

DEMURRAGE—LIABILITY OF CHARTERER—FAILURE TO FURNISH CLEARANCE PAPERS—CUSTOM AND USAGE.

A vessel's lay days expired on Saturday. Her loading was completed on Friday, but her clearance papers were not furnished by charterer until Monday afternoon, and the ship sailed Tuesday. The charter provided that charterer should be liable "for any detention of the vessel by his default" after the

¹Reported by Edward G. Benedict, Esq., of the New York bar.

expiration of the lay days. Evidence was given of the existence of a custom allowing a charterer one day after the loading is completed in which to furnish necessary papers, and charterer claimed that he was entitled to one day for furnishing papers after the expiration of the lay days. *Held*, that under the above clause of the charter a detention of clearance papers would render the charterer liable. *Held, further*, that no custom was proved, or would be sustained, allowing charterer more than one day after the loading is in fact completed, or until the end of the lay days, if that be later; and that a ship cannot be detained after her lay days have expired, without compensation, when the loading has been actually completed more than a day previous. Charterer was therefore held liable for one day's demurrage.

Wilcox, Adams & Macklin, for libellant.

Ulls, Ruebsamen & Hubbe, for respondent.

BROWN, J. The respondent chartered the libellant's bark *Lillian*, agreeing to pay \$60 per day "for any detention of the vessel by his default" after the expiration of 15 lay days. The lay days expired on Saturday, August 31, 1887. It was the charterer's duty to furnish the master certain documents in order to enable her to procure her clearance, and sail for her Spanish port. Her loading was completed early on Friday. During Saturday repeated demands were made upon the respondent for the necessary documents. They were not furnished until Monday afternoon, just in time to clear at the custom-house, but not in season to make it practicable to sail until the next morning. Evidence was given of a general practice and understanding in accordance with a rule of the produce exchange that allows charterers one day after the loading is completed in which to furnish necessary papers and documents. The reason of this rule was stated to be that it is found generally impracticable to obtain the necessary bills and documents at the moment the loading is completed. There was no default in this case as respects any of the express clauses of the charter in regard to loading; and the charter stated nothing in regard to furnishing papers and documents. It cannot be doubted, however, that it was the charterer's duty to furnish these papers. The 15 lay days were for the purpose of loading. But the general clause giving demurrage was designed, I think, to bind the charterer for the neglect of any duty required of him to enable the vessel to sail.

For the respondent, it is claimed that he was entitled to one business day in which to furnish the ship's papers after the lay days had expired. That, however, is not the language of the produce exchange rules, nor, as it seems to me, its intention, where the loading is in fact completed before the lay days have expired. In some cases, where the time to complete loading is advertised, it is the practice to allow desired changes of cargo up to the last moment; and when that is done, the charterer perhaps should not be held in default, as respects a customary obligation, until he has had the customary additional day to comply with it. The proofs show in this case that the loading was entirely completed early on Friday. The bills of lading were then signed. There is no evidence that any more loading of the vessel was designed or expected. The produce exchange rule of itself has no binding force. But it may be re-

ferred to as an aid in understanding the custom testified to, and I do not think there is any custom different from that rule. Looking at all the evidence, I do not think there is proof of any custom that warrants more than the allowance of one additional day to furnish the ship's documents after the loading is in fact completed, or until the end of the lay days, if that be later; and that the ship cannot be detained after the lay days have expired without compensation when the loading has been actually and practically completed more than a day before. The reason of the custom and of the rule in that case fails, and it becomes unjust to the ship to enlarge the time, because that would be practically to extend the stipulated lay days without cause; and no such alleged custom could be sustained. I must hold the respondent, therefore, in default for not furnishing the ship's necessary documents on Saturday. As he had the whole of that day, however, in which to do it, the following day being Sunday, the ship could not have sailed until Monday morning. His delay kept her until Tuesday morning, and the libellant is therefore entitled to one day's demurrage, viz., \$60, with interest and costs.

THE PRINCIPIA.¹

ALEXANDRE *et al.* v. THE PRINCIPIA.

(District Court, S. D. New York. March 28, 1888.)

1. SHIPPING—CHARTER-PARTY—"WORKING HOURS"—CUSTOM OF PORT.

The phrase "working hours" in a clause of a charter-party means those hours during which work is ordinarily done about the business to which the clause relates, and is to be construed according to the custom of the port as to the working and hauling of vessels in loading and discharging.

2. SAME—BURDEN OF PROOF.

In the charter-party under which libellants chartered claimants' steam-ship P. was a clause providing that "in the event of damage preventing the working of the ship for more than 24 working hours" payment of hire should cease till she should be again fit to resume her service. The steam-ship, having broken a propeller blade, was dry-docked for repairs on the afternoon of Saturday, and was taken off on Monday afternoon. Libellants claimed a rebate of charter money for the three days the vessel was on the dock, and brought this suit to enforce it, claiming that "24 working hours" meant hours during which work might possibly go on, i. e., consecutively, night and day. Claimants contended that the phrase meant only the ordinary working hours in the handling of a ship in port, and that, on this construction, the vessel's repairs had not detained her for 24 working hours. *Held*, that the burden was on libellant to prove his interpretation of the clause, and that it was not proved.

In Admiralty. Action for rebate of charter money.

A. O. Salter, for libellants.

R. D. Benedict, for claimant.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

BROWN, J. The libel is filed to recover a rebate of charter money. The libelants, in December, 1884, chartered the steam-ship *Principia* from her owners for 12 months. By the terms of the charter the owners were required to do certain repairs. By the nineteenth clause the "steamer was to be docked, and bottom cleaned and painted, if charterers think necessary, at least once in every six months, and payment of hire to be suspended until she is again in a proper state for the service." By the fourteenth article it was provided that "in the event * * * of damage preventing the working of the steamer for more than 24 working hours" the payment of hire should cease until she should be again in an "efficient state to resume her service." In the following April, having taken the ground upon one of her trips, and one of the blades of the propeller being broken, she was docked by the owners to make the necessary examination of her hull and to do needful repairs. She went upon the dock in the afternoon of Saturday, April 26, and was taken off on the afternoon of Monday following. During this time her hull was also painted. On the 8th of May the libelant presented a bill to the agents of the owners claiming a rebate for three days hire, amounting to \$534.90, for the three days the vessel was on the dock. Payment was declined. The monthly hire was subsequently paid in advance for several months, until on the 7th of July when, upon negotiations, the charter was canceled by the payment by the libelants of \$7,500. That sum was understood to embrace one month's hire in advance, and charges for agents' commissions, arbitration fees, and cables. In the negotiations for the cancellation of the charter no express allusion was made to the claim, which had previously been presented and rejected, for the rebate now in suit. A few days after the cancellation, and after payment of the money, the claim for rebate was renewed, and the present libel filed.

The claim originally made was for the time that the vessel was on the dock while being painted, under the nineteenth clause. The evidence shows clearly, however, that the charterers had made no demand or request that the bottom be cleaned or painted, and that that work was not necessary to be done at that time, but was voluntarily done by the master, in order to save the expense of subsequent docking; and that the painting did not extend at all the time the ship was necessarily on the dock for the other work. At the trial the complaint was allowed to be amended so as to include a demand under the fourteenth clause of the charter, *i. e.*, "for damage for preventing the working of the steamer for more than 24 working hours." The evidence shows that the phrase "working of the steamer" refers to work in port, about any of the charterers' business with the ship, such as that pertaining to the loading or unloading of cargo. The effect of this clause, therefore, is that in case of any damage that prevents such working of the steamer for more than 24 of the ship's working hours, payment of hire shall cease. The libelants' claim that "24 working hours" means hours during which work might possibly be going on, that is, consecutively, night and day; the respondents say that the phrase means only the ordinary working hours in the handling of the ship in port, in the work of loading and discharg-

ing, and that this, under the regulations of the custom-house, is ordinarily from 8 to 10 hours per day only. The usual stipulations in charters on this subject are made in either of three forms, viz., by running days, by working days, or by working hours. The respondents contend that the latter form excludes holidays, the ordinary hours of rest, bad weather that disables from working, and any general disability, such as strikes. Only one witness was examined on each side in regard to the meaning of this phrase. The libelants' contention would give no effect to the word "working," and would be equivalent to striking that word out of the clause. This is not admissible in the construction of written instruments. In the absence of special proof of some different meaning, the words of the contract must be construed in their ordinary sense. Twenty-four working hours in this view would mean those hours during which work was ordinarily done about the business to which the clause relates. If, for instance, it was the usual practice in this port to work day and night consecutively, during good weather, the words would be construed to mean consecutive hours during such weather. Holidays would be admitted or excluded, according as by usage they were deemed, or were not deemed, a ship's working hours in port. The burden of proof is upon the libelants to establish the fact that "working hours" in this port means consecutive hours day and night; because, without that construction, the damage in this case, and the repairs on the ship, did not prevent the working of the steamer for so many as 24 working hours. I cannot find that the libelants have established this by any preponderance of evidence, and I am therefore constrained to dismiss the libel on this ground, without considering the effect of the subsequent cancellation of the charter.

THE BELLE.¹

THE NORWICH.

CLARK v. THE BELLE AND THE NORWICH.

(*District Court, S. D. New York. March 24, 1888.*)

COLLISION—BETWEEN TOWS—NARROW CHANNEL—UPPER HUDSON NAVIGATION.

A collision occurred at night in the upper Hudson, a little below Four-Mile Point, some 80 miles below Albany, where a shoal divides the river into two channels, the westerly channel being ordinarily used by tows. At the lower end, where the channels meet, the ebb-tide, coming out of the easterly channel, causes the current to set towards the west shore. The steam-boat B. and her tow were approaching the entrance to the west channel, going up stream, and were moving so slowly that the set of the ebb-tide towards the west shore swung the tail of her tow somewhat to the westward. The steam-boat N. and her tow came down the west channel, passing within 50 to 75 feet of the B., and the N. collided with libelant's canal-boat, on the port side of the end of the B.'s tow. Both steam-boats saw and signaled to each other at a consider-

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

able distance. *Held*, that the B., perceiving the descending flotilla, was in fault for occupying with her bending tow any portion of the western side of the narrow channel. *Held*, that the N., knowing the westward set of the current, and the consequent probable swing of the B.'s tow to the west, was in fault for attempting to pass so near to the B., such approach not being absolutely necessary. Both steam-boats were therefore held in fault.

In Admiralty. Libel for damages.

Hyland Zabriskie, for libellant.

Owen & Gray, for the Belle.

R. D. Benedict, for the Norwich.

BROWN, J. At about 1 o'clock A. M. of the night of August 14, 1887, while the libellant's canal-boat Governor Dix was proceeding up the North river with a fleet of canal-boats in tow of the steam-tug Belle, and being the outer boat on the port side in the third tier from the end of the tow, she was run into by the steamer Norwich, which was coming down the river, and received damages for which this suit was brought. The libellant's boat was without fault. The litigation is between the Belle and Norwich. The collision was about 30 miles below Albany, a little above Four-Mile Point, on the western shore. About 1,500 feet above the lighthouse, which is situated on the point, is a buoy, placed at the lower end of the flats known as the "Middle Ground," which divides the river into two channels, called the easterly and westerly channels. The deeper and the better water is in the westerly channel, which is the one generally used by tows. Immediately above the point the west channel and shore bend somewhat to the westward, and the ebb-tide from the easterly channel causes the current to set somewhat towards the point and the shore for several hundred yards to the southward. This naturally inclines the ends of tows somewhat towards the westerly shore, unless sufficient precautions are taken against it. Owing to this westerly set of the ebb-tide, and the narrowness of the entrance to the westerly channel, it is unsafe for tugs with tows to meet and attempt to pass each other at the southerly entrance of the westerly channel. The usage, when they are likely to meet at that place on the ebb-tide, is for the up-going tug either to wait at a little distance below the point, or keep so far to the eastward below the buoy as not to interfere with the down-coming tug and tow, which on the ebb have the right of way. The evidence shows that the Belle and Norwich saw and whistled to each other at abundant distance; that the Belle was proceeding quite slowly, but did not stop before passing the point, making about a mile an hour by land, (while her fires were being raked out,) but continued on till she was within 100 or 200 feet of the buoy, where the Norwich passed her; and that she kept on without stopping at all, not at the time knowing of the collision.

The weight of the evidence is to the effect that the Belle's tow was swung considerably to the westward, as it would naturally be from the effects of the current while the Belle was running so slowly; and that the Norwich, which passed the Belle some 50 to 75 feet off, ran into the end of the Belle's tow in consequence of its swing to the westward, instead of keeping in a straight line astern. The witnesses of the Belle were not in a

position to see the situation of the tow as well as the other witnesses; and the master in fact said that he could not distinguish its exact position. From the Brewer Company's dock upwards for some 2,300 feet to the buoy the tow had been subject to the westward set of the tide, such as it was, more or less, during a period of from 20 to 25 minutes. The whole length of the tug and tow was about 1,200 feet, and at the very slow speed of a mile an hour, some effect from the westward set of the current was unavoidable. This accords with the westward bend of the tail of the tow as testified to by the Norwich's witnesses. Captain Oliver of the Belle, though a man of large experience, did not remember to have met a descending tow before at that point while going at so slow a rate of speed. Some of the witnesses for the Belle testify to her coming up to a point either directly south of the buoy, or a little to the eastward of it. The pilot of the Pontiac, the helper of the Belle, and on her port side, says that when the Norwich passed the buoy, she was about 200 feet above the Belle, a little on her starboard bow; and that they usually go about 150 or 200 feet away from the buoy in going up on the ebb-tide. This testimony, together with the fact that the Belle did not stop in her course, and the extreme difficulty of passing the buoy with a tow, if she had come up directly south of it, within the space of 100 or 200 feet, as her witnesses stated, lead me to the conclusion that she was not all to the eastward of the line of the buoy, but probably a little to the westward of it. In this position, with so slow a speed, and her tow swinging more or less to the westward, I do not think the navigation of the Belle can be justified as safe or prudent, having respect to descending tows in the night-time in that narrow channel. There was nothing to prevent her stopping either below the Brewer's Company's dock, or considerably further to the eastward, in mid-river, before reaching the buoy. Knowing that the tug and tow were coming down, she was bound to give them plenty of room, where, as in this case, there was nothing to prevent her doing so. Considering the heavy losses that are often sustained from collisions through the calculation of narrow chances, no rule should be upheld by the court that does not enforce the obligations of prudent and safe navigation, as between different alternatives. I feel bound, therefore, in the interest of safe navigation, to hold, considering the needs of a descending tow in the night-time in that narrow passage, and the liability of the descending tow to swing somewhat to the westward while passing Four-Mile Point, that the Belle should be held to blame for occupying with her bending tow any portion of what properly belongs to that channel.

In the case of *Lartam v. The Conqueror*, Mar. Reg. July 28, 1886, which was a case of collision very near the same point, the descending tow was held liable because she did not keep to the westward side of the channel; the ascending boat, the *Conqueror*, having grounded upon the middle ground. The tide in that case appears to have been the first of the ebb, but no mention was made of its westward set. That, doubtless, has an important bearing upon the proper course of the descending tug in reference to the management of her tow. The chart of the region, how-

ever, shows that the trend of the westerly shore to the westward above Four-Mile Point is but slight, and the bend at the point is a very gentle one. It cannot be absolutely necessary, therefore, for a descending tug to occupy the whole channel-way, and from the evidence in the cause it would appear that different pilots of equal experience differ somewhat in their customary course in coming down. The usual course of the Norwich was to draw gradually to the eastward for some time before reaching the buoy. That she did so in this case, so as to pass very near the buoy, is shown by the fact that she passed within 50 feet of the Belle. I cannot find, upon the evidence and an inspection of the chart, that so easterly a course was necessary. Having seen the Belle with her tow long before, and knowing that the Belle, instead of stopping, was continuing her approach with her tow, and seeing their positions as they drew near each other, I think the Norwich was bound not to go so far to eastward, nor so near to the Belle and her tow, as she did. As the ebb-tide sets somewhat to the westward, she was bound to know that the tail of the Belle's tow must be swinging somewhat to the westward of the Belle, so as to render so near an approach to the Belle dangerous to the tow below. This near approach not being absolutely necessary, as I must hold, to her own safety, was therefore imprudent, and unjustifiable.

There is reference in the testimony to a part of the Norwich's tow rubbing some boats at the docks on the western shore; but it also appears that one of the boats in her tow, there being only four abreast, rubbed along the leeward tier of the Belle's tow. As this must have been but a little only to the westward of the line of the buoy, I am inclined to think that the rubbing of some of the boats along the dock on the western side took place afterwards, and as the result of some disarrangement of her tow after the Norwich had stopped. The circumstances are so obscurely stated that I cannot give this evidence any controlling weight. Had the Norwich approached more slowly towards the Belle, whose dangerous position she saw; had she gone, as she might have gone, further to the westward, I think her own tow would have come down safely and straight in a line with the current; and that she would have passed safely and without collision, astern of the tow of the Belle.

No further reference as to damages being desired, the damages are found to be \$367.68, with interest from September 22d. This includes demurrage for nine days at the rate of \$10 per day; which is a reasonable amount for the detention of the boat with the several men and horses attached. For that sum, with interest and costs, the libellant is entitled to a decree against both vessels in the usual form.

CHAPPELL v. UNITED STATES.

(Circuit Court, D. Maryland. April 19, 1888.)

1. COURTS—FEDERAL CIRCUIT COURTS—CLAIMS AGAINST UNITED STATES—EMINENT DOMAIN.

Under act of March 3, 1887, c. 359, the circuit court has jurisdiction of a claim exceeding \$1,000, for compensation to the owner of land, who, by command of the light-house board, under authority of congress has been prevented from making use of his land lying between two range lights, the use intended by him being one which would have obstructed the lights. Such a restriction upon the use of private property, if authorized by the United States, entitles the owner to compensation.

2. SAME—PLEADING.

The act of congress of March 3, 1887, c. 359, having given jurisdiction to the circuit court of all claims against the United States exceeding \$1,000, founded upon contracts, express or implied, or for damages, liquidated or unliquidated, in cases not sounding in tort, if the facts alleged in claimant's petition show that the claim is not founded upon torts of officers of the government, but on acts of theirs which were authorized by legislation of congress. It is immaterial whether the petition claims compensation as upon an implied contract or as for damages. If the facts alleged show a case for compensation, the court is to give judgment upon the facts and the law, and without regard to forms of action.

(Syllabus by the Court.)

At Law. Action for compensation for use of land. On demurrer.

F. P. Stevens, for plaintiff.

Thomas G. Hayes, U. S. Dist. Atty., for defendant.

MORRIS, J. This is a suit against the United States under act of March 3, 1887, to recover compensation exceeding \$1,000 for the use of plaintiff's land at Hawkins' point, on the Patapsco river. The nature of the case upon which the plaintiff's claim is based is this: The United States light-house board by authority of congress, and with money appropriated by congress for that purpose, has erected two light-houses,—one in the water at Hawkins' point, in front of the shore of plaintiff's land, and the other on Leading point, about one mile back in a north-westerly direction, upon land of some one else other than the plaintiff. They are range lights to enable vessels to direct their course, so as to keep in the Brewerton channel as excavated by the United States, when coming up or going down the river to and from the port of Baltimore. For that use it is requisite that there should be no intervening object between the light-houses; the intention being that when a vessel is on her true course in the channel the rear light on Leading point shall, in the night-time, be seen in a line with and directly above the front light on Hawkins' point, and similarly in the day-time the signal balls shall be so seen. The land of the plaintiff in respect of which he claims compensation lies between the two lights and is used by him, according to his petition, as a site for buildings for manufacturing purposes. He claims that the United States has required of him that so much of his land as lies within the range between the two light-houses, and for a space not

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less than 60 feet in width, shall remain unobstructed by buildings, and that he has been prevented by the United States from erecting buildings upon, and from using, that portion of his land, and that the United States has used it in the manner aforesaid. The district attorney of the United States has demurred to this petition, and contends—*First*, that the plaintiff has not alleged facts from which a contract, express or implied, on the part of the United States to pay for the use of the land can be deduced; and, *secondly*, that the mere passing of light across the plaintiff's land cannot be held to be a use of it; and that, if the plaintiff yielded to the direction of the officers of the light-house board, not to obstruct the line of range, he voluntarily consented to do what the officer could not have required him to do, and has no remedy at law. With regard to the first contention in support of the demurrer, it is to be noticed that the act of March 3, 1887, gives to the circuit court jurisdiction of all claims founded upon the constitution of the United States, or any law of congress, or upon any regulation of any executive department, or upon any contract, express or implied, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States in a court of law, equity, or admiralty, if the United States were suable. Under this law, which is broader in its terms than that by which heretofore claims against the United States were cognizable in the court of claims, if the plaintiff has suffered damage by being prevented from using his land, and he has properly stated his case, and that case as stated is not one sounding in tort, we do not see that upon the ground of jurisdiction his petition is demurrable. If the erection of the light-houses, and the establishment of the range beacons, and the restriction put upon the plaintiff not to erect structures on his own land which would obstruct the range was not done by lawful authority of the United States, then, of course, those who interfered with the plaintiff were wrong-doers, and their acts tortious. But this is not the issue raised by the demurrer, or contended in argument. It is not suggested that the beacons were not located and maintained by authority of congress. It is not denied, as the petition is now amended, that the land is the private property of the plaintiff. It is not denied that the obstruction which would have resulted from the plaintiff building upon his land between the beacons would have defeated the lawful purpose of the United States, and would have endangered the safety of vessels using the channel, which congress had directed should be deepened, and should be marked by range beacons. These being the facts, it would seem clear that in requiring that the beacons should remain unobstructed, and in requiring that the plaintiff should desist from building on his intervening land, the officers of the light-house board were doing a lawful and authorized act, and one necessarily involved in the direction by congress that the board should erect and maintain the range beacons. It cannot be said, therefore, that their act was tortious. And we think it follows that, if the plaintiff, by submitting to their lawful commands, consented to a restriction upon the free use of his property which entailed damage or loss upon him, there is no obstacle in the ju-

risdiction of the court to his recovery. In the case of *U. S. v. Manufacturing Co.*, 112 U. S. 645, 5 Sup. Ct. Rep. 306, the supreme court distinctly held that where, pursuant to an act of congress, private property has been taken for public use by officers of the government, there is an implied obligation upon the government to make compensation to the owner, and although the taking be irregular, and might have been enjoined, that the claimant could waive his right to resist the officers of the government, and, electing to regard their action as lawful, might sue in the court of claims for just compensation. We are of opinion that the amended petition does state a case from which a promise to make compensation may be implied, or at any rate it states a case not sounding in tort, entitling the plaintiff to recover any damages he may be able to prove have been sustained by him.

These considerations are also applicable to the second contention, viz., that the mere passing of light across the plaintiff's land in the nighttime, or the mere exhibiting range signals in the day-time to be seen across it, is not a use of land for which compensation can be recovered. In our judgment it is immaterial whether the suit is to be considered as one for use and occupation of land by the United States, or for damages resulting from the prevention of plaintiff's use of his own land. Section 5 of the act of March 3, 1887, c. 359, provides that the plaintiff shall bring his suit by petition, and shall set forth "the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or other thing claimed, or the damages sought to be recovered, and praying the court for a judgment or decree upon the facts and the law." The form of action is not, therefore, material, and such a petition is not demurrable if it sets forth facts from which a contract may be implied, or if it alleges lawful and authorized acts of the government, not torts of its agents, upon which an obligation to pay damages may be sustained.

The demurrer is overruled.

CITY OF GALESBURG v. GALESBURG WATER CO. *et al.*

(Circuit Court, N. D. Illinois. March 20, 1888.)

MUNICIPAL CORPORATIONS—CONTRACTS—RESCISSION—ESTOPPEL BY RESOLUTION OF CITY COUNCIL.

A city that has granted a party the right, for a specified time, to erect water-works, and supply the city with water for public and private use, is not estopped by a resolution of the city council, reciting that the water-works stood the test required by the ordinance, from maintaining an action to rescind the contract, the works proving inadequate, against a corporation to whom the contract had been assigned, and holders of bonds issued by such corporation, who had purchased subsequent to the passage of the resolution. The bondholders, however, are entitled to a fair remuneration for the water actually furnished and consumed.

In Equity.

Action by the city of Galesburg against the Galesburg Water Company to have a contract for a water supply set aside as fraudulent and unfulfilled. The action was brought in the state court. On application of the Farmers' Loan & Trust Company of New York, the assignees under a trust deed of the water company, they were made parties defendant, and the suit was removed to this court.

Fletcher Carney and F. A. Willoughby, for complainant.

Turner, McClure & Rolston and Arthur Ryerson, for defendant.

GRESHAM, J., (*orally*.) By an ordinance passed on the 12th of May, 1883, the city of Galesburg granted to Nathan Shelton the right to construct and maintain, within and near the city, water-works to supply both public and private wants, for a term of 30 years; the yearly rental for fire hydrants being specified in the ordinance. This ordinance was accepted by Shelton. At and previous to this time, the city had maintained an imperfect system of water-works, and the old mains were sold to Shelton at a price to be ascertained in the future, and paid for in water-rents. Shelton caused the Galesburg Water-Works Company to be organized, and assigned to it his contract with the city. In August, 1883, the Water Company, by its trust deed, conveyed to the Farmers' Loan & Trust Company of New York its property acquired and to be acquired to secure the payment of an issue of bonds amounting to \$121,000. The Water Company proceeded to erect the works and lay down additional mains, and on December 6, 1883, the city was notified that the works had been completed, and that the Water Company was ready for the test called for by the ordinance; and on the same day, the members of the common council being present, such test was satisfactorily made, as appears from an ordinance of the common council. A few months later complaints were made both as to the character and quantity of the water. In the summer or fall of 1884 the Water Company admitted its failure to supply water according to the terms of the contract, and further time was given it to sink gang-wells, which it was thought would secure an abundant supply. After sinking such wells, the Water Company claimed that it was able to fulfill the contract; but it failed and refused on request to demonstrate its ability to do so by a proper test of its works; and the proof shows that this claim was unfounded. On the 1st of June, 1885, the city, by an ordinance, rescinded the contract with Shelton, and by its officers repossessed itself of its old water-mains for use and protection from fire, and brought this suit in the state court at Galesburg to set aside the contract for fraud and non-compliance on the part of the Water Company. The ordinance granting the franchise to Shelton required him to furnish pure water of a maximum quantity, and provided that the city should not be liable for hydrant rents for such time as the works did not supply the required amount of water. The city paid no hydrant rents to the Water Company. Shelton obligated himself to construct a system of works which would enable him to furnish a supply of water for the use of the inhabitants, also for the use of city build-

ings, public schools, churches, drinking fountains, and for fire purposes. The evidence conclusively shows that the Water Company failed to comply with its contract, although a reasonable time was afforded it to do so; that the water furnished was impure and insufficient in quantity; that it was drawn, in part, from a creek or swamp, which was polluted by the drainage from slaughter-houses, and by night-soil and dead animals dumped into it by scavengers. The Water Company thus trifled with the health and the lives of the people. It is not contended, I think, that Shelton or his successor, the Water Company, complied with the contract. On the application of the Farmers' Loan & Trust Company it was made a party defendant, and on its motion the suit was removed to this court, and the purchasers at the sale in the foreclosure suit brought by the trustee against the Water Company, and who were substituted for the trustee, now urge that the city, by adopting the resolution of December 6, 1883, declaring that the works had been constructed in compliance with the contract, and that they were satisfactory, was estopped from asserting against the trustee of the bondholders and the purchasing committee that the contract had not been complied with. It is fair to assume that those who purchased the bonds did so in good faith, and that they relied, in part at least, on this resolution.

The Water Company, by its trust deed, conveyed no greater right than it had. The mortgage contained a clause which authorized the trustee to receive from the city water rents due to the Water Company, to enable it to pay interest as it accrued on the bonds. But the right of the Water Company to rents depended upon its continued compliance with the contract. The water which it furnished was deficient both in quality and quantity, and it was not, therefore, entitled to rents. The purchasers of the bonds knew that unless water was furnished in quantity and quality as called for by the contract, nothing would be due from the city. A different ruling would be equivalent to holding that by adopting the resolution of December 6th the city guaranteed the payment of interest which would thereafter accrue on the bonds. The city did nothing of the kind.

By the trust deed and mortgage, the Farmers' Loan & Trust Company and the bondholders succeeded to the rights of the Water Company. If this were a suit between the city and the Water Company, I should grant the relief prayed for without allowing anything for water furnished, for none was furnished in compliance with the contract. But the controversy now is between the city and the persons representing the bondholders, and I think it equitable that the city should pay them a reasonable compensation for the water, such as it was, which was furnished up to the time it resumed possession of the old mains. I do not think the bondholders' committee is entitled to the old mains. They were not sold to Shelton unconditionally and absolutely. They were sold to him to be used in a particular way, and for a particular purpose, and to be paid for by water furnished under the terms of the contract. Shelton and his successor, the water company, having failed to comply with the contract, although afforded ample time to do so, the city was authorized

to resume possession of its old mains, and protect its inhabitants against fire as best it could.

A reference will be made to the master to ascertain and report the fair value of the water furnished to the city by the Water Company; and when the city shall pay into court, for the bondholders' committee, the amount thus ascertained, a decree will be entered annulling the contract, and establishing the city's title to the old mains.

TAYLOR v. ROBINSON, Sheriff.

(District Court, N. D. Texas. March 31, 1888.)

TAXATION—TAXABLE PROPERTY—LAND HELD UNDER CONTRACT OF PURCHASE.

Under Rev. St. Tex. art. 4691, providing that whoever holds state lands under a contract of purchase, or under a lease for a term of three years, shall be considered, for the purposes of taxation, the owner of the same, one who contracts with a state to build for it a capitol, and, in payment, is given possession of state lands, under a contract which provides that he is to become the owner thereof in installments as the work progresses, the land being platted for that purpose, and which also provides that if he abandon his contract he is to pay rent upon that portion of the land which he has not then earned, is properly assessed before such abandonment, upon the unearned lands, as a holder under a contract of purchase.

In Equity. On bill for injunction.

The complainant, Abner Taylor, seeks to enjoin the defendant, J. M. Robinson, sheriff and tax collector of Oldham county, Tex., from collecting taxes assessed against him upon certain state lands which he holds under a contract of purchase.

Rayland, Robertson & Coke, for complainant.

J. S. Hogg, Atty. Gen., and *R. H. Harrison*, Asst. Atty. Gen., for defendant.

McCORMICK, J. The constitution of this state, art. 13, § 1, provides that "taxation shall be equal and uniform. All property in this state, whether owned by natural persons, or corporations, other than municipal, shall be taxed in proportion to its value: * * * provided, that two hundred and fifty dollars worth of household and kitchen furniture, belonging to each family in this state, shall be exempt from taxation. Sec. 2. * * * The legislature may, by general laws, exempt from taxation public property used for public purposes; actual places of religious worship; places of burial not held for private or corporate profit; all buildings used exclusively and owned by persons or associations of persons for school purposes, (and the necessary furniture of all schools;) and institutions of purely public charity. And all laws exempting property from taxation other than the property above mentioned shall be void." Article 4691, Rev. St. Tex., provides: "Property held under a lease for a term of three years or more, or held under a contract for the

purchase thereof, belonging to this state, * * * shall be considered, for all purposes of taxation, as the property of the person so holding the same." On the 18th day of January, 1882, one Matthias Schnell contracted with the state of Texas to build for said state a capitol building described in said contract, and to pay the sum of \$20,000 to said state to reimburse the state for the incidental expenses theretofore incurred, chargeable to the account of the lands reserved for the capitol building, and to receive therefor said capitol lands, in certain installments, as the work progressed. This contract, agreeably to its terms, and with the consent or acquiescence of the proper state authorities, was assigned, and came in due course of such assignment, before the 25th day of July, 1885, to be held by the complainant. This contract contained no express provision as to the possession and use of said capitol lands prior to their being patented to the contractor under said contract. The lands had been surveyed and designated by plats, numbers, metes, and bounds, etc., and the counties named in which the surveys respectively were situated. There appears to have been a question as to the right of the contractor to use these capitol lands (3,000,000 acres) prior to their being patented to him. On the 25th day of July, 1885, a supplemental contract was entered into by the proper state authorities and complainant, by which, among other things, his right to use said lands and all of them (3,000,000 acres) from that date was fully recognized. This supplemental contract was in two parts, one relating to changes in the material and construction of the building, and the other to the holding of the capitol lands by the contractor. The one part contains this provision:

"It is expressly agreed and understood by and between the parties hereto that the lease of even date herewith, executed by the state of Texas, through its proper officers, and giving to the capitol contractor the absolute right of possession to the capitol lands, upon the conditions contained therein, is hereby made a part of this contract, as fully and expressly as if the same had been at length herein set forth, reference being thereto made for further particulars."

The other part contains these provisions:

"Said Taylor [complainant] is to pay six cents per acre per annum for said land, and is to execute a good and sufficient bond payable to the governor of the state of Texas, or to his successors in office, for the payment of said rental. If said Taylor or his assigns completes the building of said capitol according to contract, then no rent whatever is to be paid for said lands, said lands being then the property of said Taylor or his assigns, free from any claim on the part of the state for rent, as though this agreement had not been made. If said Taylor abandon his contract, or the same be terminated before the completion of said building, then he is to pay rent at the rate above mentioned for all lands which may not then have been earned by him."

So much of said capitol lands as are situated in Oldham county, and as had not been patented to complainant on the 1st day of January, 1886 and 1887, respectively, have been assessed for taxes as the property of complainant for those years; said assessment amounting in the aggregate to the sum of \$9,464.69, which the defendant, as the bill alleges, is about to collect or threatening to collect by seizure and sale of complainant's

property. There is, substantially, no dispute as to the facts, and the question is not one of irregular or excessive assessment, (for relief against which, if such ground existed, this court would probably not be the proper tribunal,) but it is whether on the said 1st day of January, 1886 and 1887, the complainant had any taxable property in said lands; and it would seem that under the constitution of this state that question resolves itself into the question whether on the dates named the complainant had any property in said lands. But waiving this broader view of the question, which has been presented, and ably argued, and well supported by authority, in the printed brief submitted by the attorney general and the assistant attorney general of the state on behalf of the defendant, I will notice briefly the positions taken in the bill and earnestly pressed in the brief of complainant's solicitors. As stated in the brief these are: *First.* The complainant did not on January 1, 1886, or January 1, 1887, hold the unearned lands in Oldham county under a contract of purchase, within the meaning of article 4691, Rev. St. Tex. "*Second.* The complainant did not at either of said dates hold said lands, within the meaning of article 4691, under a lease for a term of three years or more." The state of Texas owns a great many sections of land, separated from the public domain and set apart for a permanent public school fund, and for other public charities. There have been, and are still, laws providing for the sale of these lands on long time, and for leasing such as are not sold for longer or shorter terms on conditions as to reserved rent and other particulars mentioned in the statutes. The section of the state constitution appropriating 3,000,000 acres of the public domain for the purpose of erecting a new state capitol, provided that said lands should be sold under the direction of the legislature, and that the legislature shall pass "suitable laws to carry this section into effect." The sixteenth legislature did pass laws for carrying this provision into effect, under which the lands were surveyed into leagues, (wherever practicable,) which were numbered and platted, and carefully described by fixed corners, metes and bounds, character of soil and water, and other features affecting value. These the capitol commissioners, under direction and with approval of the capitol board, were authorized to sell for money, or to contract to an accepted bidder for the erection of the capitol building, (as was done;) but no mention is made of any authority to lease all or any portion of the capitol lands in any act of the legislature that I have been able to find. There appears to have been authority in the counties to lease certain lands belonging to said counties for school purposes. And on the 12th April, 1883, (page 89, Sess. Acts,) provision was made for leasing certain of the lands set "apart for the benefit of the common school, university, the lunatic, blind, deaf and dumb, and orphan asylum funds;" and amended provisions have since been made in reference to these lands, all requiring some rental (and generally fixing a minimum) to be reserved. The complainant insists that he did not hold these lands under a lease for a term of three years or more, for that before the expiration of three years from the 25th day of July, 1885, he had earned said lands under his contract, and had received patents for

them. But if this fact shows that he did not hold said lands under a lease for a term of three years or more, does it not as clearly show that, as to these lands at least, there never was any lease at all, for that rent was only reserved on such lands as the contractor should not earn under his contract? Waiving, therefore, all question as to the authority of the capitol commissioners and capitol board to lease the capitol lands, (a question the defendant has not raised,) I am of opinion that the position is well taken by the complainant that he did not on the 1st day of January, 1886, or the 1st of January, 1887, hold these lands under a lease for a term of three years or more. He, however, did have actual possession of them, or a clear and undisputed right to the possession of them as against the state, on said dates, under a contract of some kind. Complainant insists that it was not under a contract of purchase, because the first contract did not expressly recognize his right to the possession of said lands, and the supplemental contract, which does so recognize his right, and under which he says he entered, uses the word "lease" in connection with his right to possess said lands, and his liability to pay rent for such as may not be earned under his contract; and because the acts of the legislature authorizing his contract do not anywhere in express terms refer to the capitol contractor as a purchaser of the lands. And by way of illustration and further argument suggests that if the contract to build the capitol had provided for payment in money, the contractor would not be considered as a purchaser of the money; that purchase embraces all manner of acquisition except inheritance, and in this sense a lessee is a purchaser, but that the term "purchase" is not used in this broad sense in article 4691, Rev. St. Tex. It is apparent that by "purchase" in said section is meant a contract to acquire the fee in the land. That, however, is the estate in the land for which the complainant did contract as to all the lands earned by him under his contract to erect the state capitol building. It can hardly be seriously urged that because the word "purchaser" or "purchase" is not used in the statutes or the contracts as descriptive of the contractor, said contractor, who binds himself in writing, mutually executed and delivered by him and the proper state authorities, to erect a specified building for certain clearly designated parcels of land, is therefore to be held as not acquiring or holding said lands after entry permitted and before patent under a contract for the purchase of said lands. I have already shown why, in my opinion, the term "lease" mentioned in the supplemental contract must be restricted to such lands, if there should be any such, as are never earned under said contract. It is misleading to say that, if payment in money had been contracted for, the contract could or would not have been construed as one for the purchase of the money. The term "money" is used to designate the whole volume of the medium of exchange recognized by the custom of merchants and the laws of the country, just as the term "land" designates all real estate. If the contract in this case had been to erect the capitol building for land to the extent in value of \$1,500,000, or to the extent in acres of 3,000,000, to be taken as it might be thereafter tendered out of the public domain, the analogy to a contract for pay in money would be

closer. If the contract had been for payment in certain pieces of a definite kind of money, each piece marked and numbered, held at first by the state, but to be delivered in a certain order,—that is, commencing with a certain number, and continuing with the consecutive numbers, in installments as the work progressed,—and afterwards, when the work had considerably progressed, on the giving of satisfactory security, possession of all the marked money was delivered to the contractor, providing that as he earned it in installments it should become his absolutely, and that, if his contract should be abandoned or otherwise terminated before he earned it all, then he was to pay interest at the rate of 6 per cent. per annum for all the said moneys which may not then have been earned by him, the analogy it seems to me would be perfect. Then, whether it ever became a loan (lease or renting) would depend upon whether the contract was terminated before completion, because, if not, the whole would have been earned, and no interest whatever be due for said moneys, but the same would then be “the property of said Taylor or his assigns, free from any claim on the part of the state for rent, (interest,) as though this agreement (about the possession of the moneys) had not been made.” It appears to me that the lands in question were held by complainant in 1886 and 1887 under a contract for the purchase thereof, and were and are subject to assessment for taxes for those years, and that the motion for a preliminary injunction should be refused. And it is so ordered.

ORVISS v. DUNN.

*(Circuit Court, N. D. Texas. April 13, 1888.)***TRUSTS—ACTION TO ESTABLISH—LOST INSTRUMENTS—SUFFICIENCY OF EVIDENCE.**

In a suit brought in 1884 to establish and enforce a bond to reconvey, alleged to have been given in 1847 by defendant to his uncle J., under whom plaintiff claimed, one witness testified that he saw certain papers executed about that time, and understood them to be deeds of J.'s land to defendant, given to enable defendant to sell it in the States whither he was returning after a visit to J., and a bond to reconvey in case defendant failed to sell. Another testified that from talks with defendant at that time he understood that such an arrangement had been made, and that he afterwards saw such a bond to reconvey produced and proved in a suit in 1854; that the witnesses to the bond were dead. It appeared that in 1847 defendant was poor, and the consideration he alleged was very small—less than one-ninth of that expressed in the deed. Plaintiff and his grantor had been in continuous possession and paid taxes since 1850. *Held*, that plaintiff was entitled to relief.

In Equity.

Bill to establish a bond for title, and for specific performance, by David A. Orviss against John Dunn.

R. G. Street and A. C. Prendergast, for complainant.

Clark, Dyer & Bolinger, for defendant.

McCORMICK, J. On the 30th day of January, 1884, the defendant in this suit, a citizen of the state of Mississippi, brought his action of trespass to try title (ejectment) against complainant to recover possession of, and establish his title to, a certain half league of land in Robertson county, Tex., described in his petition therein, and in the bill herein. On the 6th day of December, 1884, the complainant filed his bill herein, setting up substantially that on and prior to the 1st day of February, 1847, the land in controversy was owned by one James Dunn, an uncle of the John Dunn party hereto, and that on said 1st day of February, 1847, said James Dunn had conveyed said land to said John Dunn by deed absolute upon its face, reciting a cash consideration of \$3,000 in hand paid, and acknowledged to have been received from said John Dunn by said James Dunn; that in truth and fact no consideration was paid or contemplated to be paid; that the purpose of said deed was to put the legal title to said land in said John Dunn, to enable him with facility to sell the same for his uncle in Mississippi, or one of the older states; and that simultaneously with the execution and delivery of said deed there was executed by John Dunn and delivered to said James Dunn an obligation to reconvey, unless sale was effected; that, pursuant to this purpose, the deed to John Dunn was recorded, and the bond or obligation to reconvey was withheld from record; that, no sale being effected by John Dunn, the said James Dunn, on the 9th day of September, 1850, conveyed this land, (in distribution of his estate) to his son, James Dunn, Jr.; that said bond for title has been lost or mislaid, and cannot now be found; that complainant holds the title of the said James Dunn, Jr., and that he and those under whom he claims have continuously

since the 9th of September, 1850, (and the said James Dunn before that time had) exercised acts of ownership over said land notoriously, and have paid taxes thereon, etc. And prays that said bond for title be established, and specific performance thereof be decreed, deed to John Dunn canceled, cloud removed, etc. The defendant denies that the execution and delivery to him of the deed of 1st February, 1847, was without consideration, or was subject to any trust in favor of the grantor, or that he ever executed and delivered a bond for title, or obligation to reconvey the land in controversy. He says that he gave a valuable consideration for this land, stating in his answer the consideration to have been \$325, of which \$75 was in money and the remainder an account against Dr. W. S. Rodgers; that he paid the taxes on it for several years; that, as he resided in Mississippi, he left his brother, A. M. Dunn, who resided in the county in Texas where this land is situated, as his agent, to pay the taxes thereon, and furnished his said brother the money necessary to pay the same; that the deed to said James Dunn, Jr., was not put to record until in 1872; that no possession was held of said land until after the sale to complainant of an interest in said land in 1873; that he never acquiesced in the adverse claim of those under whom complainant claims, nor had he any means of ascertaining that they or any of them set up any claim to said land, until the deed to James Dunn, Jr., was recorded in 1872; that at or about the time he purchased this land from his uncle, he and his uncle agreed to engage in merchandising in Robertson county, if the defendant could get the goods for this half league and for another half league owned by his uncle, and that, to carry out said agreement, his uncle did convey to him said other half league that he might sell it and his own,—the one in controversy,—and procure a partnership stock of goods; that he failed to effect said purpose, and afterwards reconveyed said other half league to the heirs of his uncle, said James Dunn. This answer is sworn to and sustained substantially by the deposition of the defendant taken in the case with a slight variance as to the consideration paid.

The complainant offers the testimony of one McFall, who says he was at James Dunn's house in 1847, engaged at work there for one Gilbreath; that he was present in the house one day, a short time before John Dunn left for Mississippi, and saw said Gilbreath and one Perry witness some papers that had been signed by James Dunn and John Dunn; that there were three or more papers; that he understood from the conversation of John Dunn and James Dunn and Perry (who was a lawyer) in presence of each other, of witness, and of Gilbreath, that James Dunn was deeding or had deeded two tracts, half leagues, of land in Robertson county (by the papers being witnessed) to John Dunn, to sell for James Dunn in the states on commission, and that John Dunn had given a bond to reconvey the lands in case he could not effect a sale. The complainant also offers the testimony of one Wheelock, who has lived in Robertson county since 1833, lived within three miles of James Dunn's house until said James Dunn died, and knew John Dunn all the time he was in Robertson county,—from October, 1846, until he went away, some time

in 1847. This witness says: "My understanding was, by talks with John Dunn, that his uncle had conveyed him lands to sell and he was to get a certain percentage." He says it was the family talk with the Dunn and Wheelock families. He was elected sheriff in 1851 of Robertson county, and was present in court at the May term, 1854, of the district court of Robertson county, and remembers a suit of James Dunn, Jr., against John Dunn, to make title to lands upon a bond for title. He caused citation by publication to be made on said John Dunn. The trial was had, and witness saw what purported to be a title-bond from John Dunn to James Dunn, Sr., to make title to the half league involved in this suit,—the Robertson one-half league; saw the bond exhibited before the jury in the trial of the cause of *James Dunn, Jr., vs. John Dunn*. His impression is that Gilbreath was a witness to the bond, and that they had Judge KILLOUGH present, to prove Gibreath's signature, because Gilbreath was dead. This witness knew both Gilbreath and Perry, and says they are both dead. (There was judgment in favor of James Dunn, Jr., in this suit, in 1854, in Robertson county, and it was pleaded in complainant's bill, but was stricken out on demurrer, because the record disclosed only service by publication on the defendant, who was a citizen of another state.) The original deed from James Dunn, Sr., to John Dunn was produced by complainants as coming from his possession. These witnesses show that in 1847 John Dunn was a young man 24 or 25 years old, without means, and without any remunerative occupation, of good presence and good qualities, in whom his uncle had confidence, and who spent a year at his uncle's house, as a young relative visiting him from a distant state (that was before the railroad had qualified distances in Texas) would; and, as occasion called, attending to any matter for his uncle that came in his way. The other proof relates to the loss of or inability to find the bond for title, to the family history or tradition in respect to this land transaction, and the constant claim of ownership and payment of taxes. The consideration recited in the deed may well be taken as the parties' estimate of the value of the land at that time. This is \$3,000, or about \$1.35 per acre. The defendant says he gave an account against Dr. W. S. Rodgers for \$250, and released two sums his uncle owed him,—one for \$25, and one for \$40, making \$315 in all, or not quite 15 cents per acre. None of the witnesses mention ever hearing of the project to convert the lands into goods, and carry on a partnership mercantile venture. All the circumstances of John Dunn's visit to Texas and remaining with his uncle, (who was a rich man, for that time and place,) and his leaving there to return to the older states, seem to me to tend strongly to support complainant's case, and to corroborate the direct testimony of the witness McFall and the witness Wheelock, whose testimony I have summarized above. It is well settled that to ingraft a trust upon a deed by parol, or to establish a lost writing by parol which declares such a trust, the proof must be clear, and the unsupported testimony of one witness, however positive and clear, cannot safely be allowed to establish such a trust. It is, however, as well settled that, where the proof is adequate, the trust must

be upheld, and that both the nature and amount of the proof required must depend in a measure upon the age of the transaction. Upon a careful consideration of the whole proof, I am constrained to conclude that the deed from James Dunn, Sr., to John Dunn for the land in controversy was made for the purpose of enabling said John Dunn to sell said land for James Dunn, Sr., and that the legal title thereby held by said John Dunn was and is for the use and benefit of said James Dunn, Sr., whose right complainant now holds; and that a decree should be passed herein granting complainant the relief prayed for in his bill; and it will be so ordered.

HEYMAN v. UHLMAN.

(Circuit Court, S. D. New York. April 16, 1888.)

EQUITY—PRACTICE—APPEARANCE—FILING PLEADINGS.

When a defendant served with subpoena entered his appearance, and filed his answer before the rule-day at which the writ was returnable, *held*, that under United States equity rules such practice was proper, and that replication should be filed on or before the rule-day succeeding that on which the writ was returnable.

In Equity. Motion to set aside an order dismissing a bill of complaint.

Witter & Kenyon, for complainant.

Witmore & Jenner, for defendant.

LACOMBE, J. The bill of complaint was filed, and subpoena served, January 14, 1888. The next succeeding rule-day was February 6th, and the rule-day thereafter, March 5th. Defendant entered his appearance February 2d, and filed his answer February 3d. No replication was filed on the March rule-day, and order was entered dismissing the bill. Complainant moves to set aside the order.

The question raised upon the motion is as to the interpretation of the rules in equity. Their language seems too plain to call for any elaborate discussion in view of the fact that they were presumably framed to promote the speedy administration of justice, and were not designed to delay suitors, except so far as might be necessary to insure a proper and orderly presentation of both sides of each case. A defendant served with subpoena must enter his appearance on or before the day at which the writ is returnable. His plea, demurrer, or answer must be filed on the rule-day next succeeding the day of entering his appearance, whether such rule-day is one day or thirty days after the entering of the appearance. The complainant has until the next succeeding rule-day after filing the answer in which to file general replication. There is no warrant in reason or authority for the proposition advanced by the complainant that an appearance can only be filed on a rule-day, and that therefore in

the case at bar defendant could not file his appearance before the February rule-day, nor his answer before March 5th. The default should be opened, and complainant allowed to file replication *nunc pro tunc*, upon proper stipulations as to expediting the trial, the details of which may be arranged upon settlement of the order.

COFFIN *et al.* v. DAY *et al.*

(District Court, N. D. Illinois. April 18, 1888.)

1. PARTNERSHIP—FIRM AND PRIVATE CREDITORS—FRAUDULENT PREFERENCES.

A transfer by an insolvent firm of its property to one who had indorsed the paper of the firm and of its individual members to a large amount, and who, in consideration of the transfer, agreed to pay the obligations of the firm and of its individual members to a specified amount, including the paper on which he was indorser,—being made in good faith, and for an adequate price, is not fraudulent as to firm creditors.¹

2. SAME.

Creditors of an insolvent firm have no legal claim on firm assets until they have acquired a vested lien by judgment or otherwise, and by consent of all its members such assets may be applied to the payment of individual creditors of the partners.¹

In Equity. Bill to set aside alleged fraudulent preferences.

Irwin, Flower, Remy & Gregory, for complainants.

Puterbaugh & Son, Hopkins & Hammond, and McCulloch & Son, for defendants.

BLODGETT, J. This case now embodies five creditors' bills, or bills in the nature of creditors' bills, filed by creditors of Day Bros. & Co., to set aside certain alleged unlawful preferential payments made by said firm. The first case was brought by *Coffin et al. v. Day et al.*, by a bill filed in the circuit court of Peoria county, in June, 1885, and removed to this court, and was for the collection of judgments at law recovered by the complainants against Day Bros. & Co., between February 13, 1885, and June 2, 1885. The second case was brought by *Dornan et al. v. Day et al.*, in January, 1886, for the collection of two judgments at law rendered in January, 1885, against Day Bros. & Co. The third case was brought by *Parker et al. v. Day et al.*, in January, 1886, for the collection of a judgment at law rendered in July, 1885. The fourth case was brought by *Simpson et al. v. Day et al.*, in March, 1885, for the collection of a judgment rendered in December, 1884. And the fifth case was brought by *Richard et al. v. Day et al.*, in May, 1886, for the collection of a judgment rendered in May, 1886. On May 24, 1886, all these cases were, by an order of court, consolidated, with the provision "that said suits should henceforth proceed as one cause, without prejudice to

¹See note at end of case.

the priority of the respective creditors therein." It appears from the pleadings and proofs in the case that the firm of Day Bros. & Co., the principal defendants in this case, was organized about the 1st of January, 1882, and consisted of Lucius L. Day, Gordis R. Cobleigh, Normand S. King, William G. Marsters, Samuel H. Van Sickler, and Herbert F. Day, and from the time of its organization up to September 23, 1884, said firm conducted a wholesale dry-goods business in the city of Peoria, and also had two retail stores in said city, and a retail store in Canton, Fulton county, in this state, and an overall manufactory in the city of Peoria. From some time in the spring of 1884 said firm had been in embarrassed circumstances, and had been obliged to obtain extensions upon its commercial paper, and in obtaining such extensions they had secured the indorsement of the defendant Charles B. Day, so that on the 23d of September Charles B. Day was indorser for the firm and its individual members to the amount of about \$100,000; and on the last-named date the entire stock of the wholesale store was sold to Charles B. Day at the rate of 75 cents on a dollar, and the stock of the two retail stores in Peoria were sold to him at the rate of 62½ cents on a dollar. There was also sold to him certain horses, trucks, wagons, etc., used in and about the firm business, the aggregate of the purchase amounting to \$228,550. For the payment of these goods Charles B. Day assumed the payment of paper and obligations of the firm, and of the individual members thereof, to the amount of \$214,043.88, and gave his notes for the balance of said purchase money, \$14,506.12, payable in one and two years. The transaction was evidenced by a bill of sale signed by the members of the firm, and a bond of Charles B. Day in which he obligated himself to pay a schedule of indebtedness aggregating \$214,043.88, and to save said firm harmless therefrom; the bond reciting that all the indebtedness included in the schedule forming a part of the bond was the indebtedness of the firm of Day Bros. & Co., and that upon the greater portion thereof the said Charles B. Day was liable as indorser or guarantor for said firm; and within a day or two after the purchase of the stock of goods as above mentioned, Charles B. Day also bought of the firm the stock of manufactured goods at their overall factory, amounting to \$2,302.06, for which he executed his note to the firm, payable six months from date. While, as before stated, the bond recited that all the indebtedness which was assumed to be paid by Charles B. Day was the indebtedness of Day Bros. & Co., in fact there was in said schedule one note held by one of the banks in the city of Peoria for \$5,000, which was the individual indebtedness of Van Sickler, one of the members of the firm, and one note of \$5,000, and another of \$1,300, which was the individual indebtedness of W. G. Marsters, another member of the firm; and another note of \$7,453, which was the individual indebtedness of L. L. Day, another member of the firm, but which was indorsed by the firm. Soon after the sale to Charles B. Day, King, one of the members of the firm, with the consent of the other members of the firm, took the two notes of Charles B. Day, amounting together to \$14,506.12, and

the note which C. B. Day had given for the purchase of the overall stock, amounting to \$2,302.06, and a note which had been given by W. P. Day for \$1,500, for the purchase of the overall factory, and turned them over to the defendant Mrs. Elizabeth Griswold, as collateral security for the sum of nearly \$50,000, which King individually owed Mrs. Griswold; and Gordis R. Cobleigh, one of the members of the firm, being individually indebted to the said Charles B. Day, withdrew from the assets of the firm two notes of L. B. Day for \$2,314, which he turned over to Charles B. Day in payment of his individual indebtedness to Charles B. Day.

The bill charges that the sale to Charles B. Day of the stocks of goods was fraudulent and void, and made to hinder and delay creditors, and also attacks the several transactions where the assets of the firm were applied for payment of the individual indebtedness of the members of the firm, on the ground that these creditors, as copartnership creditors, had a first and prior lien upon these copartnership assets for the payment of their debts before any individual indebtedness of the members of the firm could be paid.

I see nothing in the proof, or in the character of the transaction itself, which should render void or inoperative the sale of the stock of goods. There is no proof that the sale was for an inadequate price, or that it was made in bad faith. Charles B. Day had, at the request of the firm, involved himself to a very large amount as the indorser of this firm; and they had the right, undoubtedly, under the law, to prefer him, and see that he was protected as against their other creditors; and no challenge is made but that the price which he gave for the goods was as much as they would have brought if sold in any other manner. Nor is any question made in the proof as to the validity and good faith of the indebtedness which was assumed by C. B. Day.

This leaves us to consider the question of the validity of these transactions so far as they relate to the payment of the individual debts of the members of the firm out of the assets of the firm, and to determine whether these complainants are entitled to have those transactions set aside, and to recover these assets so applied to the payment of individual debts.

In making their terms for the sale of their stocks of goods to the defendant Charles B. Day, the firm required him to pay as part of the purchase price the debt of L. L. Day for \$7,453, upon which the firm was liable as indorser; the notes of Marsters for \$6,500, upon \$5,000 of which C. B. Day was indorser, and \$1,300 of which was indorsed by the firm; and the note of Van Sickler for \$5,000, which the pleadings state was also indorsed by the firm, but of which I do not find any evidence in the record; so that we may assume that the appropriation of the assets of the firm for the payment of these individual debts was the act of all the partners,—that is, the firm assets are applied to the payment of these individuals debts with the consent of all the partners,—and by such application said firm assets become individual property. The transfer by King to Mrs. Griswold of the C. B. Day

notes and the W. P. Day notes was, as the proof shows, with the consent of the firm; and the transfer by Cobleigh of the L. B. Day notes to C. B. Day in payment of his (Cobleigh's) individual debt to C. B. Day was with the knowledge and acquiescence, if not the direct consent, of the firm; so that we have as conceded or proven facts in the case that the partners all consented to this application of the assets of the firm to the payment of the individual debts of its several members.

It seems to me that the questions involved in this branch of the case are fully met and answered by the decision of the supreme court of the United States in *Case v. Beuregard*, 99 U. S. 119, where Mr. Justice STRONG, speaking for the court, says:

"The object of this bill is to follow and subject to the payment of a partnership debt property which formerly belonged to the partnership, but which, before the bill was filed, had been transferred to the defendants. No doubt the effects of a partnership belong to it so long as it continues in existence, and not to the individuals who compose it. The right of each partner extends only to a share of what may remain after payment of the debts of the firm and the settlement of its accounts. Growing out of this right, or, rather, included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity the partners have as between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. The latter are said to have a privilege or preference, sometimes loosely denominated a 'lien,' to have the debts due to them paid out of the assets of a firm in course of liquidation, to the exclusion of the creditors of its several members. Their equity, however, is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in condition to enforce it, the creditors of the firm cannot be. *Rice v. Barnard*, 20 Vt. 479; *Appeal of Bank*, 32 Pa. St. 446. But so long as the equity of the partner remains in him, so long as he retains an interest in the firm assets as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce, through it, the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration. It is indispensable, however, to such relief, when the creditors are, as in the present case, simple-contract creditors, that the partnership property should be within the control of the court, and, in the course of administration, brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither of the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed in *custodia legis*. Other property can be followed only after a judgment at law has been obtained, and an execution has proved fruitless. So, if before the interposition of the court is asked the property has ceased to belong to the partnership, if, by a *bona fide* transfer, it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end. It is, therefore, always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced. * * * The joint estate is converted into the separate estate of the assignee by force of the contract of assignment. And it makes no difference whether the retiring partner sells to the other partner or to a third person, or whether the sale is made by him or under a judgment against him. In either case his equity is gone."

And this doctrine is fully supported by *Ladd v. Griswold*, 4 Gilman, 25; *Reeves v. Ayers*, 38 Ill. 418, and *McIntire v. Yates*, 104 Ill. 491. There can be no doubt, I think, that this firm had the right to appropriate its partnership assets to the payment of the individual indebtedness of its members; that is, the individual creditor to whom payment was made had the right, with the consent of the partners, to take the firm assets in payment of his debt. The individual indebtedness was a sufficient consideration to support the payments, and the creditor became vested with the money or property so appropriated to him. When these transactions took place, and these individual creditors of the members of the firm were respectively paid or secured, the complainants in this suit had no judgments or liens upon the partnership assets. The assets were entirely within the control of the firm, and any disposition which the firm made of them was binding upon the creditors of the firm who had not some specific or vested lien thereon at the time of such appropriation. These complainants did not recover their judgments until months after this transaction had occurred; and, at the time these bills were filed, this firm did not own the property which these bills now seek to reach. The transactions cannot be said to have been fraudulent, because there was a good consideration to support them; and at most it was but a payment of individual creditors of the members of the firm out of copartnership assets, where the debts thus paid were *bona fide* debts; and it was only a diversion of the assets of the firm from the firm creditors to an individual creditor. These complainants, at the time of these transactions, were in no position to challenge or prevent them. As already said, they had no lien upon these assets; and there was, at most, only a sort of ethical or theoretical right in the firm's creditors to insist on the payment of the firm's debts out of the firm's assets. That, however, did not defeat the right of the firm to appropriate its assets, in the exercise of its own judgment, in such manner as that the persons to whom they sold, or delivered, or paid their money or assets took a good and valid title as against the creditors of the firm, and gives no right to creditors who subsequently obtained judgments against the firm to retrieve these assets and have them applied upon their judgments. Suppose, for illustration, that Charles B. Day had paid cash for these stocks of goods into the possession of the firm, and the firm had then paid this individual indebtedness of its several members out of the cash thus received, can there have been any doubt that this would have been a good and valid payment to which the creditors of the firm who had no judgments or other vested lien could make no valid objection or resistance? And if they could pay these individual debts out of the cash or assets, I can see no reason why they could not satisfy them with the same legal effect out of the commercial paper or securities received for the goods. And the fact that this firm was insolvent at the time of these transactions, and was known to be such by Charles B. Day and Mrs. Griswold, does not, as it seems to me, affect this question. Without further discussion I may say that it seems to me when this firm found itself in an insolvent condition with these assets on hand they had the right to

make such distribution of their assets as they chose, provided that it was not a fraudulent disposition; and it was not fraudulent for them to provide for the payment of the creditors of the individual members of the firm out of the assets, as was done in this case. The rule invoked by the complainants, that the copartnership creditors are to be paid out of the copartnership, is, of course, the rule followed by the courts, either in bankruptcy or in chancery, when the assets of the firm, and the assets of the individual members of the firm, are in the hands of the court for distribution; but until the assets come into the hands of the court, and while the firm is in possession and control thereof, such disposition as the firm makes of its assets is binding so long as it is not an actual fraudulent disposition, made with intent to hinder and delay creditors; and the fact that the copartnership creditors did not get as much as they would have got had not provision been made for the creditors of the individual members of the firm, does not of itself constitute a fraud. These bills are, therefore, dismissed for want of equity.

NOTE.

PARTNERSHIP—FIRM PROPERTY—INDIVIDUAL DEBTS. So long as a firm is solvent, all its members assenting, the individual debts of the parties may be paid out of the firm assets, *Roop v. Herron*, (Neb.) 17 N. W. Rep. 353; and, there being no fraud in fact, a partnership creditor cannot impeach, as fraudulent in law, a conveyance of partnership property in trust to secure an individual debt of the partners, *Glin Co. v. Bannan*, (Tenn.) 4 S. W. Rep. 831; but if the firm is insolvent at the time the transfer of the firm property to make such payment is made, it is fraudulent and void as to existing creditors of the firm, *Goodbar v. Cary*, 16 Fed. Rep. 317; and one partner may not pay his private debts out of the assets of the firm, for this would be a fraud upon his partners, *Gallagher's Appeal*, (Pa.) 7 Atl. Rep. 237; *Caldwell v. Furniture Co.*, (Neb.) 33 N. W. Rep. 836; *Willis v. Bremner*, (Wis.) 19 N. W. Rep. 408; *Vernon v. Upson*, Id. 400; *Powers v. Paper Co.*, (Wis.) 18 N. W. Rep. 20. See, also, *Johnston's Appeal*, (Pa.) 9 Atl. Rep. 76, and note; *Crook v. Rindskopf*, (N. Y.) 12 N. E. Rep. 174; *Saunders v. Reilly*, Id. 170; *Tait v. Murphy*, (Ala.) 2 South. Rep. 317.

An insolvent firm sold the firm effects to a creditor in consideration of a certain sum in cash, and a further sum which was recited to be the indebtedness of the firm to the creditor, but which in fact embraced indebtedness of the individual members of the firm. Held that, in thus securing a pecuniary benefit beyond that which the law would secure, the transaction was fraudulent as to other creditors, and void, not only as to the benefit thus reserved, but *in toto*. *Pritchett v. Pollock*, (Ala.) 2 South. Rep. 735.

CORBIN v. BOIES *et al.*

(Circuit Court, N. D. Illinois. April 30, 1888.)

PARTNERSHIP—LIMITED PARTNERSHIPS—INSOLVENCY—PREFERENCES.

A limited partnership, practically insolvent in August, 1882, was dissolved October 17th following, but the notice of dissolution was not published until December 2d following, and then only in a legal publication read by few persons besides lawyers. The remaining partners dissolved October 19th, and the notice of this dissolution was published at the same time as the other, but in a paper of extensive circulation. The business still went on, however, and the defendant bank cashed the firm's checks, although their account was overdrawn, and advanced them money on goods as collateral. This bank was friendly to G., the special partner, and it had been assured by him, as far back as August, that he, G., would see that the checks were made good, and had received further assurances from F., the managing partner, that, in case

the concern got into trouble, the bank would be protected. Between December 28, 1882, and January 20, 1883, the bank accepted unsecured notes of the general partners to a large amount in settlement of notes of the limited partnership maturing between those dates. On January 20, 1883, judgment was confessed by the general partners in favor of the bank, and the special partner, and execution so levied on the stock in trade that the bank got the first lien and G. the second; thus shutting out unsecured creditors of the limited partnership. The attorney of the partners, both special and general, was also the attorney of the bank. *Held*, that the bank had knowledge of the insolvency of the limited partnership, and was a party to the scheme to protect G. as against creditors of that firm, and that the judgment confessed in its favor was therefore void, under 2 Starr & C. St. Ill. c. 48, § 22, forbidding preferences by such partnerships in contemplation of insolvency.

In Equity. Bill by Chester C. Corbin, an unsecured creditor of Boies, Fay & Conkey, to set aside certain judgments confessed by them, as in fraud of the Illinois limited partnership act, (2 Starr & C. St. Ill. c. 84, pp. 1564-1568.)

Wm. J. Manning, for complainant.

Flower, Remy & Gregory, and *Turnbull, Washburn & Robbins*, for respondent bank.

GRESHAM, J. On March 30, 1882, William A. Boies, Benjamin B. Fay, Lucius W. Conkey, and Julius K. Graves, formed a limited partnership under the firm name of Boies, Fay & Conkey, to carry on the business of wholesale grocers for five years, at Chicago. Graves, a special partner only, was a resident of Dubuque, Iowa, where he remained; and, whether the business proved profitable or unprofitable, interest was to be paid on his capital of \$50,000, at the rate of 20 per cent. per annum. Fay and Graves were brothers-in-law, and the former became financial and chief manager of the firm. In August, 1882, about five months after Graves became a limited partner, an inventory was taken of the assets, from which the book-keeper made a statement, showing the firm's financial condition. This statement embraced all the bills receivable, and although some of the debts due to the firm were then uncollectible and worthless, no deduction was made on that account. If such deduction had been made it would have appeared that the liabilities exceeded the assets. If the partners did not then know that the firm was insolvent, they must have known it was seriously threatened with insolvency and bankruptcy. This statement has not been produced, and Fay testified that a copy of it which was furnished him by the book-keeper had been lost or destroyed.

The Illinois statute¹ under which this limited partnership was formed provides that it shall not be lawful for any such firm, or any member thereof, in contemplation of bankruptcy or insolvency, and with the intention of preferring or securing one or more creditors to the exclusion of others, to make any sale, transfer, or assignment of their property or effects, or to confess any judgment, or create any lien on the property or assets, and that all preferences so made shall be utterly void. Instead of suspending business in August, 1882, and holding

¹ (2 Starr & C. St. Ill. p. 1568, c. 84, § 22.)

the assets as a special trust fund for the payment of its debts ratably among its creditors, as the firm should have done, it continued in business. Graves came to Chicago, and assumed Fay's duties as financial manager, that the latter might go east and buy more goods on the firm's credit. During the four or six weeks that Graves thus remained in the store, he had access to and examined the private ledger and other books and papers, which disclosed the firm's condition. An account was kept with the First National Bank of Chicago, of which L. J. Gage was vice-president and general manager, and in September, during Fay's absence, Graves called at the bank and told Gage that he would be personally responsible for all checks drawn by the firm's cashier during Fay's absence, and when the latter returned he assured Gage that, should the firm have trouble, the bank would be protected. The Commercial National Bank of Dubuque, of which Graves was a director, kept an account with the First National Bank of Chicago, and Graves and Gage had a personal acquaintance, if they were not personal friends. The evidence shows that in September, after Graves had promised that all the firm's checks should be paid, the bank permitted the firm to overdraw its account. On the 14th of October the firm needed money to pay an overdraft at the bank, and to meet paper which would soon become due, and Gage accommodated the firm with a demand loan of \$10,000, for which amount he took the judgment note of the partners, with warehouse receipts for merchandise recently bought on the firm's credit, as collateral security. It is claimed that three days later,—October 17th,—the four partners signed an agreement dissolving the limited partnership, and that two days still later, Boies sold his interest in the firm to Fay & Conkey, on which day Boies, Fay & Conkey—Graves having retired three days before—signed the following agreement:

"It is hereby stipulated and agreed by and between the parties hereto that the partnership heretofore existing between William A. Boies, Benjamin B. Fay, and Lucius W. Conkey, under the firm name of Boies, Fay & Conkey, is this day dissolved by mutual consent. The said dissolution shall date from the 1st day of November, 1882, and legal notice thereof shall be published on or before the 10th day of November, 1882."

This paper or notice was published for the first time in the Chicago Daily Evening Journal, on December 2d; and the paper by which it is claimed the limited partnership was dissolved two days before, was published on the same day in the Chicago Legal News, a legal publication read by few besides lawyers. On the 18th of October, the day after the alleged dissolution of the limited partnership, the bank, through Gage, made another demand loan of \$10,000 to the limited partnership, receiving as security other warehouse receipts of the same character. At the time of the alleged dissolution of the limited partnership, and the sale by Boies of his interest to Fay & Conkey, a large amount of the limited partnership paper was about to mature, and the firm was still purchasing goods; and the testimony shows that the partners deemed it unwise to then give notice of the alleged withdrawal of Graves and Boies. The business was continued in the name of the limited partnership,

with Graves' knowledge, and checks were signed in the firm name until December 2. From October 6 to December 6, the over-drafts ranged from \$557 to \$10,126; and from December 4 to December 16, the bank paid checks drawn in the name of the limited partnership, payable to Graves, amounting to a large sum, and up to December 6, at least, charged such payment to the account of Boies, Fay & Conkey. The goods which were pledged to the bank were part of the purchase made by Fay after the firm had become insolvent, and they were hauled direct from the freight depot to a warehouse, instead of to the store or warehouse of the firm. On December 7, the bank, through Gage, made a demand loan of \$8,000 to Fay & Conkey, taking in pledge therefor part of the new goods bought in the name of the limited partnership. A note of Boies, Fay & Conkey, payable to Graves, for \$5,000, was protested at Dubuque on the 14th of December, and sent to the First National Bank of Chicago for collection; and on January 20, 1883, Gage, for the bank, discounted customers' notes for Fay & Conkey, amounting to \$3,459; and on the same day, with the firm's money, Graves paid the bank, through Gage, two notes of the limited partnership for \$5,000 each, due in seven and nine days, respectively, before maturity; the bank then holding, with the knowledge of Gage, a \$5,000 note of Fay & Conkey, indorsed by Graves, and payable two days later, and also other notes of Fay & Conkey, unindorsed and unsecured, for more than that amount. It will thus be seen that paper of the limited partnership, which was not then due for seven and nine days, was paid in preference to a note of Fay & Conkey, on which Graves was liable as indorser, as well as unsecured notes of Fay & Conkey. This payment was made after it had been determined that the firm should suspend, and prefer part of its creditors; and on the same day Graves and Fay & Conkey went to the office of Flower, Remy & Gregory for legal advice, which firm then was, and for some time had been, the general counsel of the bank and of the insolvent firm. During the consultation which occurred with Mr. Remy, he visited the bank, and on his return stated that Gage would be satisfied with a judgment in favor of the bank for \$40,000, for which amount a judgment note was accordingly prepared, and signed by Fay & Conkey. It was thought that with the warehouse receipts and the customers' discounted notes, this would amply secure the bank. Two judgment notes,—one for \$17,500, and the other for \$27,000,—were also executed by Fay & Conkey at the same time and place, payable to Graves; and it was agreed between Graves, Gage, and Remy that, when the judgments were confessed, including 5 per cent. for attorney's fees, executions should immediately issue, and that the bank's execution should be first levied, and that Graves' execution for \$17,500 should be next levied, so that the bank and Graves might have liens prior to all other creditors. Before leaving the store, on the evening of the same day, Fay & Conkey divided the firm money on hand, each receiving \$566, and the next morning (Sunday) the same parties again met by appointment at the office of Flower, Remy & Gregory, where the book-keeper and cashier brought the firm's mail, which contained drafts

amounting to \$2,215.38. These drafts were indorsed and delivered to Graves. At this interview Remy appears to have prepared notes upon which judgments were to be confessed in favor of other creditors. The mail brought to the firm on Monday morning about \$1,300, which was divided between Fay, Conkey, and Graves, after which judgments were confessed in one of the state courts and in this court, in favor of the bank, Graves, and other creditors, on the judgment notes previously executed, amounting in the aggregate to \$233,709.09, of which \$10,658.65, represented attorneys' fees. Executions were immediately issued on the state court judgments, and handed to Remy, who delivered them to the sheriff of Cook county in such order as to secure to the bank the first lien, and Graves the second. These executions were levied upon the entire stock of merchandise of the firm, and the proceeds of the sale paid the bank's judgment in full, and something less than \$10,000 on the Graves \$17,500 judgment. The executions which were issued upon the judgments confessed in this court in favor of Graves, the Commercial National Bank of Dubuque, the Dubuque County Bank, and the Importers & Traders National Bank, were the same day returned *nulla bona*, and these parties joined in a creditors' bill against Fay & Conkey, with whose consent, on the following day, Bradford Hancock was appointed receiver. Hancock immediately qualified, and took possession of the firm's office, books, and bills receivable, without interfering with the sheriff's possession. On the 1st of March following, Chester C. Corbin, an unpreferred creditor of the limited partnership, for himself and such other creditors as might be willing to unite with him, commenced this suit against all the parties in whose favor judgments had been confessed, for the purpose of setting them aside, and having the assets of the insolvent limited partnership equally divided among the creditors. On March 31, 1883, a subpoena *duces tecum* was served upon Hancock, the receiver, to appear on April 4, before the examiner, with the books of the firm, and testify as a witness, and the evidence shows that after the service of this subpoena, and before the 4th day of April, he sold as old paper all the letter-press copy-books except one, the bank-books, check-book, and checks back of November, 1882, the cash-balance statements and bills payable book prior to July, and other books which were regarded as important by the expert book-keeper. This fact is all the more significant as Flower, Remy & Gregory were also the receiver's counsel.

Why was it thought necessary to dissolve the limited partnership on the 17th of October, and keep the fact a secret from the public until the 2d of December? And if there was no intention on the part of Graves and his partners to take advantage of any portion of their creditors, and allow Graves to escape liability as a partner, why was the agreement of dissolution published in the Chicago Legal News, a legal publication read by few except lawyers, instead of in the Evening Journal, a paper of much wider general circulation? And why did the notice which appeared in the Evening Journal of the same day say nothing about the retirement of Graves? What occurred prior and subsequent to October 17 fairly shows that the dissolution was a pretended one, and that the

form was gone through for the purpose of having Fay & Conkey, as general partners, confess judgments as they did, to protect Graves against his liability as special partner, and as indorser of the firm's paper. Prior to the secret dissolution of the limited partnership, the firm had placed in the hands of brokers in Chicago, New York, and Boston, its commercial paper for sale on the market; and three days before the same time the firm had pledged to the First National Bank goods bought by Fay on the credit of the insolvent firm, as collateral security for a demand loan of \$10,000; and on the day following the secret dissolution they made another pledge of merchandise purchased in the same way, as security for another demand loan of the same amount. Between the time of the secret dissolution and the 2d of December a still larger amount of the firm's commercial paper was put upon the market for discount, and during the same time the firm was unable to pay its employees, its rent, and bills for current purchases in Chicago. The substitution of a large amount of the notes of Fay & Conkey for the notes of Boies, Fay & Conkey, furnishes still further evidence of a previously formed purpose to enable Fay & Conkey, as general partners, to confess judgments by way of preferences, and thus shield Graves. The judgment confessed in favor of the Commercial National bank of Dubuque, represented in part four notes of \$2,500 each, drawn by Fay & Conkey in favor of Graves, for his accommodation. These notes did not represent an indebtedness of the firm, and yet Graves caused them to be treated as part of the firm's indebtedness, and that amount was paid out of the assets of the limited partnership. This was not done through inadvertence or mistake, for Graves knew the facts; and in the argument his counsel admitted that this was the debt of Graves, and not the debt of the firm. The judgment confessed at Graves' instance in favor of the Dubuque County Bank exceeded the indebtedness of the firm to that bank by about \$3,000. The bank declined to receive more than the amount of its debt, and Graves collected and retained the excess. These circumstances are damaging to Mr. Graves' integrity.

This, the Corbin suit, came to a final hearing on November 17, 1885, when the court decreed that on the 20th of August, 1882, the limited partnership was insolvent, with the knowledge of each of the partners, and so continued until the termination of its business on the 22d of January, 1883, when Fay & Conkey, the pretended successors of Boies, Fay & Conkey, confessed the judgments already mentioned; that the acts of the partners, whereby they pretended to dissolve the limited partnership, were done with intent to defeat and evade the provisions of the statute of Illinois which prohibited preferences by such partnerships, and that all such acts were void; that the judgments were confessed by Fay & Conkey for the purpose of protecting Graves against loss as a member of the limited partnership, and as an indorser for it; that the judgments in favor of the Commercial National Bank for \$14,896.49, the Dubuque County Bank for \$12,002.38, the Importers & Traders National Bank of New York for \$15,126, were confessed at the special instance of Graves, and that they, as well as the Graves' judgment in this court,

in all amounting to \$68,758.24, were paid in full out of the equitable assets of the limited partnership; that Graves also received out of the assets of the limited partnership \$9,781.18 on the judgment confessed in his favor in the state court,—\$5,900 as profits, although the firm made no profits, and \$2,741.38, being the amount taken by him on Sunday and Monday, January 21st and 22d. Graves was required by this decree to pay into court for the benefit of the creditors of the limited partnership, within 30 days, \$100,796.71, which was the amount so received by him, or for his benefit, with 6 per cent. interest thereon from the date of payment. Flower, Remy & Gregory received upon the several confessed judgments, as attorneys' fees, \$8,559.80, for which amount the court also entered a decree against them, with interest thereon at 6 per cent., the total decree being \$9,886.57, which they were also required to pay to the clerk of the court within 30 days, for the benefit of the creditors of the limited partnership, it being thought that these sums would be sufficient to pay the claims of the unpreferred creditors; and the court reserved the right to thereafter decree against the First National Bank of Chicago, as the proof might justify.

At and before the hearing, Graves was represented by Flower, Remy & Gregory, and, not paying the decree within the time limited, an execution was issued against him, and returned *nulla bona*, after which an *alias* execution was issued, upon which the marshal indorsed a return that he had made a personal demand upon Graves for money or property to pay or satisfy the same, and he had refused to do either.. An order was then entered on the application of the complainant, requiring Graves to personally appear before the court on October 30, 1886, and show cause why he should not be attached for contempt in failing to comply with the decree of the court. This he did not do, although personally served with a copy of the order. On November 1, 1886, it was adjudged that Graves had willfully disobeyed the orders of the court; that he was guilty of contempt of its authority; and that a writ be directed to the marshal of the Northern district of Illinois, commanding him to arrest Graves, and commit him to the jail of Cook county until he complied with the orders of the court, or was discharged by due process of law. Not finding Graves within his district, the marshal proceeded to Dubuque, where Graves resided, and there presented the writ to the district judge of the Northern district of Iowa, and requested that the proper process should be issued for his arrest and identification, in order that he might be removed to this district. This request was denied after argument of counsel. *In re Graves*, 29 Fed. Rep. 60.

The jurisdiction of this court, both as to subject-matter and the parties, including Graves, is not denied, and until the decree and orders are reversed they are binding upon him. When Graves refused to obey the orders and process of the court, and thus defied its authority, he was rightfully adjudged guilty of contempt. Section 725, Rev. St., declares that the courts of the United States shall have power to punish, by fine or imprisonment, persons guilty of contempt of their authority by disobedience to any lawful writ, process, order, rule, decree, or command.

By his willful disobedience of the orders and process of the court, Graves committed an offense against the United States for which he stands convicted and sentenced; and he is no more entitled to immunity in another jurisdiction than if he had escaped after conviction and sentence for a felony. In *Wartman v. Wartman*, Camp. Dec. 262, Chief Justice TANEY says: "Disobedience to the legitimate authority of the court, is by law a contempt, unless the party can show sufficient cause to excuse him." In speaking of this offense in *Funshawe v. Tracy*, 4 Biss. 497, Judge DRUMMOND says:

"It is not a crime, in one sense, but it partakes of the nature and character of a crime; and I do not see why, if a man is imprisoned for a contempt of a court of the United States, and breaks jail and escapes into another state, he cannot be arrested and returned to his imprisonment under the authority of the United States."

In *New Orleans v. Steam-ship Co.*, 20 Wall. 392, Justice SWAYNE says: "Contempt of court is a specific criminal offense." On this subject see, also, *In re Chiles*, 22 Wall. 157.

Graves should have paid into court the amount adjudged to be due from him, if he was able to do so; and if he was insolvent, or unable to satisfy the decree, he could and should have exonerated himself by personally appearing and showing that fact. It cannot be that the law is so impotent as to allow a party to resist a suit step by step, and, when a decree is entered against him, disobey it with impunity, by removing beyond the court's territorial jurisdiction.

Graves having thus, for the time being, at least, successfully defied the authority of the court, the complainant now asks for a decree against the First National Bank of Chicago for \$40,000, paid to it in satisfaction of the confessed judgment, and also for \$10,000 of the firm assets, paid to it on January 20, with interest on these amounts. This relief is asked on the ground that the limited partnership became insolvent as already stated; and, knowing that fact, the bank, through Gage, co-operated with Graves in his scheme, which had for its object the latter's protection against liability as special partner and as indorser. Graves needed the aid of the bank to accomplish his purpose, and it co-operated with him through Gage. The bank was apparently willing, if not desirous, that Graves should be protected against threatened loss, provided it did not suffer thereby. Gage testified that it was not until after the judgments had been confessed that he knew a limited partnership could not prefer one or more creditors to the exclusion of others. We have already seen that while Fay was absent buying goods, and Graves was occupying his place in the store, the latter told Gage he would see that all checks drawn by the firm's book-keeper were paid; that when Fay returned he promised Gage that if the firm got into trouble the bank should be protected; and that two days before the judgments were confessed it was agreed between Graves and Gage and Fay & Conkey, in the office of Flower, Remy & Gregory, who acted as counsel for all the parties, that the bank's judgment and execution should be a first lien and first paid, and that Graves' judgment should stand next in priority. After the proceeds of the sale had

been paid to the bank and Graves, nothing was left from this source for other creditors, nor was it expected that anything would be. On December 28 the bank, through Gage, accepted an unindorsed and unsecured note of Fay & Conkey in renewal of a note of the limited partnership due on that day. On December 29 the bank, through Gage, accepted another unsecured note of Fay & Conkey for \$5,000 in renewal of a note of the limited partnership, for the same amount, due the same day. On December 30 the bank, through Gage, again accepted an unsecured note of Fay & Conkey of \$5,000 in renewal of a note of the limited partnership, dated October 23, and payable 65 days after date. On January 9, 1888, the bank, through Gage, discounted an unsecured note of Fay & Conkey for \$5,000; and paid to Graves \$1,900 of the proceeds on a check of Fay & Conkey, and applied the residue in payment of debts of the limited partnership and in satisfaction of an overdraft of Fay & Conkey. On January 10 the bank, through Gage, discounted another unsecured note of Fay & Conkey for the same amount, and on the same day paid to Graves two checks drawn by Fay & Conkey in his favor, for \$2,500 each. The testimony, including that of Gage, fairly shows that he doubted the solvency of Fay & Conkey as early as December 28, when he accepted the first of their unsecured notes in exchange for a note of the limited partnership for a like amount, and thus released Graves from liability. This conduct of Gage is strong evidence in itself that he had been made acquainted with some plan for the protection of Graves at the expense of the creditors of the limited partnership, and that something had been done or promised, upon the faith of which the bank was willing to take unsecured paper of two men, not entitled to credit, in renewal of paper of the limited partnership. The firm had lost money from the time it commenced business, and, after the inventory was taken in August, if not before, it was slow in meeting its payments. Its account was repeatedly overdrawn at the bank both before and after Graves' alleged withdrawal. Remy wrote the dissolution contracts, and Flower, Remy & Gregory were the general counsel for the firm, made collections for it, and from time to time gave the partners legal advice. It does not appear from the testimony that the members of the limited partnership had any reason for keeping their counsel ignorant of the firm's condition and purposes, or of Graves' retirement as a partner. It was known to the members of the limited partnership and to the bank that Flower, Remy & Gregory were counsel for both and it is not unfair to assume, as I do, that any information that the counsel had of the condition and purpose of the insolvent firm, which it was material for the bank to know, was communicated to Gage. If the counsel knew that the limited partnership was insolvent, or threatened with insolvency, as I think they did, and that it had been dissolved, and did not communicate that information to the bank, they were unfaithful to it. The mere fact that Flower, Remy & Gregory continued to maintain the relation of counsel to the limited partnership as well as to its alleged successor, and also to the bank, indicates that the latter knew the financial condition of the former, and that there was co-operation between

them. But even if the bank in good faith continued to deal with the limited partnership, and afterwards with Fay & Conkey as its successor, without knowledge of anything indicating insolvency, or threatened insolvency on the part of either, and that Graves had ceased to be a special partner, it was bound by the knowledge which its counsel had upon these subjects.

A decree will be entered against the bank for the amount it has received in satisfaction of the judgment confessed in its favor, with interest.

MARTIN v. BARBOUR *et al.*¹

(Circuit Court, E. D. Arkansas. April, 1888.)

1. TAXATION—ASSESSMENT—OATH OF ASSESSOR.

The constitution of the state of Arkansas declares that "all property subject to taxation shall be taxed according to its value; that value to be ascertained in such manner as the general assembly shall direct." The revenue act of the state requires the assessor, before entering on the discharge of the duties of his office, to take the oath of office prescribed by the constitution for all state and county officers, and, in addition thereto, a comprehensive oath covering in detail his official duties, and particularly the declaration that "all real property will be appraised at its actual cash value." This oath is required to be indorsed on the assessment book, which the clerk makes, prior to its delivery to the assessor; and, if the assessor fails to take said oath within the time prescribed, his office is declared vacant, and the clerk is required to notify the governor, and the vacancy is to be filled according to law. *Held*, that the oath which the assessor is required to take is one of the means provided by the legislature to give effect to the constitutional requirement that property shall be taxed according to its value; that the failure to take the oath vacates *ipso facto* his office; and that where the assessor fails to take the oath, and the clerk, in violation of law, delivers to him the assessment book, no assessment on that book can be made the foundation of a valid tax title.

2. SAME—SALE—PUBLICATION.

When the delinquent list and notice of sale, and proof of their publication, are required to be perpetuated by a record, to be certified to by the clerk before the sale, it is indispensable that such record be kept; and parol evidence is inadmissible to supply the omission.

3. SAME.

Where a statute requires the notice of sale of delinquent lands to be published "weekly for two weeks" between the fourth Monday in April and the fourth Monday in May, two weeks must elapse between the first publication and the fourth Monday in May; and where the publication is made on the 16th and 28d days of May, and the fourth Monday of the month is the 25th, the notice is void.

4. SAME.

Where the notice of sale prescribed by law has not been given, the collector has no authority or jurisdiction to sell, and before he sells, his jurisdiction, in this regard, must be made to appear of record, in the mode prescribed by the statute.

5. SAME.

Affidavits of the proof of publication of the notice of the tax sale, made and placed in the clerk's office more than two years after the tax sale, are no part of the record of the tax proceedings, or of the official files of the clerk's office, and have no legal sanction.

¹ Reported by Messrs. Stephenson & Trieber, of the Helena bar.

6. SAME—RIGHT TO REDEEM—MISCONDUCT OF OFFICER.

When the owner of a lot which has been sold to the state for taxes, without his knowledge, is prevented from discovering the sale and making redemption by the official misconduct or mistake of the officer who makes out the assessment book, he will be permitted to redeem on discovering the facts.

7. SAME—CAVEAT EMPTOR.

The rule of *caveat emptor* applies to the purchaser of a tax title.

8. SAME—TAX TITLES—GROUNDS OF CONTEST.

Mansf. Dig. Ark. §§ 5782, 5791, do not apply to meritorious defenses, and by meritorious defenses is meant any act or omission of the revenue officers in violation of law and prejudicial to the rights and interests of the owner, as well as those jurisdictional and fundamental defects which affect the power to levy the tax, or sell for its non-payment. *Radcliffe v. Scruggs*, 46 Ark. 96.

In Equity. Bill to confirm tax title.

U. M. & G. B. Rose, for complainant.

J. M. Harrell, for defendants.

CALDWELL, J. This is a proceeding under chapter 23, Mansf. Dig., to confirm a tax title to lot 5, in block 145, and other lots and lands not here in controversy, in the town of Hot Springs. The lot was sold to the state on the 25th day of May, 1885, for the taxes of 1884, and at the expiration of two years—the period allowed by law for redemption—it was certified to the commissioner of state lands, and immediately thereafter purchased by the plaintiff from that officer. The bill was filed in the Garland circuit court. The defendants, Frances M. Barbour, a married woman, and her infant children, Howard P. Munger, Grace E. Munger, and Robert P. Munger, by their next friend, Ormand Barbour, entered an appearance to the suit in that court, and removed the cause to this court. It is clear from the proofs that the lot belongs to Mrs. Barbour, or to her and her children, unless the tax sale divested them of title. The defendants allege the tax title is void for numerous reasons.

The act of March 31, 1883, under which the tax title in judgment accrued, provides that the assessor, before entering upon the discharge of the duties of his office, shall take and subscribe the oath of office prescribed by the constitution for all officers, "and, in addition thereto, the following oath or affirmation, which shall be indorsed upon the assessment books prior to their delivery to the assessor." [Here follows the oath, which is comprehensive and exacting, and contains the declaration that "all real * * * property * * * will be appraised at its actual cash value."] Section 5661, Mansf. Dig. Section 5662 declares:

"If any person so elected fails or refuses to take the oath required in the preceding section, and file the same with the clerk of the county court of his county within the time prescribed, the office shall be declared vacant, and the clerk of the county court shall immediately notify the governor, and such vacancy shall be filled in accordance with the constitution and laws of the state."

The defendants have shown that the oath here required is not "indorsed upon the assessment books" for the year 1883, nor has it been found elsewhere. This proof rebuts the presumption that it was taken, and imposes upon the plaintiff the burden of proving that it was. This bur-

den the plaintiff has not discharged, and the conclusion must be, the oath was not taken. "Where a paper is not found, where, if in existence, it ought to be deposited or recorded, the presumption arises that no such document has ever been in existence." *Platt v. Stewart*, 10 Mich. 260; *Hall v. Kellogg*, 16 Mich. 135. In considering the legal effect of the failure of the assessor to take this oath, a brief reference to the legislation on this subject will be instructive. From 1846 to 1868, sections 8, 9, c. 148, Gould's Dig., were in force. These sections required the assessor, within a prescribed period, and before entering upon the duties of his office, to take the oath there set out, and vacated his office upon his failure to do so. The act of July 23, 1868, repealed these sections, and the only oath required of the assessor by that act was one to support the constitution of the United States and this state, and it rewarded the assessor for his services by giving him "three per centum on the amount of taxes levied on his assessment." Subsequent acts (act April 8, 1869, § 60, and act March 25, 1871, § 59) required the assessor to verify his return by an oath to the effect that he had "not appraised any lot or tract of land at less than its true value in money." This oath was not in harmony with the constitutional requirement that property should be taxed at its value. It afforded no protection to the land-owner, but, on the contrary, its terms conveyed a strong implication that the assessor was licensed, if not invited, to assess land for taxation at more than its value, and loud complaints were made that it was so assessed. In *Radcliffe v. Scruggs*, 46 Ark. 96, it was decided that the failure of the assessor to take this oath did not affect the validity of the assessment, because it was "intended to protect the interests of the state, rather than the tax-payer; * * * and no owner of real estate could have been injured by its omission." From 1868 to 1883, the only oath the assessor was required to take before entering on the duties of his office was the general oath of office prescribed by the constitution for all state and county officers. Section 5105, Gantt's Dig. The same section required that he should make oath "to his return," according to a form given. But this latter oath could only be taken after he had completed his assessment. The act of March 31, 1883, is the result of a complete revision of the revenue laws of the state; it was doubtless intended to harmonize the law on the subject with the constitutional requirement, and correct the evil of excessive assessments that had grown up under previous legislation. The constitution requires that "all property subject to taxation shall be taxed according to its value; that value to be ascertained in such manner as the general assembly shall direct. * * *" Article 16, § 5, Const. 1874. To carry out this provision of the constitution, the act of 1883 requires the assessor, before entering upon or discharging any of the duties of his office, to take, in addition to the general oath of office, the searching and exacting oath set out in section 5661, Mansf. Dig. A binding oath laid upon the assessor who is about to go forth to value property, that he will appraise it at its actual cash value, is probably the most usual and appropriate, if not the only, means the legislature can provide to secure the taxation of property according

to its value, as required by the constitution. It is undoubtedly one of the means provided by the legislature for that purpose. The requirement is, therefore, in effect, the same as if it had been imposed by the constitution itself. The oath is more comprehensive and exacting than that required by Gould's Digest. Some of the provisions intended to preclude the assessor from exercising the duties of his office until he has taken the oath are not found in any other statute in this, nor is it believed, in any other, state. The requirement that the oath "shall be indorsed upon the assessment books prior to their delivery to the assessor" appears first in this act.

It is the duty of the county clerk to make up the assessment book or roll of real estate in the county, showing each subdivision and the name of the owner. Section 5694, Mansf. Dig. To this assessment book the assessor simply adds his appraisal of each lot and parcel of land. This is the assessment book referred to in section 5661. This book the clerk is required to make up and deliver to the assessor on or before the first Monday in February. But by section 5661, the clerk is forbidden to deliver, and the assessor to receive, this book, until the required oath is taken; and, that there may be no misunderstanding or doubt as to whether the oath has been taken, the law requires that it shall be indorsed on the book itself. A failure to take this oath within the time prescribed, *ipso facto* vacates the assessor's office. Legislative ingenuity has exhausted itself in an effort to compel the assessor to take this oath or vacate his office. These provisions were enacted in the interests of property owners; and when the assessor refused to take the required oath, and the clerk, in violation of law and his duty, delivered to him the assessment book, no assessment on that book can be made the foundation of a valid tax title. If the law were otherwise, no property owner could ever hope to have his property appraised for taxation by an assessor bound by the obligations of an oath to appraise it at its value. But in this forum this question is foreclosed by the judgment of the supreme court of the United States in *Parker v. Overman*, 18 How. 137. That was a proceeding like the one at bar, and the tax title sought to be confirmed was held invalid because the assessor did not take the oath prescribed by section 8, c. 148, Gould's Dig., within the required time. The court say:

"The principal objection to the regularity of the sale in this case, and the only one necessary to be noticed, is that the land was not legally assessed. A legal assessment is the foundation of the authority to sell; and, if this objection be sustained, it is fatal to the deed. In order to qualify the sheriff to fulfill the duties of assessor, the statute requires that on or before the 10th day of January in each year the sheriff of each county shall make and file in the office of the clerk of the county an affidavit in the following form, etc., and if any sheriff shall neglect to file such affidavit within the time prescribed in the preceding section, his office shall be deemed vacant, and it shall be the duty of the clerk of the county court without delay to notify the governor of such vacancy. * * * The record shows that Peyton S. Bethel, the then sheriff of the county of Dallas, did not file his oath as assessor on or before the 10th of January, as required by law. He did file an oath on the 15th of March, but this was not a compliance with the law, and conferred no power on him to act

as assessor. On the contrary, by his neglect to comply with the law his office of sheriff became *ipso facto* vacated, and any assessment made by him in that year was void, and could not be the foundation for a legal sale."

In *Moore v. Turner*, 43 Ark. 243, Mr. Justice EAKIN, referring to the case of *Parker v. Overman*, *supra*, said:

"Upon an appeal to the United States supreme court it was held that in such a proceeding, expressly provided to give every one interested an opportunity to contest the legality and regularity of every step in the proceedings, it might be shown that the preliminary affidavit was not filed in time. This is regarding the affidavit, not as an oath of office, but as a preliminary step to the assessment proceedings; a part, as it were, of the legal machinery by which the revenue was to be collected, or the citizen deprived of his property; and this is certainly the correct view of the case, as our law then stood."

The law as it "then stood," and the law applicable to the case at bar, are the same, save that the present law, for the better protection of the property owner, amplifies the assessor's oath, and adds new and stringent provisions intended to make it impossible for the assessor even to obtain the assessment books, until he has taken the required oath. The word "deemed" in the old law, and "declared" in the present act, have the same meaning in the connection in which they are used. The failure to take the oath vacates *ipso facto* the office. The clerk is the maker and custodian of the assessment book, until the assessor's oath is recorded upon it, and also filed in his office; and when it is not taken within the prescribed time, he is required to "immediately notify the governor, and such vacancy shall be filled." No proceeding to vacate the office is provided for or contemplated. The exigency of the business will not admit of any such proceeding. It would be inconsistent with the dispatch indispensable to the making of a valid assessment. *Falconer v. Shorea*, 37 Ark. 386; *Alston v. Falconer*, 42 Ark. 114; *Elsev v. Falconer*, Id. 117. The doctrine of the supreme court of the United States on this question finds support in the following cases: *Pike v. Hanson*, 9 N. H. 491; *Langdon v. Poor*, 20 Vt. 13; *Payson v. Hall*, 30 Me. 319; *Morris v. Tinker*, 60 Ga. 466; *Railway Co. v. Donnellan*, 2 Wy. 479; *Coit v. Wells*, 2 Vt. 318; *Isaacs v. Wiley*, 12 Vt. 674; *Ayers v. Moulton*, 51 Vt. 115; *Dresden v. Goud*, 75 Me. 298.

The list of delinquent lands and notice of sale were required "to be published weekly for two weeks," between the fourth Monday in April and the fourth Monday in May, 1885. Act March 5, 1885, § 3, and section 5762, Mansf. Dig. Section 5763, Mansf. Dig., provides that "the clerk of the county court shall record said list and notice in a book to be kept by him for that purpose, and shall certify at the foot of said record, stating in what newspaper said list was published, and the date of publication, for what length of time the same was published before the second Monday in April then next ensuing, and such record, so certified, shall be evidence of the facts in said list and certificates contained." The clause of the section "then next ensuing" shows that this record is required to be made before the day of sale, but it was not so made, and has never been made. When the notice and proof of publication are required to be perpetuated

by a record, it is indispensable that it be so done; and parol evidence is inadmissible to supply the omission. *Kellogg v. McLaughlin*, 8 Ohio, 114; *Minor v. McLean*, 4 McLean, 138; *Langdon v. Poor*, 20 Vt. 13; *Icercise v. Spaulding*, 32 Wis. 394; *Taylor v. French*, 19 Vt. 49; *Tolman v. Hobbs*, 68 Me. 316; *Burroughs, Tax'n*; 293 Black, Tax Titles, p. 229. Presumptions cannot supply the place of a record when the law requires one, nor can they help out a defective record. *Id.*; and *Cooley, Tax'n*, (2d Ed.) 480. The plaintiff seeks in various ways to supply the record of the notice of sale and proof of its publication, which the law requires to be made, and which was not made. Attached to copies of the delinquent list and notice of sale are certified copies of what the clerk terms in his certificate, "the advertisement and proof of publication." An inspection of this proof of publication discloses the fact that the affidavit of the publisher of the paper in which the same was published, was sworn to on the 9th day of November, 1887, two years and a half after the sale, and several months after the suit was brought. The certified copy has no file-mark upon it, but it was probably not filed before it was sworn to. If such proof was competent, it would not aid the plaintiff, because the proof of publication shows that the notice was published on the 16th and 23d days of May, 1885. The law required it "to be published weekly for two weeks," between the fourth Monday in April and the fourth Monday in May, 1885. The fourth Monday in May, 1885, was the 25th day of the month. The publication of the notice on the 16th and 25th days of May was not a compliance with the law. It is essential to the validity of a notice under this act that two weeks shall elapse between the first publication and the fourth Monday in May. *Pennell v. Monroe*, 30 Ark. 661. In *Thweatt v. Black*, *Id.* 739, Chief Justice ENGLISH, delivering the opinion of the court, said:

"The object of the advertisement is twofold: *first*, to notify the owners of land or persons having an interest in it, or charged with the duty of paying the taxes upon it, that the taxes are unpaid, and that the land will be sold for the taxes unless paid before the sale; and, *second*, to bring together competing bidders at the sale, etc. The advertisement is a prerequisite to the authority of the officers to sell, and must be made in accordance with the requirements of the law. * * *"

In *Bagley v. Castile*, 42 Ark. 77, it was held that an act which authorized the sale of delinquent lands without notice was unconstitutional. Judge Cooley, referring to the notice of sale of delinquent lands says:

"Whatever the provision is, it must be complied with strictly. This is one of the most important of all the safeguards which has been deemed necessary to protect the interests of parties taxed, and nothing can be a substitute for it, or excuse the failure to give it." *Cooley, Tax'n*, (2d Ed.) 488, and cases cited.

Where the notice is for less than the statutory time, it is as fatal as if no notice had been given. *Id.* 484; *Black, Tax Titles*, p. 83. Discovering this fatal error in his first effort to supply the unkept record, the plaintiff offers in evidence a certified copy of the affidavit of the publisher of the paper that the notice was published on the 9th, 16th, and 23d days of May, 1885. This affidavit was sworn to on the 17th day

of February, 1888, and filed in the county clerk's office on the 23d day of that month, and the copy offered here certified on the same day. There is no copy of the delinquent list and notice published annexed to the certified copy of this affidavit, as required by law, (section 4359, Mansf. Dig.) but the clerk certifies "that attached to the foregoing proof of publication is the same printed advertisement of tax sale copied in the transcript in reference to the assessment, collection, and sale for taxes of the year 1884, furnished U. M. and G. B. Rose, under my certificate and seal, on the 15th day of February, 1888." Of course this certificate is extra-official and proves nothing, and if the list and notice were attached it would prove nothing. Necessity sometimes justifies the use of *ex parte* affidavits in judicial proceedings, but they are an exceptional species of proof not favored by the courts. When competent at all, it is in the court where the suit is pending, and where the opposing party can be heard to object or to file counter-affidavits. But to allow the title to an estate to be changed by an *ex parte* affidavit, filed in the clerk's office of another court long after the transaction to which it relates has been closed, and suit brought, and without notice to the opposing party, would be intolerable. If that were the law, affidavit-making would rapidly rise to the dignity of a fine art, and a lucrative one. In a country of law, titles do not hang on such a slender thread. If a tax title is bad in law it falls, because it is so purely a technical, as distinguished from a meritorious, title, that a court of equity will not lend its aid to correct the errors of officers that invalidate it. • *Altes v. Hinckler*, 36 Ill. 265; *Keepfer v. Force*, 86 Ind. 81; *Bowers v. Andrews*, 52 Miss. 596. It would be a singular perversion of the law on this subject if that which a court of equity cannot do with all the parties before it, could be done by filing out of time an *ex parte* affidavit in the clerk's office. Making and placing these affidavits in the clerk's office more than two years after the tax sale did not make them a part of the record of the tax proceeding, or of the official files of that office. They were placed there without authority of law, and have no legal sanction.

The plaintiff next seeks to prove by the deposition of the publisher of the paper that the notice was published on the 9th, 16th, and 23d days of May, but no copy of the delinquent list or notice is made an exhibit to his deposition, and he only says: "To the best of my recollection each publication was the same as that filed with the clerk in proof of publication." If they are the same, it could easily have been shown, and ought to have been. The deputy-clerk, who had the custody of the tax-books, and special charge of matters relating thereto, at the time, testifies that they "made it a point to keep the papers," and that the notice "was published twice,—once on the 16th day of May, 1885, and the last on the 23d day of May, 1885." If the notice was published on the 9th of May it is highly probable that that publication was for some reason fatally defective. It is certain that it was disregarded by all parties at the time, and the publication on the 16th and 23d alone counted upon. Why should the printer publish it on the 23d if it had been properly published twice before? If parol evidence and *ex parte* affidavits were competent

evidence it would boot the plaintiff nothing, because the clear weight of the evidence is that the list and notice exhibited were published on the 16th and 23d of May, and on no other day; but all such evidence is incompetent. The law plainly prescribes how proof of such publication shall be made, (section 4359, Mansf. Dig.,) and, in the case of notice of tax sales, requires a record of them to be made, and certified to by the clerk before the sale, (section 5763, Mansf. Dig.,) Until the notice prescribed by law has been given, the collector has no authority or jurisdiction to sell; and before he sells, his jurisdiction to do so must be made to appear of record in the mode prescribed by law. The supreme court of Wisconsin, in discussing this question, said:

"The counsel for the plaintiff conceded that if the defect related to any matter which the statute required should be recorded, then parol evidence would be inadmissible to supply the omission. But we think the same rule should be applied to the affidavits, under the circumstances, that would apply to a statement which the law requires should be recorded; for these affidavits constituted in fact a part of the record of the tax proceedings, and may have been examined by the original owner, who failed to redeem solely for the reason that he discovered there was no record evidence that any proper notice of sale had been given by the county treasurer." *Iverslie v. Spaulding*, 32 Wis. 394.

The rule is the same in this case that it is in cases where it is sought to conclude a party by constructive service by publication. The rule is stated by this court in *Cissell v. Pulaski Co.*, 3 McCreary, 449, in these terms:

"It is a rule without qualification or exception, that when it is sought to conclude a party by constructive service by publication, a strict compliance with the requirements of the statute is required. Nothing can be taken by intendment, and every fact necessary to the exercise of jurisdiction based on this mode of service must affirmatively appear in the mode prescribed by the statute. *Gray v. Larrimore*, 4 Sawy. 638-646; *Steinbach v. Leese*, 27 Cal. 295; *Staples v. Fairchild*, 3 N. Y. 43; *Payne v. Young*, 8 N. Y. 158; *Hill v. Hoover*, 5 Wis. 371; *Galpin v. Page*, 3 Sawy. 93, 18 Wall. 350; *Settlemier v. Sullivan*, 97 U. S. 444. It is not competent for this court to receive parol testimony to supply the omission. *Gray v. Larrimore, supra*; *Noyes v. Butler*, 6 Barb. 617; *Lowry v. Cady*, 4 Vt. 506."

The case of *Com'rs v. Morrison*, 22 Minn. 178, is in conflict with the current authorities on this question. The doctrine of that case cannot possibly be the rule under a statute like that in this state.

The revenue law provides that, if no person bids the amount of the tax for the delinquent land at the tax sale, the collector shall bid the same off in the name of the state. Section 576, Mansf. Dig. The clerk is required to attend the sale, and record in a "book to be kept for that purpose each tract of land, town or city lot, sold to the state, together with the taxes, penalty, and cost due thereon." Section 5769, Mansf. Dig. The clerk is required to "immediately after the sale transfer upon the tax-books all lands sold for taxes to the name of the purchaser," (section 5771, Mansf. Dig.,) and "all lands and town lots sold for the payment of taxes shall be thereafter assessed in the name of the purchaser," except that when the state is the purchaser they are no longer assessed or subject to taxation, but are taken off the tax-books, and entered in

the book of state lands, which the clerk is required to keep. Section 5769, Mansf. Dig. If the town and city lots purchased by the state are not redeemed within two years from the date of sale, the commissioner is authorized to sell them at private sale for the exact sum for which they were bid in by the state. Section 4275, Mansf. Dig. The lot in controversy was bid in by the state for \$110.95, and two years afterwards the state sold it to the plaintiff for that sum. But if the former owner desires to redeem within two years after the sale, he is required to pay what the state bid, "and the taxes which would have accrued thereon if such land or lot had been continued on the tax-book and the taxes extended." Section 5779, Mansf. Dig.

As the constitution provides that property shall be taxed by a uniform rule, both as to rate and mode of assessment, and as an assessment is essential to the imposition of a tax, there would seem to be some embarrassment in giving effect to this requirement. How is it to be known what the property would have been assessed at, and what the taxes would have been? But for the purposes of this case it will be assumed that the provision is valid. If the lot is sold by the commissioner of state lands after the expiration of the redemption, the state gets no taxes for the intervening years between the purchase at the tax sale and the sale by the state, because during that period it is treated as the property of the state, and the officers are forbidden to put it on the assessment book. In some states the purchaser at a tax sale cannot obtain a deed under his purchase until he has given the former owner notice of his purpose to apply for one. Black, Tax Titles, p. 180. The object of such a law is to give to the former owner, who may be ignorant of the fact that his land has been sold for taxes, an opportunity to redeem it. The law in this state works out the same result by a different method. "Immediately" after the tax sale, the land is required to be transferred on the tax-books to the name of the purchaser, if an individual, and when bid in by the state it is taken off the tax-books altogether, and entered on the books of non-assessable state lands. When one whose lot has been sold to the state for taxes without his knowledge, goes to pay his taxes the next year, if the clerk has done his duty, the owner is confronted with the fact that he has no lot to pay taxes on; that it has been sold to the state for the taxes of the previous year. Under the law he has the opportunity two years in succession to be thus advised, for two years' taxes accrue and are due before the expiration of the right of redemption. The fact that land is delinquent by no means proves that the owner has knowingly been guilty of any neglect or dereliction of his duty to the state. The delinquency may have resulted from fraud, accident, or mistake for which the owner is not to blame. The facts in the case at bar illustrate this truth. The property in controversy is a boarding-house or hotel, valued at \$7,000 or \$8,000. The owner resided in a distant state, and had a local agent to collect the rents and pay the taxes. That agent was provided with funds to pay the taxes of 1884, as had been done in previous years. The owner supposed the taxes were paid; but it now turns out that the agent appropriated the money to his own use, and left the state,

without paying the taxes of that year. The owner employed another agent, who was provided with the necessary funds, and directed to pay all taxes on the lot. The agent applied at the collector's office in apt time to pay all taxes due in 1885, and paid the sum of \$105.50, which was all the collector demanded, or that his books showed to be due. The same thing was repeated in reference to the tax of 1886, amounting to \$96, which was paid by the agent, and was all that appeared to be due. Neither the owner nor her agent knew of the forfeiture for the taxes of 1884, until the expiration of the period allowed by law for redemption, and the plaintiff had procured his deed. The agent of the owner had the means, and would have redeemed the lot, if he had been advised of the sale. That he was not advised of it was owing to a dereliction of official duty on the part of the county clerk. If that official had done his duty, and transferred the lot to the state, and taken it off the tax-book, the agent, when he went to pay the taxes for 1885, would at once have discovered the forfeiture, and redeemed the lot. The clerk was guilty of the same dereliction of official duty in 1886, for he put it on the tax-books for that year, and the agent again paid the taxes in ignorance of the forfeiture. Upon this state of facts it cannot be maintained that it was the owner's own fault or negligence that she paid two years' taxes on property not subject to taxation, and for which she was in no manner liable, and that for the taxes of these years she has only a remedy against the state for taxes erroneously paid. Under that view of the case, the plaintiff gets the lot for \$110.95, free from the taxes of 1885 and 1886; the state has to pay back the taxes for those years, amounting to \$201.50, which is just \$90.95 more than she got for the lot when she sold it to the plaintiff; and the defendant loses her property; and, if she does not get back the \$201.50 paid the state, she loses that sum also; and these startling results are due solely to neglect of an official duty by a public officer. Mistakes or misconduct of officers connected with the assessment and collection of the public revenue are never permitted to work such inequitable and unjust results. The mistake and error of the clerk prevented redemption within the time prescribed by the statute, and the law gives the owner a reasonable time after discovering the mistake to make the redemption; the clerk is not the owner's agent, but the agent of the state, (*Kellogg v. McLaughlin*, 8 Ohio, 114.) and the state, no more than an individual, can take advantage of the mistakes of one of her public officers to possess herself of the citizen's land. The principle here involved is clearly stated by the supreme court of Pennsylvania in *Baird v. Cahoon*, 5 Watts & S. 540:

"We are of opinion that the court below erred in charging the jury that it was immaterial whether the non-payment of the taxes was owing to the neglect of the agent, or of the treasurer, or both, as we think the determination of the case must depend upon that question. The officer has duties to perform, as well as the owner, when the latter comes to him to pay up the taxes on his unseated lands. Various acts or omissions of the officer may occur, constituting such neglect on his part that the owner ought not to suffer by it, which cannot be defined beforehand, but must depend upon the particular circumstances of each case."

And in *Bubb v. Tompkins*, 47 Pa. St. 359, the court said.

"The owner came in proper time to the proper officer, the county treasurer, and offered to pay all charges that were against the land, and it was by mistake of the officer that he did not pay all. * * * His redemption is not invalidated by the mistake of the public officer. It was very natural to trust him,—most people do,—and the law cannot declare such trust wrong."

The county clerk makes and keeps the record of the sale of delinquent lands for taxes; he makes and keeps the record showing the lands bid in by the state for taxes; and he makes up the assessment book of real estate, and is enjoined by law not to put such lands on it, and certainly, if he does, their previous forfeiture ought to be noted. When he put the lot in controversy on the tax-books for 1885, and again for 1886, without noting the previous forfeiture, it amounted to a solemn declaration of record, repeated in each of those years that it had not been forfeited for taxes, and that no delinquent taxes were due upon it. The owner and her agent had a right to presume that the clerk had done his duty. On these facts the owner is entitled to redeem on paying the amount bid by the state, with interest from that date. *Cooley, Tax'n*, 532-540; *Black, Tax Titles*, p. 52; *U. S. v. Lee*, 106 U. S. 196, 1 Sup. Ct. Rep. 240; *Price v. Mott*, 52 Pa. St. 315; *Corning Town Co. v. Davis*, 44 Iowa, 628; *Laird v. Hiestler*, 24 Pa. St. 452; *Dietrick v. Mason*, 57 Pa. St. 40; *Van Benthuyssen v. Sawyer*, 36 N. Y. 150. *Gage v. Scales*, 100 Ill. 218. If this was a case where one of two innocent parties must suffer by the wrongful act of a third, the state would have to bear the loss resulting from the misconduct of her own agent. *Conway Co. v. Railway Co.*, 39 Ark. 50; *Jiska v. Ringgold Co.*, 57 Iowa, 630, 11 N. W. Rep. 618. But this is not that kind of a case. Here the owner and the state both lose by the official misconduct of the officer if it is overlooked, and the sale held valid,—the owner loses the lot, and the state two years' taxes on it. On the other hand, if the sale is void by reason of the clerk's error, the state gets all her taxes, the owner keeps her lot, and the purchaser loses nothing, because he gets back his purchase money with interest. The right to redeem may be rested on another ground. It is obvious that the state has no right to the two years' taxes, if she denies the former owner's right to redeem, and stands on her purchase at the tax sale. The money paid for the taxes of the two years was paid to the same officer, and was distributed in the same way it would have been if it had been paid on a technical redemption of the property; and, the full amount required to make redemption not having been paid by reason of the mistake or misconduct of the clerk, equity will treat it as so much paid towards redemption, and will permit the owner to perfect the redemption, on discovering the mistake. *Id.* The rule of *caveat emptor* applies to the purchaser of a tax title. He is not a *bona fide* purchaser for value without notice. For such titles the commissioner is directed to "execute to the purchaser a quitclaim deed." Section 4245, Mansf. Dig. The purchaser takes the land in the same plight the state held it, and subject to the same equities and defenses. *Cooley, Tax'n*, (2d Ed.) 475-553; 2 *Desty, Tax'n*, 850.

The learned counsel for the plaintiff has pressed upon the attention of the court the case of *Moore v. Turner*, 43 Ark. 243. That case arose on a petition of a single tax-payer for a writ of *certiorari* to quash the tax levy for the county, after most of the tax-payers had paid their taxes. The learned judge who delivered the opinion of the court referred at some length to questions relating to the validity of assessments, but these remarks must be held to apply to the case then before the court. The learned judge himself does this on page 252, by calling attention to the difference in the rules of decision between the case then before the court and a contest "between A. and B. for the ownership of a particular piece of property alleged to have been improperly sold for taxes." And by reference to page 262 of the opinion it will be seen the judgment of the court is rested on, and the case only authority for, the doctrine that the writ of *certiorari* is not a writ of right, but one to be granted or refused in the discretion of the court; and that in the exercise of this discretion a circuit court may rightfully refuse to issue the writ on the petition of a single tax-payer to quash the tax levy for a county, no matter how irregular the assessment and levy may be. In the case at bar the holder of the tax title has chosen to proceed in equity for a confirmation of his title, under a statute which provides that if "it shall appear that the sale was made contrary to law, it shall be the duty of the judge to annul it." Section 579, Mansf. Dig. The plaintiff cites and relies on the provision of section 5782, Mansf. Dig., that one claiming title adverse to a tax "deed shall be required to prove that there had been an entire omission to list or assess the property, or levy the taxes, or to give notice of the sale, * * *." It is argued that under this section, a single hour's notice of sale is sufficient; and it would seem to follow logically that it might be given by oral proclamation on the street, or posting a notice on a tree in the forest. The affidavit and record of the proof of publication of notice of sale not having been made and kept in the time and manner required by law, and no other evidence being competent to prove the publication, it is an indisputable presumption of law that no notice was given. Besides, the intensifying adjective "entire" adds nothing to the legal effect of the section. A failure to give the two weeks' notice by five days is, in contemplation of law, an "entire" failure to give the notice required by law. This section worked no change in the law. The limits of legislative power in this direction are stated by the supreme court of this state in *Railroad Co. v. Parks*, 32 Ark. 131, and with great precision and perspicuity in *Radcliffe v. Scruggs*, 46 Ark. 96. The provision under discussion is not as broad in its scope and design as the statute of limitations of two years, (section 5791, Mansf. Dig.,) construed by the court in *Radcliffe v. Scruggs*, and in construing which the court, speaking by Mr. Justice SMITH, said:

"Neither the validity nor the construction of this statute has been settled by previous decisions of this court, further than it does not operate to deprive the former owner of any meritorious defense. And by 'meritorious defense' we mean any act or omission of the revenue officers in violation of law, and prejudicial to his rights or interests, as well as those jurisdictional and funda-

mental defects which affect the power to levy the tax, or sell for its non-payment. But while the act cannot have the free course that its framers intended, it is still our duty to give it such effect as may be consistent with legal and constitutional principles. And this may be best accomplished by restricting its operation to mere irregularities or informalities on the part of officers having some duty to perform in relation to the assessment and levy of taxes or sale. Our legislation and previous decisions have always distinguished between this class of defects, which have no tendency to injuriously affect the taxpayer, and substantial defects, such as go to the jurisdiction of the levying court to levy a particular tax, or of the power of the officer to sell for non-payment, or the omission of any legal duty, which is calculated to prejudice the land-owner."

It is obvious that the defenses pointed out to the tax title in suit in this case are "meritorious," as that term is defined by the court in *Radcliffe v. Scruggs*, and by the weight of authority, and that the legislature cannot deprive the property owner of such defenses without, in the language of Mr. Justice SMITH, "transcending the boundaries of its power." *Davis v. Minge*, 56 Ala. 121; *Stoudenmire v. Brown*, 57 Ala. 481; *Cooley, Tax'n*, (2d Ed.) 298, 299, 521, and cases cited, and notes; *Black, Tax Titles*, 253; *Silsbee v. Stockle*, 44 Mich. 561, 7 N. W. Rep. 160, 367.

The question whether Mrs. Barbour, as a married woman, has not a right to redeem without regard to the validity of the sale, and whether her infant children have not an interest in the lot which would entitle them to redeem under the statute, and objections to the validity of the tax sale, other than those passed upon, are not decided.

Let a decree be entered declaring the plaintiff's deed void, giving him a lien on the lot for the purchase money and interest, and directing the sale of the lot unless the amount is paid into the registry of the court for his use within 20 days, and that the plaintiff pay all costs.

MOWRY v. CUMMINGS.

(Circuit Court, S. D. Illinois. January Term, 1888.)

EJECTMENT—EQUITABLE DEFENSES—DEED CONSTRUED AS MORTGAGE.

In ejectment, plaintiff, to rebut any presumption of outstanding title arising from a certain deed conveying the land in controversy to defendant, offered in evidence a defeasance executed the same day as the deed, and then showed conclusively that the deed in question, although on its face absolute, was a mortgage only; that the debt thereon had been paid; and that defendant knew of such defeasance and payment before acquiring any title to the premises. *Held*, that such evidence was admissible, and that, notwithstanding the rule that in ejectment the legal title must prevail, equitable defenses should be allowed.

At Law. In action for ejectment.

Esther O. Mowey brought suit against William O. Cummings. Judgment for plaintiff.

James C. Conkling, for plaintiff.

John M. Palmer, for defendant.

ALLEN, J. This was an action of ejectment, brought by the plaintiff against the defendant to recover the S. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, section 2, township 10 N., range 9 W. Under a stipulation of record both the plaintiff and defendant claim title from George W. Putnam, to whom the original patent was issued; and there does not seem to be any objection interposed to plaintiff's *prima facie* case. The chain of title is a very short one. George W. Putnam, the patentee, conveyed the land by deed to Washington F. Adams, on the 16th day of July, 1855. By his deed of April 7, 1857, Adams reconveyed it to Putnam, who, on the 12th of September, 1859, conveyed to the plaintiff. This deed of Adams to Putnam of April 7, 1857, was not filed for record till the 21st day of June, 1887. The defendant, after plaintiff had rested her case, introduced, for the purpose of establishing outstanding title, a deed from Washington F. Adams to Henry T. Darrah, conveying the land in controversy, dated June 2, 1856, recorded May 19, 1857; and an instrument without seal, dated August 25, 1857, and recorded September 26th of the same year, signed by Henry Darrah and his wife, purporting to convey to Haynes and Rupert the same land, was also offered in evidence. The plaintiff, to rebut any presumption of outstanding title arising out of the deed from Adams to Darrah, offered in evidence an instrument containing a defeasance made June 2, 1856, and recorded September 27, 1872. This was followed up by testimony fully establishing the fact that what purported to be an absolute deed on its face from Adams to Darrah, was in fact but a mortgage to secure the sum of about \$3,200, due the grantee from the grantor, and that this sum was fully paid by the grantor Adams to Darrah, in 1859 or 1860, and that defendant Cummings had full knowledge of such defeasance and payment before acquiring any claim or color of title to the premises. Counsel for defendant object to this testimony, contending that it is inadmissible in a court of law; and this is the principal question in the case.

The rule is quite a familiar one that in ejectment the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of his adversary, and that legal titles must prevail in this form of action. This doctrine is invoked against the admissibility of the evidence which, by producing a defeasance executed at the same time as the deed, converts it into a mortgage, and then shows conclusively that the mortgage debt was paid about the year 1859. The rule, while well recognized, is not broad enough to sustain the objection. The evidence establishes beyond any question that there has been no outstanding title since 1859. The debt was the principal thing, and the mortgage—for such was the real character of what purported to be an absolute deed on its face from Adams to Darrah—a mere security; and, when the debt was fully paid, the mortgage was afterwards utterly worthless. Counsel for the defendant refer the court to *Finlon v. Clark*, 118 Ill. 32, 7 N. E. Rep. 475, in support of their objection to the admissibility of the evidence. The case cited fails to sustain defendant's position, which is, that proof that the

deed to Darrah was made to secure a debt cannot be heard in a court of law, but the mortgagor must go into a court of chancery for relief. The court, in delivering the opinion, used this language:

"The offer of the bond was not accompanied by any offer to prove, either that the debt secured was not due, or that the same had been paid, or that the decree directed by the opinion in 90 Ill. 245 had been entered by the lower court, and performed by appellant."

The bond spoken of by the court had been offered by the defendant to prove that the deed on which plaintiff based his right to recover was not absolute, but was in effect a mortgage. The inference is very strong that, if the offer of the bond in evidence had been accompanied by an offer to prove that the debt secured had been paid, the evidence would have been proper, and a recovery thereby defeated; and this view meets my approval. While the well-known distinction between the rules of pleading and evidence in courts of law and courts of chancery will be recognized, the flexibility of the rules of law in adapting them to cases falling within the reason of such rules must not be lost sight of. To compel the plaintiff to resort to a court of chancery in order to establish that the defense interposed, alleged to be an outstanding title, is not a valid defense, and is no outstanding title, and presents no obstacle to her right of recovery, would tend to the multiplicity of suits, and would sustain a view of the question too technical and arbitrary for the prompt attainment of justice. There will be a judgment in favor of the plaintiff for the 80-acre tract of land described in the declaration.

UNITED STATES v. LOVING.

(*District Court, N. D. Texas. March 27, 1888.*)

1. INDIANS—TRESPASS ON INDIAN LANDS—GRAZING CATTLE.

Rev. St. U. S. § 2117, provides that "every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock." *Held*, that this penalty is recoverable when cattle are driven and permitted to graze on the lands of an Indian tribe a single day without permission.

2. SAME—OBSTRUCTION OF PERMITTED TRAIL.

One who makes a trail across Indian lands to the nearest accessible point of a permitted trail, incurs the penalty prescribed in Rev. St. U. S. § 2117, for grazing cattle on said lands without permission, although prevented by natural obstructions from entering said lands by the permitted trail.

At Law. Action to collect penalty under Rev. St. U. S. § 2117, for driving cattle on land belonging to the Indians.

This action was brought against J. C. Loving to collect the penalty for driving cattle into the Comanche, Kiowa, and Wichita Indian reservations.

McCORMICK, J., (charging jury.) This action is prosecuted to enforce the penalty provided for in the section of the law of the United States for the protection of the Indians:

"Every person who drives or otherwise conveys any stock of horses, mules, or cattle to range and feed on any land belonging to any Indian or Indian tribe without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock."

It is admitted that the defendant drove 1,200 head of cattle into the Comanche, Kiowa, and Wichita Indian reservation, and that said cattle had been so on the lands of said Indians for at least two days and a half, subsisting by grazing at will along the route they were traveling, or, if not at will, at least being allowed to graze for their subsistence for that time. The statute, as I construe it, is not limited to the meaning to range permanently or for any long period or an indefinite period of time to graze, but the offense is complete when they are so driven and permitted to range and graze one day. It is not disputed that there is a fixed trail well known to the defendant (as he testifies on the stand) through these lands of the Indians, in which persons have permission to drive cattle; but the defendant's cattle were not being driven on this trail, and it is no defense to this action that, by reason of inclosures or other obstructions on the Texas side of Red river, the defendant could not enter the Indian lands on the permitted trail. He could not make a trail of his own from some point where he chose to enter the Indian lands without permission, even to the nearest accessible point on the permitted trail, without incurring the penalty. There being no dispute about the facts of the case, you are instructed to return a verdict for the plaintiff, (the United States) for \$1,200.

ROBERTSON v. CORNELISON.

(Circuit Court, D. South Carolina. April 9, 1888.)

1. MASTER AND SERVANT—DEFECTIVE APPLIANCES.

A master is bound to provide safe machinery, and keep it in safe order; not the best possible machinery, or in the best possible order.¹

2. SAME—EMPLOYMENT OF CHILDREN.

In the use of machinery, a master is bound to exercise ordinary care; and in the case of the employment of a child a higher degree of care is required than

¹ If the machinery furnished by a master to his servant is sound, well made, and kept in repair, he will not be liable for an accident occurring to an employe when the only ground alleged is that there is a better and safer kind used for the same purpose. *Richards v. Rough*, (Mich.) 18 N. W. Rep. 735; *Sweeney v. Envelope Co.*, (N. Y.) 5 N. E. Rep. 358; *Pierce v. Cotton Mills*, (Ga.) 4 S. E. Rep. 881; *Delaware River Works v. Nuttall*, (Pa.) 13 Atl. Rep. 65. A master is not bound to adopt the safest method of working. *Naylor v. Railway*, (Wis.) 11 N. W. Rep. 24; *Hickey v. Taaffe*, (N. Y.) 12 N. E. Rep. 286. And his liability for injuries to his servant for defective arrangements is not that of an insurer or guarantor. The question is one of reasonable care and diligence. *Batterson v. Railway Co.*, (Mich.) 18 N. W. Rep. 508, and 18 N. W. Rep. 584; *Railroad Co. v. Wagner*, (Kan.) 7 Pac. Rep. 204; *Railroad Co. v. Hughes*, (Pa.) 13 Atl. Rep. 286; *Bowen v. Railway Co.*, (Mo.) 8 S. W. Rep. 230.

in the case of an adult, especially in seeing that he does not assume risks without the scope of his employment.

3. SAME—NEGLIGENCE OF VICE-PRINCIPAL.

Where it is unusual and dangerous to clean the machinery of a mill before the stoppage of the mill, the master is responsible for the negligence of his foreman in requiring a minor in his employ to clean the machinery before the stoppage of the mill, although such work was within the scope of his employment.¹

4. SAME—CONTRIBUTORY NEGLIGENCE.

Where an employe, a minor, while disobeying the orders of his foreman, assumes unusual dangers, and is injured before his action could, in the exercise of proper care, be discovered and stopped, the master is not liable.

5. DAMAGES—PERSONAL INJURIES—ELEMENTS.

In estimating damages for personal injuries, the jury may consider plaintiff's age, his station in life, the character of the injury, the effect it has on his efficiency in the future, and his suffering, bodily and mental.

At Law. Action by John E. Robertson against George H. Cornelson, for damages for personal injuries.

D. H. Henderson and Claiborne Snead, for plaintiff.

Islar & Glaze and Smythe & Lee, for defendant.

SIMONTON, J., (*charging jury*.) The plaintiff, a boy of 12 years of age, a hand in the factory of defendant, had his left hand caught in the gearing of a machine which he was cleaning, and lost his arm. The questions are: Is the defendant liable to the plaintiff for this injury? If so, what is the measure of his damages? In solving the first question you must inquire: Was the injury caused by a defect in the machinery of the defendant? If so, was this defect occasioned, or did it exist, by reason of any negligence on the part of defendant in procuring a proper machine, or in keeping it in proper order? He was not bound to procure the best possible machine, nor to keep it in the best possible order. He was bound to get a safe machine, and to keep it in safe order. If the machine was defective, was this known to defendant, or could it have been known to him by the exercise of proper care on his part, or on the part of his agents? The kind of care which defendant was bound to exercise was the care which a person of common prudence and of common sense exercises under the same conditions in the same employment. The fact that plaintiff was a child naturally increased the degree of care and caution which would be required in the case of an adult, especially in seeing that he did not assume an unusual risk not within the scope of his employment. An adult might assume such risk; a minor could not. The defendant is responsible for the acts and for the knowledge of his agents. Their knowledge and their negligence are his.

In determining these questions the burden of proof is on the plaintiff. The jury are not at liberty to infer that either the defendant or his agents

¹The master is responsible for the negligence of a servant who stands as his vice-principal and direct representative, invested with his own authority over inferior servants; and the latter, when injured by such negligence, are not barred by the doctrine of fellow-servant. *Faren v. Sellers*, (Ia.) 8 South. Rep. 363, and note; *Railroad Co. v. Smith*, (Neb.) 36 N. W. Rep. 285; *Criswell v. Railway Co.*, (W. Va.) 6 S. E. Rep. 81.

As to who are fellow-servants within the rule exempting the master from liability for injuries resulting to a servant from the negligence of a co-employe, see *Wolcott v. Studebaker*, 34 Fed. Rep. 8, and note; *McMaster v. Railway Co.*, (Miss.) 4 South. Rep. 59.

were negligent simply because the accident occurred. The plaintiff, by preponderance of testimony, must show that the accident occurred by reason of the negligence of defendant or his agents, and from no other cause. The jury cannot find the defendant guilty of negligence because the plaintiff, a minor, was engaged in a dangerous employment. He was engaged in this mill by and with the concurrence of his father. He took the risks of his employment,—the natural and ordinary risks. But defendant could not put him to extraordinary risks outside of his employment. If he did this he would be liable if the injury occurred from it. In this connection, then, you must inquire, for what was plaintiff engaged? Was his employment a general one, to do whatever he was told to do, including cleaning the machines? Or was he employed only as a doffer? If it was among his duties to clean the machines, was he doing this under the instructions of the foreman when the accident occurred, before the general stoppage of the mill? If so, and if it was unusual and dangerous to clean the machine before the general stoppage of the mill, this would be negligence on the part of the defendant's agent, for which he would be responsible. If plaintiff was not acting under orders of the foreman, but was disobeying him, and if he incurred unusual danger in this, and was injured before his action would be discovered and stopped, defendant is not liable. If there was no unusual danger in cleaning the machine before the general stoppage, and plaintiff was acting in disobedience of orders, but the accident occurred because of a defect in the machinery, and was not the result of the disobedience, defendant is liable. If the disobedience of orders caused the injury, and if the plaintiff could by proper care have been discovered, and could have been stopped in his disobedience in time to have prevented the accident, inasmuch as he was a young child, the defendant is liable. If the accident occurred by the unauthorized act of the plaintiff, or by his own negligence in the course of his employment, defendant is not liable. Apply the facts as stated in the testimony to these principles, and find your verdict. If, upon considering the whole testimony, you solve it in favor of the plaintiff, what is the measure of damages? You cannot find vindictive or punitive damages. Nothing has been developed in the case which will justify this. You must compensate the plaintiff considering his age; his station in life; the character of the injury; the effect it has on his efficiency in the future; his suffering, bodily and mental. The sum you must determine. You cannot go beyond the amount stated in the complaint.

NOTE. See *Gunter v. Manufacturing Co.*, 15 S. C. 450; *Bridger v. Railroad Co.*, 28 S. C. 24; *Hough v. Railway Co.*, 100 U. S. 218; *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493; *Railroad v. Herbert*, 116 U. S. 642, 656, 6 Sup. Ct. Rep. 590; *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; *Steam-Ship Co. v. Carey*, 119 U. S. 245, 7 Sup. Ct. Rep. 1860; *Railroad Co. v. Fort*, 17 Wall. 558.

ROBOSTELLI v. NEW YORK, N. H. & H. R. Co.

(Circuit Court, S. D. New York. April 17, 1888.)

DEATH BY WRONGFUL ACT—DAMAGES—INTEREST—PLEADING.

Where the complaint demands judgment "in the sum of \$5,000, with the costs of this action," and a verdict is returned for plaintiff for \$5,000 damages, the plaintiff may waive the interest from the date of decedent's death, under Code Civil Proc. N. Y. § 1904, providing that "when final judgment for the plaintiff is rendered the clerk must add to the sum so awarded interest thereon from the decedent's death, and include it in the judgment."

At Law. On motion for judgment.

Chas. H. Noxon, for plaintiff.

Robert D. Benedict, for defendant.

WHEELER, J. This action is brought upon section 1902 of the New York Code of Civil Procedure for an alleged wrongful act which caused the death of the plaintiff's intestate. The section provides that such administrator "may maintain an action to recover damages for" such wrongful act. In her declaration or complaint the plaintiff set out her cause of action upon that statute, and concluded: "Wherefore plaintiff demands judgment against the defendant in the sum of five thousand dollars, with the costs of this action." The answer was in substance a denial of the complaint. Upon trial on these pleadings the jury returned a verdict for the plaintiff to recover \$5,000 damages. Section 1904 of the same Code provides that "the damages awarded to the plaintiff may be such a sum not exceeding five thousand dollars as the jury" "deems to be a fair and just compensation for the pecuniary injuries resulting from the decedent's death to the person or persons for whose benefit the action is brought;" and that, "when final judgment for the plaintiff is rendered, the clerk must add to the sum so awarded interest thereon from the decedent's death, and include it in the judgment." The plaintiff has filed a waiver or *remittitur* of this interest and costs, and moves for judgment on the verdict for \$5,000 damages only. This motion is resisted by the defendant upon the ground that the matter in dispute would not then, "exceed the sum or value of five thousand dollars, exclusive of costs," and the judgment would not be reviewable by the supreme court. Act Feb. 16, 1875, (18 St. 315;) *Railroad v. Bank*, 118 U. S. 608, 7 Sup. Ct. Rep. 23. The laws which confer jurisdiction upon the supreme court to review the judgments of this and other courts, and those that leave the judgments final, are equally binding. The limits are set in each case by the same authority, and the rights of parties to insist upon the one or the other are equally sacred. This case should be determined in this court in such manner as to award to the parties their just rights, respectively, according to law, as near as may be, and, when this is done, if the right to have the judgment reviewed is left by the law to either, it should not by any act of the court be taken away; and if by the law it is left final, nothing should be done by the court to

disturb it. The action is ominently one for the recovery of open and uncertain damages; they can only be ascertained by estimate. In such actions, plaintiffs have from the earliest times always been limited in their right of recovery to the sum demanded. Brooke, Abr. 31; *Pilford's Case*, 10 Coke, 117a; Bac. Abr. 2; 1 Chit. Pl. 398; *Bonner v. Charlton*, 5 East, 139; *Burger v. Kortright*, 4 Johns. 415; *Hemmenway v. Hickey*, 4 Pick. 497; 2 Sedg. Dam. 578. When a verdict in such a case was rendered for an amount of damages greater than the *ad damnum*, the plaintiff was not entitled to a judgment on the verdict without remitting the excess. If judgment was entered on the verdict without a remittitur of the excess the judgment was erroneous, and reversible. This is shown by the books and cases cited and many others. Some cases hold that the excess cannot be remitted, and the error corrected, after writ of error brought; and others that the judgment can be saved from reversal in that manner. *Pickwood v. Wright*, 1 H. Bl. 642; *Fury v. Stone*, 2 Dall. 184; *Hutchinson v. Crossen*, 10 Mass. 251; 1 Sel. Pr. 481. All agree, however, that the excess must be remitted before judgment on the verdict will be regular. This limitation of the right of a plaintiff to judgment for no more damages than are demanded in the declaration or complaint in actions for the recovery of unliquidated damages, does not appear to be varied by this Code of Procedure, unless it is as to the effect of a judgment on an excessive verdict without objection. *Corning v. Corning*, 6 N. Y. 97; *Schultz v. Railroad Co.*, 89 N. Y. 242. Here the question is made before judgment; and what the effect would have been if the judgment had been entered up without question is not material. The question is as to what judgment is proper now, as the case stands. As the plaintiff has declared or demanded judgment for only \$5,000 damages, a judgment for more than that amount would be manifestly improper. The intent of the statute on which the action is founded appears to be to give damages to an amount not exceeding \$5,000 at the time of the death, and interest after whatever the delay of the recovery may be, so that the judgment entered up may be for more than \$5,000. But when the interest is added, it is made by the express words of the statute a part of the judgment, as much so as if the jury were allowed to add it as a part of the sum awarded by the verdict. The *ad damnum* must therefore be made large enough to cover this increase, if the plaintiff wishes to have judgment for it. In this case the plaintiff has waived the interest, and the statute says that the clerk shall add it. This is a matter of procedure in a common-law action, and the statute of the state is made a rule of procedure in this court. Rev. St. U. S. § 914. The defendant argues that this statute is imperative, and that the clerk must add the interest. It is given by the statute for her benefit, and it would seem that she might waive it, and not be compellable to receive it if she should so prefer. In the case, *In re Cooper*, 93 N. Y. 512, the court said that it was "very well settled that a party may waive a statutory, and even a constitutional, provision for his benefit." But if the plaintiff must have the interest on the verdict, that should be reduced so that with the interest it will not exceed the *ad damnum*. There would be no

difference between remitting the interest and remitting such part of the verdict as would leave enough to amount, with interest, to what the verdict now is. Nothing would be gained by requiring the *remittitur* already entered to be changed. Upon these considerations a judgment on the verdict for \$5,000 damages only appears to be the proper and only proper verdict to be entered. This conclusion makes consideration of whether the plaintiff should be allowed to take judgment on the verdict and *remittitur*, as a matter of discretion, unnecessary. That the court has that power is unquestioned. *Thompson v. Butler*, 95 U. S. 694; *Insurance Co. v. Nichols*, 109 U. S. 232, 3 Sup. Ct. Rep. 120; *Bank v. Redick*, 110 U. S. 224, 3 Sup. Ct. Rep. 640; *Royers v. Bonsermun*, 21 Fed. Rep. 284. There is, however, one consideration which would favor granting that leave. This statute respecting interest was not called to the attention of the court or jury upon the trial, and the case was submitted to the jury as if the amount of the verdict would be all that could be recovered. They might not have found the damages at the time of the death to be \$5,000, or any more than enough to amount to that sum now. The *remittitur* may have left as large a verdict as the jury would have given. In *Darrel's Case*, Year Book 13 Hen. VII. fol. 16, 17, in a writ of trespass, the plaintiff laid his damages at 20 marks. On not guilty being pleaded the jury found the damages and costs of suit jointly to be 22 marks, thereupon, BRIAN, J., said: "*Semble que le verdict est bon pur 20 markes & pur le remnant void.*" The *ad damnum* need not be large enough to cover both damages and costs, but in that case the court could not tell how much of the 22 marks was for damages, nor how much was for costs; therefore the judgment was for but 20 marks. *Pilfold's Case*, 10 Coke, 117b. Here the statute gives the interest as a part of the damages, but the jury may have considered the same interest as a part of the damages found by the verdict. Motion granted, and let judgment be entered on the verdict and *remittitur* for \$5,000 damages, only.

ALBERT v. ORDER OF CHOSEN FRIENDS.

(Circuit Court, D. Kentucky. August 23, 1887.)

1. INSURANCE—MUTUAL BENEFITS—PERMANENT DISABILITY.

The constitution of a relief fund association provided that a member "permanently disabled from following his or her usual or other occupation" was entitled to a benefit; and in another section defined such disability as one which should "permanently prevent the member from following any occupation whereby he or she can obtain a livelihood." Held, that the words "or other occupation," in the first-mentioned section, could not be held to mean "or other of the same kind;" and the definition in the latter section was conclusive against one who, disabled from his own profession, had been working at another totally dissimilar one.

2. SAME—PROOF OF CLAIM.

The laws of a relief fund association provided that on notice of the disability of a member a board of physicians should examine him, and report to the

supreme council; that all proofs for death or disability benefits should be approved by the subordinate council; and that, upon approval of satisfactory proofs of a member's disability, he should be entitled to a benefit. *Head*, that the subordinate council could not finally reject a claim.

At Law. On demurrer.

Action by J. J. Albert, to recover \$3,000 from the supreme council of the Order of Chosen Friends.

Browder & Edwards and *Dodd & Grubbs*, for plaintiff.

Finch & Finch and *F. T. Fox*, for defendant.

BARR, J. The plaintiff has demurred to the defendant's answer, and this demurrer raises important questions. The plaintiff has sued to recover of the defendant \$3,000 because of his total inability to pursue his usual occupation—that of a barber. The answer (second paragraph) alleges that the plaintiff is not disabled by his disease from following some other occupation than that of a barber, and that he has, since his alleged disability, engaged in other occupations, and that he has in fact run, as owner, a restaurant in Russellville, and is now engaged in said occupation, and that he has also been engaged in clerking in a boot and shoe store since said disability. The plaintiff is a member of the Order of Chosen Friends, and his certificate, which is filed, provides that he is "entitled to all the rights and privileges of membership, and of a benefit not exceeding three thousand dollars from the relief fund of said order, in the manner, and subject to the conditions, set forth in the laws governing said relief fund, and in the application for membership." The fourth section of article 2 of the relief fund declares that: "Should a member become totally and permanently disabled from following his or her usual or other occupation, by reason of disease or accident, such member, upon the receipt and approval of satisfactory proofs, as hereinafter provided for, shall be entitled to a benefit of not exceeding one-half the amount of the relief fund certificate held by him or her." The plaintiff insists that, as the answer set up his ability to follow occupations which are not of a like character as that of a barber,—his usual occupation,—it is not good. He construes this section as meaning his or her usual or other like occupation. Such a construction is sustained by excellent authority. There is another section (11) of this article which, however, defines the total and permanent disabilities mentioned in section 4, and these definitions are, I think, conclusive upon the plaintiff. That section is as follows:

"The following are hereby declared to be total and permanent disabilities, within the meaning of section 4 of this article, viz.. The loss of both hands; the loss of both feet; the loss of both eyes; the loss of one hand, and permanent crippling of the other; the loss of one foot, and permanent crippling of the other foot or leg; such a permanent and disabling sickness as shall render the member helpless to the extent of permanently preventing the member from following any occupation whereby he or she can obtain a livelihood."

This section leaves no room for the rule of *ejusdem generis* to be applied. The language is explicit that the disabling sickness shall render the mem-

ber helpless to the extent of permanently preventing him "from following any occupation whereby he or she can obtain a livelihood." See *Saveland v. Fidelity Co.*, 30 N. W. Rep. 237. The language of the article of association, which states the principal objects of the association, or that of the constitution, which declares that one of the objects of establishing a relief fund to be to relieve a member when by reason of disease or accident he "becomes permanently disabled from following his or her usual or some other occupation," cannot help the plaintiff. Both parties are bound by the certificate of membership, which is the contract as to the relief to be given, and that refers to the laws governing the relief fund as the controlling rule upon the subject now under consideration. The demurrer to the second paragraph of the answer should for the reason given, be overruled.

The demurrer to the third paragraph of answer presents a novel question. That paragraph proceeds upon the theory that the plaintiff cannot recover if the subordinate council, of which he is a member, does not approve his proofs of the disability. It sets out affirmatively as a complete defense that the subordinate council of which he is a member has rejected his claim. The question is not whether the plaintiff has sufficiently excused himself from having the approval of this council, as required by section 8, and made the proper allegations in that regard, but whether, this council having rejected his claim, that is the end of it, except by an appeal to a superior council of the order. The relief fund laws direct that, upon proper notice of a disability being given, the supreme councilor shall order a board of three physicians, whose duty it shall be to make a careful examination of the member's condition, and report as to the character and permanency of the disability. If this report "shows a disability of an unquestionable total and permanently disabling character, the supreme councilor, supreme recorder, and supreme medical examiner may approve the same, and order the benefit paid." Section 7 of these laws provides that in case of disability for accident, this board of physicians may be dispensed with. Section 8 of these laws declares that "all proofs for death or disability benefits shall be approved by the subordinate council to which the claim belongs, while assembled in regular session, and such approval shall be attested by the chief councilor and secretary with the seal of the council. A medical examiner shall also approve and attest such claims, all of which shall be done before a claim is forwarded to the supreme recorder." The fourth section provides that upon the receipt and approval of satisfactory proofs of the disability of a member, as hereinafter provided for, "he shall be entitled to a benefit of not exceeding one-half of the relief fund certificate held by him or her. These provisions are seemingly somewhat inconsistent. The use of the words "not exceeding" one-half of the amount of the relief fund certificate held by him, would indicate that there was either a sliding scale upon which the benefits were to be regulated, or that some one had a discretion in the matter. The disability benefits are, as I understand it to be, one-half of the amount of the relief fund certificate held by the claimant, except in the case mentioned in section 1. There is,

therefore, uniformity in benefits as well as assessments; and neither a subordinate council, or other body or person in the order, can, in their discretion, scale a benefit. We have seen that the right to allow a disability claim is with the supreme councilor, supreme recorder, and supreme medical examiner. What, then, is the meaning of the provision of section 8, which requires "all proofs for death or disability benefits shall be approved by the subordinate council to which the claimant belongs." We think this provision is directory as to the mode of preparing proofs for those who are to act upon the claim, and does not give the subordinate council the right to reject the claim itself. I see nothing in the constitution or laws of this order which gives to subordinate councils the right to reject a claim for either a death or disability benefit. Such a right will never be presumed, but must be given in the clearest and most explicit terms. Neither do I find anything which makes the judgment of a supreme councilor, supreme recorder, and supreme medical examiner upon these benefits final, so as to preclude a claimant from appealing to the courts for redress, if he be otherwise entitled to it. The demurrer to the third paragraph should be sustained.

AULTMAN et al. v. McCONNELL et al.

(Circuit Court, S. D. Iowa, W. D. April 20, 1888.)

1. INSURANCE—ASSIGNMENT OF POLICY.

When the owner of an insurance policy, after loss, places the same in the hands of an attorney for collection, with instructions to apply the proceeds in payment of his debt to a third person, this does not constitute an assignment of the policy to such third person.

2. SAME—VALIDITY—CHANGE OF POSSESSION—RECORDING.

The written assignment of a policy, made by the holder after loss, notice of such assignment being served upon the company, and the original holder of the policy retaining possession, is valid as against a subsequent garnishment, and need not be recorded as required by Code Iowa, § 1923, in case of a sale or mortgage of personal property when the vendor or mortgagor retains possession.

At Law.

Stone & Sims, for plaintiff.

Sapp & Pusey, for intervenor.

SHIRAS, J. In 1886, James McConnell was the owner of a store building in the town of Harlan, Iowa, upon which he held a policy of insurance in the Pennsylvania Fire Insurance Company, for the sum of \$700. Joseph G. Peirce held a mortgage on the property as security for a debt due him from McConnell. In August, 1886, the premises were destroyed by fire, and on the 11th of that month McConnell executed a written assignment of the policy to Peirce, as additional security to him. This assignment was not indorsed on the policy, which was at the date of the

assignment in McConnell's safe in the ruins of the burned building. Notice of the assignment of the policy was given to the agent of the insurance company. Subsequently McConnell placed this policy with others in the hands of an attorney, with instructions to collect the policies, and apply the proceeds in payment of a debt due from him to Aultman, Miller & Co., plaintiffs herein. An agent of the plaintiffs visited Harlan for the purpose of settling the account between the firm and McConnell. At that time he endeavored to procure an assignment of the policy in the Pennsylvania Insurance Company, but McConnell refused to sign it, although he did transfer to plaintiffs the other policies on the property. Thereupon plaintiffs brought suit against McConnell by attachment, and garnished the attorney, in whose hands the policy had been placed, and also the agent of the insurance company. The company paid the amount due upon the policy into court, and, Joseph G. Peirce having intervened in the action, the question for determination is, which of the parties, Aultman, Miller & Co., or Joseph G. Peirce, is entitled to the money in the registry of the court.

The evidence fails to show that McConnell in fact made a legal transfer of the policy of insurance to Aultman, Miller & Co. When the policies were handed to the attorney with instructions to collect the same and apply the proceeds, the attorney was not in fact acting for the plaintiffs. True, he had and was acting for Aultman, Miller & Co. in making collections, but it does not appear that he had any authority touching this claim. It was a voluntary act on part of McConnell in handing the policies to him, and the acceptance of them by the attorney did not in any way bind the plaintiffs. If the attorney had the next day presented the policies for payment to the company, and received the money, and had then appropriated it to his own use, or it had been stolen from him, the loss would have fallen on McConnell, and not on the plaintiffs. It must be held that the policy in the hands of the attorney had not been assigned or transferred to the plaintiffs, and the acts of the parties at the time show that such was their understanding. The agent endeavored to procure an assignment of this with the other policies, but McConnell refused to give it, and thereupon a garnishment was served on the attorney. The rights of the parties must therefore be determined by the effect to be given to this garnishment.

There can be no question that as between McConnell and Peirce, and as between the latter and the company, the written assignment executed on the 11th day of August conveyed to Peirce the right to demand and receive the money from the company, the latter having been duly notified of the fact of the assignment. On behalf of plaintiffs it is claimed that the assignment to Peirce is invalid as against them, because McConnell retained actual possession of the policy of insurance after the assignment thereof, and the written assignment was not placed upon the records of the county as required by section 1923, Code Iowa, which enacts that "no sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers without notice, unless a written in-

strument conveying the same is executed, acknowledged like conveyances of real estate, and filed for record with the recorder of the county, where the holder of the property resides." The contention between the parties is whether under this section of the statute, it was the duty of Peirce either to have obtained actual possession of the policy when the claim was assigned to him, or, failing in that, to have placed the assignment on the records of the county, and this presents the question whether the property in dispute belongs to that class of personal property intended to be included within this section. The statute was intended to prevent the perpetration of frauds by requiring notice of sales or mortgages to be given, either by actual change of possession of the property, or by the recording of the written evidence of the transfer. To come within the statute the property must be of a character that it can be fairly said to be in possession of the vendor or mortgagor. The real thing in dispute is the claim in favor of McConnell against the insurance company. The policy of insurance is not the property, nor is it even the complete evidence of the right to the property. When the fire occurred, McConnell, by showing that he had a contract of insurance with the company, that the property insured had been destroyed by fire during the life of the policy, and that due notice of the fire and proofs of loss had been given the company, would have thereby established his right to claim payment from the company. This right to payment was property, but it was in the nature of a chose in action, intangible, incapable of manual delivery or actual visible possession, and therefore not within the meaning of section 1923, Code Iowa. The policy by itself was neither the property nor the complete evidence of the claim held by McConnell against the company. If the policy had been burned in the fire, the chose in action or claim existing in favor of McConnell would not have been destroyed, and it is this claim which in fact is the property in dispute between the parties to this litigation. In the case of *Howe v. Jones*, 57 Iowa, 130, 8 N. W. Rep. 451, and 10 N. W. Rep. 299, the supreme court of Iowa holds that it is not required to record the assignment of a judgment, as provided in section 1923, on the ground that the judgment is merely evidence of the chose in action or claim, and does not constitute the property itself, within the meaning of this statute, and that a chose in action cannot be said to be in the present possession of the owner or holder thereof. If a judgment, which in itself is complete evidence of a claim, is not properly within the meaning of section 1923, it is clear that the policy of insurance, which is only part of the evidence necessary to make out the claim against the company, cannot be deemed to be the property in dispute in this case. The policy itself is of no value. What the parties are seeking to reach, is the claim due to McConnell from the insurance company. This claim is not tangible property, and cannot be said to be in the visible or actual possession of any one, within the meaning of section 1923, and the provisions of this section are not applicable to the transfer of this claim. When the writ of garnishment was served upon the attorney and the agent of the company, the claim in favor of McConnell had already been

assigned to Peirce, and notice thereof had been given to the company. McConnell had no longer any interest or right of property in the claim thus assigned, and the garnishment was therefore unavailing. Judgment will therefore be entered in favor of the intervenor, Joseph G. Peirce, and an order directing the payment to him of the money paid into court by the insurance company. Also judgment in his favor against plaintiffs for costs.

FARWELL *et al.* v. MAXWELL, (GRAFF, Intervenor.)

(Circuit Court, S. D. Iowa. April 21, 1888.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES.

Under Code Iowa, § 2115, providing that no general assignment of property for the benefit of creditors shall be valid unless it be made for the benefit of all the creditors, etc., a general assignment for the benefit of all creditors will not be held invalid because the debtor executed a mortgage to one of the creditors a few hours before he made the assignment, unless it appear that at the time he executed the former he had formed the intention of making the general assignment.

2. SAME.

Under Code Iowa, § 2115, providing that no general assignment of property for the benefit of creditors shall be valid unless it be made for the benefit of all the creditors, etc., a general assignment for the benefit of all creditors will not be held invalid for the reason that the debtor on the day of making the assignment delivered to his wife certain notes due him, it appearing that such notes were, by previous agreement, to operate as security for sums borrowed by the debtor of his wife.

3. SAME—FRAUD—DELAYING CREDITORS.

Where a debtor made a general assignment of his property for the benefit of all his creditors, with the intent that the property be sold to the best advantage for the payment of his debts, yet believing that after such payment there would be a large surplus left for himself, there being no evidence of an intent on his part to secure delay in the sale, or a compromise with his creditors, such assignment will not be held void as in fraud of creditors.

4. SAME—INCLUDING CHILDREN AS CREDITORS.

The fact that a debtor included in the list of creditors in making a general assignment of his property for their benefit, the names of his sons and daughter, who, according to the evidence, had helped him in his business with a general understanding that they should be remunerated, does not of itself invalidate such assignment as fraudulent, even though it may prove that such children have no legal claim.

At Law. Intervening petition.

W. W. Moreman and Wright, Baldwin & Haldane, for plaintiff.

W. P. Hepburn, for intervenor.

SHIRAS, J. On the 21st of April, 1887, Adam Maxwell, a merchant carrying on business at Clarinda, Iowa, executed a deed of assignment for the benefit of his creditors to Valentine Graff. The plaintiffs, to whom Maxwell was indebted for goods sold on credit, brought suit to recover the amount due, and, having judgment therefor, they now seek to

subject the proceeds of the assigned property to the payment of their judgment, on the ground that the assignment is void as against creditors. The first objection made to the assignment is that a preference was in fact given to Valentine Graff by the execution of a chattel mortgage on the stock of goods on the same day that the deed of assignment was executed. The statute of Iowa requires as a condition to the validity of a general assignment that it shall be made for the benefit of all creditors, preferences being expressly forbidden. Under the statute it has been held by the supreme court of Iowa, that if an insolvent debtor, with the intention of disposing of all his property for the benefit of his creditors, mortgages his property, or a part thereof, to one creditor, and also executes an assignment,—the conveyances being parts of one general disposition of his property,—in such case the assignment will be held void, because in effect the giving of the mortgage is the giving of a preference in connection with the assignment. The fact that the debtor executes a mortgage to one creditor, and immediately after makes a general assignment, does not necessarily invalidate the latter. It must appear that the debtor, at the time of the giving of the mortgage, has the intention of disposing of his property for the benefit of his creditors, and with that intention gives the mortgage to secure one or more of his creditors, completing the transfer of his property by the execution of the deed of assignment. *Van Patten v. Burr*, 52 Iowa, 518, 3 N. W. Rep. 524. From the evidence in this case it appears that Valentine Graff was security for Maxwell for over \$2,100; that on the 21st day of April, 1887, Maxwell applied to Graff to aid him in raising an additional amount with which to meet claims then pressing him; that Graff declined to aid him in raising the sum needed, and insisted on being secured against loss by reason of his then existing liability; that Maxwell agreed to give him a mortgage on his stock in trade, this agreement being made in the forenoon; that about 1 o'clock the mortgage was executed and delivered to Graff; that between 4 and 5 o'clock of the same day the deed of assignment was executed, Graff being named as assignee. Maxwell testifies that when he agreed to give the mortgage to Graff, and when the same was executed, he did not intend to make an assignment, and aside from the fact that the mortgage and assignment were executed within a few hours of each other, there is nothing in the evidence tending to show that when the mortgage was executed, Maxwell intended to execute the assignment. On the contrary, the facts sustain Maxwell's testimony in this particular, and it must be held that when the mortgage was executed, Maxwell did not contemplate making an assignment. The mortgage and deed of assignment do not, therefore, form parts of one general disposition of the debtor's property, and the execution of the former does not invalidate the latter.

The next objection urged against the validity of the assignment is that in fact it was intended to hinder and delay creditors, and thereby secure an advantage to the assignor. In support of this objection, reliance is had upon the testimony of Maxwell to the effect that when he made the assignment he believed that he had property enough to pay his debts

and leave him a surplus of \$5,000 or more. Conveyances, in fact made to hinder and delay creditors, are voidable at the option of the latter, no matter in what form the conveyances may be clothed. Creditors have the right to subject the property of their debtors to the payment of the debts justly due them, and to use the usual legal process to that end. If the debtor, for the purpose of defeating or delaying the creditor in the collection of his claim, transfers his property to another, such transfer is a fraudulent act on part of the debtor. Even though the conveyance by the debtor may be ostensibly for the benefit of creditors, yet if in fact the intent of the debtor and the necessary result of the conveyance is to hinder and delay creditors, it may be voidable by them. Thus, if a person having property more than sufficient to pay his debts if sold by ordinary judicial process, but not being able to readily convert it into money, should execute a general assignment, ostensibly for the benefit of creditors, but in reality for the purpose of delaying the seizure and sale of his property by judicial process, it might be that such an assignment would be held invalid, on the ground that it was not executed for the protection and benefit of creditors, but in reality for the purpose of delaying them. *Ogden v. Peters*, 21 N. Y. 24; *Angell v. Rosenbury*, 12 Mich. 242; *Van Nest v. Yoe*, 1 Sandf. Ch. 4. Counsel for plaintiffs, in a very able argument, has sought to show that this case falls within the rule recognized in these authorities, and it is not to be denied that they give strong support to his contention. The evidence, however, in the present case, fails to show that Maxwell had any intent to unjustly hinder or delay creditors in making the assignment. He testifies, it is true, that he thought he had enough property, if it was not sacrificed to pay his debts in full and have a surplus of from \$5,000 to \$8,000, to be returned to him, and that he wished to make the surplus as large as possible. In view of the real state of his affairs, it is difficult to see how he could have deluded himself into believing that any surplus could be realized after paying his debts; yet he testifies that he did so believe, and it is doubtless true that he believed that if he made the assignment his property would be sold to better advantage than if it was seized and sold under executions. In fact, the motives that actuated Maxwell in making the assignment, are very clearly set forth in the following answer made by him in giving his testimony:

"I want further to say as to my motives in making the assignment, I wanted to make my funds go as far as possible. I thought I had property enough to pay my debts, and have property left. I could not decide any better way, and was compelled to do something, and this was the safest, fairest, and best way for all parties,—my creditors and myself, too,—and it was to pay all my debts, in the quickest, and least expensive way, that made me assign."

The argument for plaintiffs is that the assignment was made in reality in the interest of the debtor, and adversely to the creditors. If this were true, as a matter of fact, there would be force in the argument based thereon, but the evidence fails to sustain the assumption of fact. To invalidate a conveyance of property by a debtor, it must appear that it was made to defraud, hinder, or delay creditors. The fact that the convey-

ance was made to prevent a sacrifice of the property, does not necessarily show that it was made to hinder or delay creditors. It is the duty of a debtor, when he finds himself insolvent, to make the best disposition of his property possible, so that his creditors may realize the full value thereof. The real interest of the debtor and of the creditors is identical in this particular; and so long as the disposition of the property is made for the purpose of realizing its value, it cannot be said that such disposition is adverse to the rights of the creditors. To make it such it must appear that the intent of the debtor in making the conveyance was to hinder and delay the creditors. In the present case it wholly fails to appear that such was the intent of the debtor, or that in fact such has been the result. The plaintiffs obtained judgment against Maxwell at this term of court; and when the judgment was rendered, the property had been sold by the assignee, and the money is in hand to meet the judgment, if the plaintiffs have a right thereto. In making the assignment, Maxwell made no attempt to restrict or control the sale of his property. He conveyed it to his assignee with the intent that it should, as speedily as possible, be converted into money, and the proceeds be applied in payment of his debts. There is no evidence in the case from which it can be inferred that he expected or hoped for a delay in selling the property, or that he intended to use the fact of the assignment as a means of forcing a compromise with his creditors. His intent in making the assignment was to have the property sold to the best advantage, the proceeds to be applied to the payment of his debts. It was not his intent to secure delay in the sale of his property. If in fact his property would be sold to better advantage—that is for a better price—by the assignee than it would if it had been sold piecemeal on executions in favor of the creditors, then the latter would be benefited by the conveyance. It will not do to hold that, because Maxwell believed in making the assignment that by such disposition of his property it would be sold to the best advantage, and realize enough to pay his creditors in full, leaving a considerable surplus to be returned to him, the assignment is thereby rendered fraudulent as to creditors. It is not a fraud upon creditors for an insolvent debtor to make such a disposition of his property as to insure the sale thereof for the largest possible price, and the application thereof to the payment of all creditors, in proportion to the sums due them, even if the debtor has the hope or belief that the property may sell for enough to leave him a surplus after paying his debts in full. The debtor has the right to prevent a sacrifice of his property, in his own interest as well as in that of his creditors, if he can do so without unjustly hindering or delaying his creditors. Each case must, of course, be determined in the light of the facts pertaining thereto. Under the statutes of Iowa, an insolvent debtor has the right to make a general assignment for the benefit of his creditors, even if by so doing he prevents a particular creditor from making a levy upon his property, and thereby securing a preference over other creditors. Such an assignment cannot be defeated at the suit of one or more creditors, unless it be shown that in the making thereof the assignor sought to hinder, delay, or defraud

his creditors, and this fraudulent intent must be established by fair evidence. In the present case, the facts developed in the evidence fail to show any such wrongful purpose on part of the assignor.

It is also claimed that the fraudulent character of the assignment is evinced by the fact that Maxwell included in the rest of his debts, sums alleged to be due to his two sons and daughter, for services rendered by them in carrying on the business of the father. It is not disputed that the sons and daughter had for years aided in the business, acting as clerks. It does not appear that there was any agreement as to the amount of remuneration to be paid. The father and the sons and daughter testify that there was a general understanding that the children were to be remunerated. Whether in fact any legal claim existed in favor of the children is, to say the least, very doubtful; but, on the other hand, a strong equitable claim certainly existed in favor of the children as between them and their father. They had given years of time in aid of the business, and it is entirely reasonable to suppose that there was a general understanding that they were to be benefited thereby by receiving an advancement from the father. When the assignment was made, it appears that Maxwell discussed the question with his attorney, whether he should list the children among his creditors, and was advised that it would do no harm, as it would be for the court to determine whether they were entitled to share in the proceeds of the assignment. The evidence does not show that the claims of the children were included in the list of creditors for the purpose of enabling Maxwell to secure to himself any share or portion of his property, nor that they were included for the purpose of enabling Maxwell to force or secure a compromise with his other creditors. The question is narrowed down to the proposition whether placing the names of the children among the list of creditors with a statement of the amounts that might be due them, if they can claim to be creditors, should be held to show fraud in making the assignment, and thereby defeat it. The question of the legality of the claim of the children is open to investigation and decision in the court wherein the assignment was filed. The creditors are not bound, nor is the assignee, by the act of Maxwell. The fact that he included in the list of his creditors the names of his sons and daughter, does not necessarily show an intent on his part to work a fraud upon his creditors. Whether they have a just claim is an open question. Before the children can entitle themselves to a share in the proceeds of the property, they must establish the validity of their claims. If their names had not been included in the list of creditors, they would have still had the right to file their claims with the assignee; and including them in the list does not confer any advantage on them, nor disadvantage upon the creditors. Under the facts disclosed in the evidence it cannot be held that the act of Maxwell in including the names of his children in the list of creditors, even if it should be ultimately held that they are not creditors, constitutes a fraud invalidating the assignment.

A further objection to the assignment is based upon the fact that on the day of its execution, Maxwell took out of his safe, notes of the face

value of \$250, and handed them to his wife. He testifies that in September previous he had borrowed from his wife \$275, which money had come to her from a legacy left her; that he told her at that time she could have as security the notes then on hand, and enough to be added, as they were obtained, to secure the repayment of the sum due; that the notes were put in a bundle, and placed in the safe as her property; that on the day he executed the mortgage to Graff, but before the execution of the assignment, he took the notes from the safe, and gave them to his wife; that about \$100 has been realized from them, and that there is not value enough in them to pay the amount borrowed from his wife. It is not disputed that the money was borrowed by Maxwell as stated, and the only point that can be made is that the giving the notes to the wife, was preferring her over other creditors. If the testimony of Maxwell is true, that he set apart the bundle of notes in September preceding the day of the assignment, then the giving the security was not part of the general disposition of his property in contemplation when he made the assignment; and this would be true, even though some notes were subsequently added thereto, for that would only be carrying out the agreement made in September. While the mode of the transfer of the notes in question is certainly amenable to criticism, and probably could not be sustained against creditors who might have attached the same while not in the actual possession of Mrs. Maxwell, yet that does not justify the court in holding that the transaction is a fraud of such a nature as to defeat the assignment.

It appearing, therefore, that the assignment to Valentine Graff is valid and binding, it follows that judgment must be entered in favor of the garnishee and intervenor; and it is so ordered.

UNITED STATES *v.* HUGHES *et al.*

(*District Court, N. D. Texas. March 23, 1888.*)

1. CRIMINAL LAW—INSTRUCTIONS—DUTIES OF JURORS.

The duty of jurors to find a verdict. Duty of each to consult with the others, and allow the views of his fellow-jurors to influence his mind in reaching his final conclusion.

2. SAME—REASONABLE DOUBT.

Amount of proof required to convict. A reasonable doubt defined.¹

3. SAME—CREDIT OF WITNESSES.

Elements affecting credibility of witnesses. Judged of by jurors as they would judge of it in an important matter in every-day life.

¹A reasonable doubt is one for which a sensible man can give a good reason, based on the evidence or want of evidence. It is such a doubt as a sensible man would act upon, or decline to act upon, in his own concerns. *U. S. v. Jones*, 31 Fed. Rep. 718. The guilt of an accused is proven beyond a reasonable doubt when, upon the entire comparison and consideration of all the evidence, the minds of the jurors are in that condition that they can say from the evidence they have and feel an abiding conviction to a moral certainty of the truth of the charge. A reasonable doubt does not consist of possible or conjectural doubts not growing out of the evidence, but is one which, when considering the evidence alone, leads the juror to hesitate, and upon which he would refuse to act.

4. **SAME—IMPEACHMENT OF WITNESSES.**

Manner of impeaching witnesses. Effect of impeaching testimony.

5. **SAME—CONFESSIONS.**

Confessions. Caution with which oral confessions are to be received and considered by juries.

6. **SAME—PRINCIPAL AND ACCESSORY.**

Statement of the charge against the defendants, who are principals.

7. **SAME.**

Summing up of the evidence.

(*Syllabus by the Court.*)

Indictment for Robbing Mail Train.

R. M. Wynne and Chas. B. Pearre, for the United States.

C. W. Johnson, Robt. Arnold, Jas. T. Daniel, and Robt. West, for defendants.

MCCORMICK, J., (*charging jury.*) 1. In giving you a charge in this case, I desire to call your attention to the duty devolved upon jurors to find a verdict in the case submitted to them. It is often stated in the argument of counsel—as has been earnestly done in this case by one of the counsel for the defense—that it is the duty of jurors to consider the evidence each for himself, uncontrolled and uninfluenced by the statements of counsel, the comments of the judge on matters of fact, or the views of some dominating mind in the jury-box; and upon each individual juror's own view he must reach a conclusion on the issue joined here, and adhere to it. If such is the law, our practice of keeping the jury together on their retirement to consider on their verdict is all wrong, and each juror should be furnished the opportunity of wrapping himself in the solitude of his own thoughts, undisturbed by the presence of his fellows, and evolving from his own reflections his verdict in this or any given case. Such has never been the practice where the English right of trial by jury is enjoyed. As I construe the law, such is not the law or the logic of jury trials. Upon the contrary, each juror is entitled to have, and, in my judgment, is bound to thoughtfully and impartially consider, the argument of counsel, the comments of the judge, and the views of his fellow-jurors, and allow all these such influence in helping him to a satisfactory conclusion as in his judgment their various suggestions deserve, and honestly to strive to bring his own mind and the minds of his fellows into harmony, so that the jury may agree upon a verdict. It is true that if, in this case, or any given case, any one or more of the jury, after an earnest and impartial consideration of all these matters proper to be considered in weighing the proof, under the law applicable thereto, as given in the charge of the court, cannot bring his

in the important concerns of life. *Carr v. State*, (Neb.) 37 N. W. Rep. 630. Respecting "reasonable doubt" in criminal cases, see *Knarr's Appeal*, (Pa.) 9 Atl. Rep. 878; *People v. Lee Sare Bo*, (Cal.) 14 Pac. Rep. 310; *McCullough v. State*, (Tex.) 5 S. W. Rep. 175; *White v. State*, (Tex.) 3 S. W. Rep. 710, and note; *U. S. v. Jackson*, 29 Fed. Rep. 503, and note; *People v. Kernaghan*, (Cal.) 14 Pac. Rep. 566; *Cowan v. State*, (Neb.) 35 N. W. Rep. 406; *State v. Robinson*, (S. C.) 4 S. E. Rep. 570; *Kidd v. State*, (Ala.) 3 South. Rep. 442; *State v. Maher*, (Iowa,) 37 N. W. Rep. 2; *People v. Cox*, (Mich.) 88 N. W. Rep. 235; *Lang v. State*, (Ala.) 4 South. Rep. 193; *Ochs v. People*, (Ill.) 16 N. E. Rep. 662; *U. S. v. King*, 84 Fed. Rep. 302.

mind or their minds to concur in the conclusion of his or their fellows as to the guilt or innocence of the accused, each such juror not only may, but must, adhere to the final and fixed conclusion of his own mind, for it is the logic and the law of jury trials that the 12 minds of the jury must actually and honestly concur in a verdict, before a verdict can rightly be rendered.

2. In jury trials in civil cases,—that is, between citizens,—jurors are instructed to find a verdict on the preponderance of testimony. The interest of the parties as well as of the public justifies the use of this rule in such cases, that a speedy end may be put to the strife. But in all criminal cases, out of regard to the life or liberty or reputation and feelings of the accused, a larger measure of evidence is required to support a conviction, and juries are instructed that to warrant them in convicting the accused, the evidence must satisfy their minds of the guilt of the accused beyond a reasonable doubt. Great stress is laid upon this rule by counsel for the accused in all criminal cases, and a highly exaggerated idea of its meaning is sought to be impressed upon the minds of the jury. It does not require that all possible doubt should be excluded from the mind, it is not mathematical certainty that is required, for such a degree of certainty cannot be produced by the force of human testimony. The doubt must be a substantial one, arising from the testimony or from the want of testimony on a material point. It must be a reasonable doubt, such as would cause a reasonable and cautious man of average intelligence to hesitate in reaching a conclusion in a serious matter upon which he was called to decide affecting his private affairs. You are to consider the evidence tending to show guilt offered you in the jury-box just as you would consider the same amount and character of evidence submitted to you in your every-day life, touching any serious matter in your business or domestic affairs; and if it would be sufficient to make you decide and act in such matters, feeling satisfied that you were deciding and acting rightly, then it is sufficient to support a conviction and to require a verdict of guilty; and unless it would make you so decide and act, you must acquit the accused.

3. You are the exclusive judges of the credibility of the witnesses, and of the weight of all and each particular of the testimony. By the credibility of the witnesses I mean their disposition and intention to tell the truth in the testimony they have given. Here, too, you judge in the jury-box just as you would out of it, just as all men of the intelligence and experience necessary to qualify them to sit on juries, always and everywhere, judge of the credit they should give to any one stating matters within his knowledge, and touching the interest of the person receiving the information. In the court-house, in the jury-box, as everywhere, you judge from the relation of the witness to the case; his direct interest, or his connection with parties directly interested; the consistency or otherwise of the different parts of his testimony, one with the other; his whole manner of telling his story, and all like features with which experience makes every man of good intelligence and mature years familiar. In judging of the weight of the testimony, having satisfied

yourself as to how far you can credit the witness, you will take into consideration all the other testimony in the case, the comparative intelligence of the several witnesses, the apparent capacity of each to take a correct and full impression of what occurred in his view, or was said in his hearing, and to retain a sound recollection of his impressions, and to express clearly—that is, convey substantially, to your minds—the impressions he has retained in his own mind. Until very recently parties, even in civil cases, were not (as a rule) permitted to testify, because the liability of such witnesses to suppress the truth or utter falsehood, as the same might affect their interest, was deemed so great as to render such testimony of too little value to let it go to the jury. It was also considered wrong to subject persons, or permit persons to be subjected, to so strong a temptation to commit the impious crime of perjury, by allowing them to testify in a case to which they were parties. Even yet, in the state courts in this state, for these or other reasons the party accused in a criminal case is not permitted to testify. But in this court, by a comparatively recent statute of the United States, accused persons are, at their own request, permitted to testify. And both these defendants have testified in this case, and the question of their credibility is left entirely to you.

4. Closely connected with the matter of the credibility of witnesses is the manner of impeaching witnesses and its effect. It is permitted to show that the general character of the witness for truth in the community where he lives is bad, or to show that in a material matter, about which the witness could not be mistaken, his testimony is untrue; or to show that on a material point the statements of the witnesses on the stand are different from his statements on the same point at another time. I say in a material matter, for it is not every discrepancy or misstatement of a witness that tends to contradict and weaken or destroy his testimony. Sometimes immaterial discrepancies or misstatements by a witness strengthen our conviction of his veracity, for it is the common experience that persons perfectly truthful, who take distinct and correct impressions of the material facts, often have incorrect impressions and recollections of the immaterial incidents, even when their recollection of these seems to them to be distinct. I am not giving you a rule on this subject, but only calling your attention to the rules of common sense, which all men observe in seeking truth through the testimony of others. In this case it has been attempted to weaken or destroy the testimony of some of the witnesses for the government in each of the ways I have indicated; and all the proof bearing upon their credibility is to be considered by you, but you are still to determine for yourselves how far you should credit said witnesses in the testimony they have given in this case.

5. Confessions, when voluntarily made, and clearly proved, are taken as strong proof of guilt, because sane men do not voluntarily speak falsely against their own interest. But oral confessions are always to be received with care; and, besides being satisfied that the witness who testifies to the confession speaks truly, you must be satisfied that the witness could not be, or was not, mistaken as to the substance of the con-

fession. And where the witness is able to give the exact words of the accused, and these are so vague as to convey no definite meaning, or (in the circumstances in which the words were spoken) are susceptible of a meaning consistent with the innocence of the accused, they are not to be taken as a confession of guilt. The language of Jim Hughes, testified to by one of the witnesses, "I expect we will all be arrested for it, we are so hard up,"—is of this character, and you will not consider it as evidence against him.

6. Bearing these general principles in mind, you will weigh all the evidence in this case, both that introduced by the government and that offered for the defendants; and if, upon such consideration of the whole proof, you are satisfied beyond a reasonable doubt that the defendants are guilty, it will be your duty to say by your verdict that they are guilty. On the contrary, if on such consideration of the whole proof you have a reasonable doubt as to their guilt, you should return a verdict of not guilty.

7. The defendants are indicted separately, and charged with robbing the carrier of the United States mail of such mail, (being carrier on a railroad train,) near the town of Gordon, in Palo Pinta county, in this district, on the morning of the 23d January, 1887; and that, in effecting said robbery, they put the life of the carrier in jeopardy by the use of deadly weapons. All persons acting together in the commission of an offense are principals, and each is equally chargeable with all that is done by himself and by each of the others in the commission of the offense. There is, however, no necessary connection between the defendants, (here tried together for convenience and the economy of time,) and you may convict both or acquit both, or convict one and acquit the other, according to your view of the proof against each. The proof is abundant and all one way; and it is not disputed on this trial that, at the place and time charged in the indictment, the mail train was robbed, and that, in effecting the robbery, the parties robbing put the life of the carrier in jeopardy by the use of dangerous weapons. The proof shows that there were several persons engaged in committing the offense. One witness saw four persons and heard others, one counted six persons, and one of the robbers at the time said there were eight. The only real issue of fact for you to determine on this trial is, were the defendants, or either of them, of the number?

8. The government relies upon the testimony of the locomotive engineer and the three postal clerks, whose testimony tends to identify Jim Hughes as being one of the robbers. With the particulars of the testimony of each of these four witnesses you must now be familiar. It was clearly stated by the witnesses themselves, and it has been rehearsed by each of the six counsel who have argued the case, with a degree of candor and accuracy seldom attained in forensic discussion. If your impression and recollection of this proof does not in every particular agree with any one of the statements of it made by the different attorneys, I do not doubt that their statements and argument on it has called out most vividly in all the details your own impressions of this proof, and I will not run the hazard of

stating it differently from your recollection of it, by attempting myself to rehearse it. To identify these defendants the government also relies upon the testimony of Cornelius Taylor, who says that on Friday before the robbery he saw Ben Hughes, (who had been absent from the state for several years, and who claims to have returned not until Monday after the robbery,) giving the time of day and place and circumstances of his seeing him; and that on the morning of the robbery (Sunday, January 23, 1887,) he saw Jim Hughes and Ben Hughes (these two defendants) and two other men unknown to witness conferring together in a secluded place on the creek back of old man Hughes' (father of defendants) field, and that there was near them four horses, fastened in some way, whose color and appearance he describes; and that about a week after the robbery, in passing near old man Hughes' house, about 10 or 11 o'clock at night, witness saw some men on the porch, and on or by the fence near the porch, talking and laughing, and he overheard one, whose voice he recognized as Ben Hughes' voice, say: "You ought to have seen how quick he dropped the coal shovel when I jabbed the pistol in his face." The government has also offered the testimony of Bart Houx, who says that at a late hour (11 or 12 o'clock) of the night of the robbery (the time of the robbery being between 2 and 3 o'clock Sunday morning) he saw Jim Hughes and Harvy Carter pass the door of a livery stable in the town of Gordon. And the testimony of Dave Brooks, who says that on Sunday morning (the day of the robbery) he saw four men, each leading a horse, start from Jim Hughes' house going west towards the creek back of old man Hughes' field; giving the color of the horses. And the testimony of one Wolford, who says that he and Ben Hughes had been living together, or near each other, in the Indian Territory for some time previous to January, 1887, and that about the 10th or 13th of January Ben Hughes told witness that he (Ben) was busted, and that he was going down to Texas and make a raise by robbing trains, or any way he could, and proposed to witness that witness should go with him, which witness declined; and that a few weeks after that—not less than two or three weeks, and not longer than four or five weeks—witness again saw Ben Hughes, near McAlister in the Indian Territory, when Ben told him that he and several others had robbed a train at the trestle bridge near Gordon, and had made a good haul. And upon the testimony of Jim Dyer, who says that several months after the robbery Ben Hughes told witness that if he (witness) would go with him, (Ben,) witness could make plenty of money, and not have to work very hard for it. The defendants rely, first, on the insufficiency, as they claim, of the proof to show that they or either of them were participants in the commission of the offense. And in connection with this they rely upon the want of credibility of the witnesses Wolford, Taylor, and Houx, all of whom they have attacked, and if there is such insufficiency the defendants can well rely upon it, for the benignity of our laws is such that accused persons are conclusively presumed to be innocent until their guilt is established by sufficient proof. The defendants also rely upon their proof of *alibi*—that at the time of the commission of the offense they were at another place, too remote to permit

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of their taking part in the robbery. The defendant Jim Hughes and his wife, and Mrs. Caps, his wife's sister, all testify that he was at his own house, five or six miles from the scene of the robbery, all of the night in which the robbery was committed. The testimony of the wife is contradicted by the testimony of Bart Houx, who says that on Monday morning next after the robbery, and again on Tuesday morning, he called at Jim Hughes' house, and asked Mrs. Hughes (his wife) if Jim was at home, and on both occasions was told "that he was not; that he had left home Saturday, to go up on Ironi to brand some horses, and had not returned yet." And all three are contradicted by the same witness, who says that he saw Jim Hughes, with Harvy Carter, pass the livery stable in Gordon at 11 or 12 o'clock the night of the robbery. The defendant Ben Hughes testifies that about the 13th of January he left his home in the Indian Territory, riding a certain horse and leading or driving another with a pack. He gives the different stages of his progress, making him arrive at his father's house about noon on Monday next after the robbery. He produces a witness, Fitzgerald, whose testimony tends to show that he saw Ben on Saturday afternoon, near Boonville, in Wise county, 40 or 50 miles or more from Gordon, traveling as Ben in his testimony says he was traveling. He also offers two other witnesses whose testimony tends to show that they saw Ben on Sunday and Monday traveling as described. There is some uncertainty as to the days, and some uncertainty as to these witnesses identifying Ben, as they were all strangers to him; but you will recollect the particulars of their testimony. This proof, as you will understand, is contradicted by the testimony of Taylor, who says he saw Ben at his father's house the Friday before the robbery, and again saw him the morning of the robbery back of his father's field. Ben also offers proof tending to show that he remained in Texas continuously from the time of his arrival at his father's house until his arrest, the particulars of which proof you will recollect without my detailing it. And now, in conclusion, I repeat: If upon the whole proof which I have permitted to go to you on this trial, as you received it and recollect it, you are satisfied beyond a reasonable doubt that the defendants, or either of them, were participants in said robbery, as to that defendant, one or both, so found by you to have taken part in said robbery, you should render a verdict of guilty. If the proof fails to so satisfy your minds as to the guilt of either, he is entitled to a verdict of not guilty.

Verdict as to both: "Not guilty."

FALK v. HOWELL *et al.*

(Circuit Court, S. D. New York. March 31, 1888)

COPYRIGHT—INFRINGEMENT—BILL TO ENJOIN—AMBIGUITY.

A bill to enjoin the infringement of an alleged copyright, alleging disjunctively, in the language of Rev. St. U. S. § 4956, (which prescribes the prerequisites to the obtaining of a copyright,) that orator "before publication delivered at the office of the librarian of congress, *or* mailed to said librarian, a copy of the title of said photograph," is ambiguous, and tenders no issue.

In Equity. On bill for injunction.

I. N. Falk, for complainant.

Arnoux, Pitch & Woodford, for defendant.

LACOMBE, J. This is an application for a preliminary injunction to restrain the infringement of an alleged copyright of a photograph. The statute (Rev. St. U. S. § 4956) provides that "no person shall be entitled to a copyright unless he shall, before publication, deliver at the office of the librarian of congress, or deposit in the mail, addressed to the librarian of congress, * * * a * * * copy of the title of the * * * article * * * for which he desires a copyright, * * * nor unless he shall also, within ten days from the publication thereof, deliver at the office of the librarian of congress, or deposit in the mail, addressed to the librarian of congress, * * * two copies * * * of such article." The complainant in this case does not show that he delivered a copy of the title at the office of the librarian, nor that he deposited the same in the mail, addressed to such officer; neither does he show that he delivered the two copies required by the statute, at such office, nor that he deposited the same in the mail, addressed as therein required. The averments in the bill referring to these statutory requirements are as follows:

"Before the publication * * * your orator * * * delivered at the office of the librarian of congress, *or* deposited in the mail, addressed to the librarian of congress, at Washington, D. C., a printed copy of the title of said photograph, * * * and * * * also within ten days from the publication thereof * * * delivered at the office of the librarian of congress, *or* deposited in the mail, addressed to the librarian of congress, at Washington, D. C., two copies," etc.

This is alternative pleading. It is ambiguous and tenders no issue, and is not a sufficient averment of compliance with the statutory requisites. The motion is denied, with leave to renew upon other papers.

VAN CAMP v. MARYLAND PAVEMENT CO.

(Circuit Court, D. Maryland, April 2, 1896.)

PATENTS FOR INVENTIONS—EXTENT OF CLAIM—ASPHALT PAVEMENT.

In an action for infringement of letters patent No. 174,648, issued March 14, 1876, to Aaron Van Camp, for improvement in concrete pavements, it appeared that the invention consisted in the use of crushed and pulverized rock, 60 per cent. thereof finely crushed, and 40 per cent. crushed more coarsely, heated and saturated with dead oil, crude petroleum, or the residuum of petroleum mixed with natural asphaltum previously dissolved to a pitch by crude petroleum, the object sought being to obtain the proper proportions necessary to form a hard and durable concrete; that there were numerous older patents using the same ingredients in various proportions for the attainment of the same end; that defendant did not use the materials in the specified proportions, and altogether omitted the previous saturation of the crushed rock with oil. *Held*, that, in view of the previous state of the art, the invention could not be considered as a new composition of matter, but as a mere process, in which the specified proportions of the materials, and the saturation with oil, were essential features, and that defendant, not having used them in his process, had not infringed the patent.

In Equity. On bill to restrain infringement of letters patent.

Aaron Van Camp brought a bill against the Maryland Pavement Company to restrain the alleged infringement of letters patent No. 174,648.

John G. Bennett and Arthur Stump, for plaintiff.

Brown & Brune, Upham & Proctor, and Straubridge & Taylor, for defendant.

MORRIS, J. The complainant seeks relief for the alleged infringement by defendant company of patent No. 174,648, granted to complainant March 14, 1876, as the inventor of an improvement in concrete pavements, the specifications and claim of which are as follows:

"To all whom it may concern: Be it known that I, Aaron Van Camp, of Washington city, in the county of Washington and District of Columbia, have invented certain new and useful improvements in concrete pavements for streets and sidewalks; and I do hereby declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to which it appertains to make and use the same. I take crushed and pulverized rock, sixty per centum of the finer pulverized portion, and forty per cent. of the coarser. The crushing and pulverizing process should be continued until the even or naturally smooth surface of the stone is entirely destroyed. The object of crushing and pulverizing the rock is to obtain sharp angles and rough surfaces. I use the blue limestone; but it is evident that any hard rock, boulder, or gravel, when crushed and pulverized, will answer my purpose. The rock thus crushed and pulverized I subject to heat, so as to expel the moisture. I then add dead oil, crude petroleum, or the residuum of petroleum, until the rock becomes perfectly saturated. While thus heated, I add about twenty per cent. of natural asphaltum,—Cuban, Trinidad, or California,—that has been previously dissolved by crude petroleum, or the residuum of petroleum, until it has assumed the consistency of bitumen or pitch. I have found by experience that by saturating the crushed pulverized rock, as above stated, it will absorb more asphaltum, and produce a more perfect concretion and cementation. What I desire to claim and secure by letters patent is: In a concrete pavement, the use of crushed and pulverized rock,

when the same is heated and saturated with dead oil, crude petroleum, or the residuum of petroleum, and mixed with natural asphaltum,—Cuban, Trinidad, or California,—previously dissolved to a pitch by crude petroleum, or the residuum of petroleum, substantially as described, and for the purposes set forth."

The defendant denies the alleged infringement, and that is the question which will be first disposed of. The use of crushed limestone or other similar crushed material, combined with an asphaltic cement, to form a concrete paving material was not in itself new at the date of Van Camp's alleged invention. Nor was the heating of the materials, either separately or together, for the purpose of causing them to form a more perfect union, at all new in practice. Many of the patents for improved concrete pavements put in evidence by the defendant were granted prior to Van Camp's application, and they describe paving concretes made of petroleum and products of petroleum mixed with asphalt and combined with crushed rock in various proportions, and when in a heated state. The object sought for by all the experimenters in this field was a perfect union of proper proportions of the stone with the cementation or binding ingredients, so as to form a hard and durable concrete; and each patentee claimed to have accomplished an improvement in this respect, either by some variation in the proportion of the ingredients, or the introduction of some new ingredient, or by some improved method of preparing them, or some improved process in the art of combining them. Among other patents describing the use of crushed stone or similar material with asphaltic cements are the patents granted to Foye, No. 109,607, November 29, 1870; to De Smet, No. 103,582, May 31, 1870; to Matthews, No. 114,172, April 25, 1871; to Hawes, No. 119,607, October 3, 1871; to Vandermark, No. 117,946, August 8, 1871, reissued 4,591, October 10, 1871; and the British patent to Newton, No. 925, October 6, 1871; and the British patent to Skinner, No. 1,795, January 2, 1872. These patents, together with the testimony showing the process of making asphaltic paving blocks at Stony Point on the Hudson, in 1872, and at Sing Sing in 1873, prove conclusively that at the date of complainant's alleged invention there was nothing new in the use of crushed stone and asphalt, variously softened or tempered, nor in heating these materials to aid in effecting their combination. The claim of Van Camp, therefore, to stand at all, must be strictly confined to the proportions of the materials specified by him, and to his precise process for combining them. Looking to the state of the art as disclosed by these patents, and the evidence above adverted to, there was nothing else that he could lawfully claim as a new discovery. This he seems to have been aware of, for, as all crushed rock consists of some pulverized portions and some coarser parts, he first specifically directs that there shall be used for his composition "sixty per centum of the finer pulverized portion, and forty per cent. of the coarser." The next step in his process is the treatment of this crushed and pulverized material to prepare it for combination with the asphaltum, the importance of which step he states his experience has demonstrated. That next step, after

first heating the crushed and pulverized rock, is to perfectly saturate it with dead oil, crude petroleum, or the residuum of petroleum. When this has been done, then the material thus prepared is to be mixed with asphaltum which has been dissolved to the consistency of pitch. He claims to have discovered that the previous saturation with oil of the crushed and pulverized stone enables it to absorb more asphaltum, and for that reason makes a more perfect combination. By no allowable construction of this patent can the previous saturation of the stone be considered as unessential, nor can the proportions thus definitely stated of the finer and crushed stone be considered as immaterial; for, if these are to be disregarded, all that could possibly sustain the novelty of the patent would be disclaimed. In neither of these particulars does the defendant in its manufacture use the process described in the patent. It does not use the specified proportions of the stone, but uses 60 per cent. of the coarser and 40 per cent. of the finer or pulverized limestone, thus reversing the proportions of the patent; and it omits entirely the previous saturation of the stone as hurtful and injurious to the special character of concrete it requires for molding under pressure into blocks, and for the same reason it does not use 20 per cent. of the softened asphaltum, but only 12 per cent. The complainant contends that he is not confined to the proportions indicated in his specifications, but that any substantial use of the same materials in the same way is an infringement; and contends that although the defendant may not previously saturate the stone before mixing with the asphaltum, that it subsequently does so, because when the heated dry particles of stone come in contact with the asphaltum, and the mass is then subjected to great pressure, the oil in the asphaltum permeates into the stone. But it seems to me plain that, even if it were allowable to disregard the specified proportions of material in a patent which must be so narrowly construed, it certainly cannot be allowable to disregard the previous saturation of the stone with oil, which the patentee emphasizes in his specification, and makes a part of the claim allowed by the patent-office, and which step in the process the defendant does not use. If the previous saturation of the stone is not essential to the result, but a subsequent and incidental permeation with oil is sufficient, which, it would seem, must always before have taken place, then the complainant claimed as essential a step which is unnecessary, and this would be fatal to his patent. The permeation of oil into the stone must always have happened whenever heated crushed stone and asphaltum tempered with oil were combined, as was the case in nearly all the patents above mentioned. The permeation may take place in defendant's process to a somewhat greater extent, because, after the mixing is complete, the comparatively dry and granular product is put into a mold and subjected to a pressure of 90 tons, so as to form a paving block; but I cannot see how this incidental permeation under the pressure resulting from improved molding machinery can be the equivalent of the previous saturation, which complainant describes and claims to be necessary before the stone is brought into contact with the binding cement. The witnesses who explain de-

defendant's process of manufacture state that the object is to use as little oil and as little asphalt as possible, so that the paving block when molded may contain the greatest possible per centum of stone, and the least possible per centum of bituminous cementing material, relying very much upon the pressure in the mould to make the small amount of binding cement effective. These witnesses also testify that their experience leads them to believe that the previous saturation with oil described in the patent, and the use of the amount of asphaltum there specified, results in a material too soft and sticky to be used in defendant's machinery. I am clearly of opinion that the defendant does not infringe the process claimed in the complainant's patent.

Complainant's counsel, however, urges that the patent should be construed as claiming the invention, not only of a process, but also as claiming a new combination of matter; that is to say, a new paving concrete not before discovered. It is difficult to see how this contention can be supported, either as a construction of the language of the patent, or, if it could be shown to be claimed in the patent, how it could be maintained that the process there described results in a new product. The patent does not anywhere use words which can be construed to mean that the patentee has discovered a new substance for use in pavements, or that he has discovered a new paving material. The patentee simply and by apt and appropriate words claims that he has invented an improvement in concrete pavements. As before shown, concrete pavements made of the same materials variously compounded were old and in common use. The result of his combination was a material not different in anywise from former combinations, except that it contained a little more or less of some of the same ingredients mechanically combined, and differing from others only as the proportions of the ingredients differed. When such a mechanically combined material is old and in common use, and has already been the subject of numerous patented improvements both as to the proportions of ingredients, the processes of manufacturing, and methods of laying the pavement made of it, to say that a person who has merely altered the proportions of the ingredients or the process of combining them has discovered a new composition of matter in the sense of the patent law, is to trifle with language. To be a new combination of matter the product must have some distinctly new property, or be applicable to some new use. Of this there is no testimony whatever, and it is not alleged or claimed or suggested, either in the bill of complaint or the patent. With respect to the qualities or merits of the concrete made according to complainant's process there has been no practical test. The complainant never obtained any opportunity of putting his concrete into actual use as a pavement. He only made a few experimental blocks, and produces as an exhibit one of them made by him in 1876. To all outward appearances the material of this block is not distinguishable from the paving block made at Stony Point on the Hudson in 1872, a specimen of which was also exhibited by the complainants. It was endeavored to show by chemical analysis that the Stony Point material contained less mineral substance than the Van Camp block, and more bitu-

minous matter, and therefore could not have contained the same ingredients. The chemical experts differed from each other in the results obtained, and nothing convincing to support complainant's contention was established by the analytical tests. That the manufacture of asphalt blocks at Stony Point was abandoned,—presumably because the blocks were not a commercial success,—proves nothing, because the Van Camp material has never been put into use, never subjected to any test to prove whether or not it does possess any new or useful quality or use which similar compositions had not before possessed. The testimony tends to show that whatever reputation the defendant's manufactured blocks have obtained has resulted rather from the improved machinery and powerful presses used by defendant, and the skill in manipulating the material specially adapted to being moulded in defendant's machinery rather than from any combination of materials differing from that used in 1872.

While a patent is to be liberally construed, so as to sustain it as a grant of the invention actually made and actually claimed, it can never by judicial construction be made to cover an invention nowhere claimed in it, and which the public has had no fair notice that the patentee intended to claim. *Merrill v. Yeomans*, 94 U. S. 573. If it were necessary to say more it might well be suggested that even in a good claim for a new composition of matter, which is not described otherwise than by the process of making it, nothing can be an infringement which is not made by the process described. *Cochrane v. Badische A. & S. F.*, 111 U. S. 310, 4 Sup. Ct. Rep. 455.

The defense of non-infringement and the rejection of the claim for a new composition of matter make it unnecessary to consider other defenses set up in the answer, and urged at the argument. A decree dismissing the bill will be signed.

CELLULOID MANUF'G Co. v. AMERICAN ZYLONITE Co.

(Circuit Court, S. D. New York. April 9, 1888.)

PATENTS FOR INVENTIONS—INFRINGEMENT—ACTIONS FOR DAMAGES—PLEADING.

Rev. St. U. S. § 4919, providing that damages for the infringement of a patent may be recovered by action on the case, and Rev. St. U. S. § 914, providing that the forms of pleading in the federal courts shall be the same as those employed in the same action in the state courts, are construed together, and the pleadings in an action for damages for infringement of a patent should be in the state form, except as modified by Rev. St. U. S. § 4920, providing that in such action defendant may plead the general issue, and, having given notice, may prove certain special matters.

At Law. Motion to strike out certain pleas.

Betts, Atterbury, Hyde & Betts, for complainant.

Starr & Ruggles, for defendant.

LACOMBE, J. This is a motion to strike out pleas filed by the defendant, or to treat them as an answer. The action is for the recovery of

damages for the infringement of a patent. The summons and complaint are in the forms approved in state practice. The defendant contends that because section 4919 of the Revised Statutes prescribes that such damages "may be recovered by action on the case," the only method of securing such relief is by the archaic form and procedure of the common-law action of case, modified only by the rules of this circuit in force before the passage of the act of 1872, now preserved in section 914 of the same Revision. He is unquestionably correct in the proposition that sections 914 and 4919 are to be construed together, but to such construction it is by no means necessary to exclude actions brought under section 4919 from the operation of section 914. An action on the case is undoubtedly the mode in which such damages can be recovered, but the forms of pleading and procedure in such action in the federal courts should be the same as those employed in the same action in the state courts. The substance of an action on the case was not abolished by the reformed procedure, though its pleadings and practice were reconstructed in conformity with the new system. By the operation of section 914 an action on the case in the federal courts is assimilated to the state model, except so far as it is modified by express enactment of congress, as by section 4920. Motion granted.

HAT SWEAT MANUF'G CO. v. PORTER *et al.*

(Circuit Court, D. New Jersey. April 16, 1888.)

PATENTS FOR INVENTIONS—LICENSES—BREACH OF CONTRACT—INJUNCTION.

A bill in equity alleged that complainant licensed defendants to use the former's patents on certain terms, among which were payment of royalties, the rendering of monthly accounts, etc.; that defendants soon refused to fulfill any part of the agreement, but continued to use the patents; that they had conspired with other licensees to destroy complainant's license system, and irreparable injury would result. Defendants answered that the agreement was obtained by fraud on the part of complainant, and was therefore void. *Held*, that complainant has no adequate remedy at law, and an injunction will issue against defendants, unless they will give satisfactory bonds pending litigation.

In Equity. Motion for preliminary injunction.

John R. Bennett, Roscoe Conkling, and A. Q. Keasbey, for complainant.
Edmund Wetmore, for defendants.

WALES, J. The question presented for consideration is, does the bill exhibit a case for equity cognizance? The defendants insist that the complainant has an adequate remedy at law. The bill sets forth these facts: The complainant is a Pennsylvania corporation, having its general place of business in Philadelphia. The defendants are citizens of New Jersey. On the 7th of March, 1884, the complainant, being the owner of several patents, all of which relate to sweat-bands for hats or caps, the

manufacture thereof, and the machinery used in making them, licensed the defendants to use the patents, on certain terms and conditions, among which were the payment of royalties, the rendering of monthly accounts, with remittances of cash, and a stipulation that the agents of the complainant should be allowed at all reasonable times to inspect their books for the purpose of verifying their accounts, and to have free access to the premises where the patented machines were operated or stored, to verify their number and examine their condition. The defendants also covenanted not to dispute the validity of any of the patents. After accepting the license, the defendants made many thousand dozens of hat bands under the patents, paid the royalties as they fell due, and performed all of their covenants up to June 1, 1887, since which time they have refused to pay royalties, render accounts, or fulfill any part of their agreement with the complainant, although they have continued to use, and are still using, the patented machines. The complainant has issued 145 licenses, which are all in force and complied with, except those of the defendants and four other licensees, against whom similar motions are now pending. The bill further charges that the defendants have combined with certain other licensees of the complainant, and with other parties, who are infringing these patents, and have formed an association for the contribution of money to embarrass the complainant by expensive litigation, and to destroy its license system. The damages claimed for these unlawful acts are estimated at \$7,500; and it is also claimed that, if the defendants are permitted to continue the violation of their agreement, the complainant will receive irreparable injury. The bill prays for a discovery and account, and for a decree for the payment of the royalties and the damage sustained, and enjoining the defendants in the mean time from using any of the inventions recited in the agreement of license. The defendants do not deny the material allegations of the bill, with the exception of the charge of combination or conspiracy, but justify their conduct on the ground that they were induced by the false and fraudulent representations of the complainant's agent to execute the agreement of license. They also contend that the object of the bill is to enforce the payment of the royalties, for which the complainant has an adequate remedy at law. It is admitted that if this was the sole object of the bill it could not be sustained; but the complainant is seeking for something more than a mere naked account. A discovery is sought for as well, and an order to compel the defendants to perform their covenants, or to abstain from the use of the patents, since such use, under all the circumstances of the case, will cause irreparable damage. The defendants assume the right to use the patented machines without compensation; a right acquired under a contract which they now repudiate. By their acts they are endangering the license system of the complainant, and, unless promptly restrained, will give encouragement to other licensees to imitate their example. Actions at law for the royalties as they fall due would not afford complete relief to the complainant. A new action would be necessary every month, not only against the defendants, but against other licensees, who are now acting in like manner, by repu-

diating their contracts with the complainant, and are still using the rights acquired under them. To refuse the injunction would lead to a multiplicity of suits, which may be prevented on a final hearing of this case. The complainant is also entitled to a discovery. These are recognized heads of equity jurisdiction. Injunctions have been granted in this class of cases on a much narrower basis than is here presented. *Woodworth v. Weed*, 1 Blatchf. 165; *Wilson v. Sherman*, Id. 536; *Goodyear v. Rubber Co.*, 3 Blatchf. 449; *Eureka Co. v. Bailey Co.*, 11 Wall. 438; *McKay v. Mace*, 23 Fed. Rep. 76; *Manufacturing Co. v. Owsley*, 27 Fed. Rep. 100; *McKay v. Smith*, 29 Fed. Rep. 295. The facts in the present case distinguish it from *Root v. Railway Co.*, 105 U. S. 189, and *Purifier Co. v. Wolfe*, 28 Fed. Rep. 814. An injunction should therefore be issued, unless the defendants, within 15 days after notice of the order herein entered, shall give bond with two or more sureties, to be approved by a commissioner of the court, conditioned to render month'y accounts according to the terms of their contract with the complainant, and to file such accounts, duly verified, in the office of the clerk of this court, and to pay the amount of any final decree which may be rendered against them; the penalty of the bond to be in such sum as may be agreed on by the parties, or, if they are unable to agree, as may be fixed by the court.

SHIPMAN ENGINE CO. *et al.* v. ROCHESTER TOOL-WORKS, Limited, *et al.*

(*Circuit Court, N. D. New York.* April 16, 1888.)

PATENTS FOR INVENTIONS—PATENTABILITY—PRIOR STATE OF THE ART.

Letters patent No. 804,865, granted to Albert H. Shipman for a "hydro-carbon furnace," cover a device consisting of a boiler of any known form, with an oil reservoir containing liquid fuel, and from which said fuel is drawn up; two pipes, one for conducting the oil from the reservoir, and the other the steam from the boiler; a steam oil-atomizing jet, formed by arranging the orifices of the pipes in such relation to each other that the steam will suck up the oil from the reservoir, and spray the oil with which it comes in contact; and a steam regulator, operating automatically by the pressure of steam in the boiler, to diminish or entirely cut off the supply of steam to the atomizing jet. All previous devices lacked either the atomizing jet or the automatic regulator; the nearest approach being one by Dickerson, in which there is no atomizer, and the oil supply is obtained by gravity and not by suction. It appears that Shipman's device has been sold extensively both at home and abroad, as the others have not. *Held*, a patentable device as regards the prior state of the art

In Equity. On bill for an injunction.

John Lowell and George B. Selden, for plaintiff.

B. F. Thurston and Josiah Sullivan, for defendant.

WALLACE, J. This suit is brought to restrain infringement of letters patent No. 304,365, dated September 2, 1884, granted to Albert H. Shipman for "hydro-carbon furnace." The defense of prior public use.

based upon the experiments made with the apparatus of Marvin E. Otis, need not be considered, as the record discloses nothing to modify the opinion expressed at the hearing of the cause, that this defense only presents an instance of an experimental use, which did not and could not demonstrate a practical realization of the apparatus of the patent.

The real question in the case is whether there was any patentable novelty in Shipman's apparatus in view of the prior state of the art. He makes no pretensions to being a pioneer in utilizing liquid fuel as a substitute for coal or other bulkier or more expensive fuels for producing heat or steam. He assumes to have invented certain improvements in hydro-carbon furnaces, which consist of a combination of devices for regulating more efficiently the rate of combustion by the degree of steam-pressure in the boiler. Although he contemplated the application of his devices more particularly to steam-engines designed for driving light machinery, what he devised, and what his patent describes, is an improvement in a hydro-carbon burner for use under a steam-boiler of any kind, effected by a combination of parts, each of which was old and well known when he took up the subject, several of which had previously been used in such burners to perform in combination the functions they performed in his apparatus, but all of which had never before been combined together in the same apparatus. The patent describes a steam-boiler, which may be of any known form; an oil reservoir, which is to contain the liquid fuel, and from which the liquid fuel is drawn upward; two pipes, one leading from the reservoir for conducting the oil, and the other leading from the boiler for conducting the steam; a steam oil-atomizing jet, which is an atomizer formed by arranging the orifices of the pipes in such relation to each other that the steam will suck up the oil from the reservoir, and spray the oil with which it comes in contact; and a steam regulator, which operates automatically by the pressure of steam in the boiler, to diminish or entirely cut off the supply of steam to the atomizing jet. The regulator is described in the specification as follows:

"In order to provide for the regulation of the steam-pressure in the boiler, I combine with the pipe, K, which supplies steam to the atomizer, the regulator, L'. The regulator consists of a flexible diaphragm, N', (Figs. 3 and 4.) arranged, in connection with a valve, s'', to operate to reduce the supply of steam to the atomizer when the pressure in the boiler becomes too great. The diaphragm, N', forms one side of a chamber, into which the steam is admitted through a pipe, t''', communicating with the boiler or steam-dome through a hollow boss, b'''. The diaphragm is provided at its center with a boss, u'', into which the stem of the valve, s'', (Fig. 3.) is screwed. The head of the valve is fitted to a suitable valve-seat, v'', (Fig. 3.) and it operates, when the diaphragm, N', is pressed outward, as represented by the dotted lines in Fig. 3, by the steam in the chamber, to diminish or entirely cut off the supply of steam to the atomizer. The amount of pressure which will be required to accomplish this result may be regulated by screwing the valve, s'', in or out of the boss, u''. As shown in the drawings, this can only be effected when the pipe, K, is removed; the intention being to adjust the regulating valve at the factory before the engine is sent out, and to prevent any subsequent alteration of it. The practical effect of the regulator is that, if the pressure in the

boiler rises above any given point at which the valve is set, the supply of steam to the atomizer is entirely cut off, and the fire goes out. It will be noticed, also, that if the water should be entirely evaporated from the boiler there will be no more steam to supply the atomizer, and the fire in this case also will be extinguished. Provision is thus made for insuring entire safety under any circumstances which may arise. I have demonstrated, by practical trials under various circumstances, that the regulator above described is highly efficient, and never fails to produce the desired results. In starting an engine provided with my improved regulator, I obtain a pressure of air in the boiler by means of an air-pump, or by turning the engine backward. I am aware that the supply of steam and liquid fuel to the furnace of a steam-boiler has been heretofore controlled by a diaphragm regulator operating to control valves in the supply-pipes, but such construction I do not claim, as in my invention the delivery of the liquid fuel is controlled by varying or cutting off the supply of steam to the atomizing device by a regulator operated by the pressure of the steam in the boiler. The construction of the regulator herein shown forms no part of the present invention, as it is my intention to file a separate application for letters patent on the novel features thereof."

The claims of the patent are as follows:

"The combination with a steam-boiler, of an oil reservoir, a steam oil-atomizing jet, an oil conduit, a steam-supply pipe, K, and a steam regulator operating to vary or cut off the supply of steam from the boiler to the atomizer, substantially as and for the purposes set forth. (2) The combination, with a steam-boiler, of an oil reservoir, the steam oil-atomizing jet and oil conduit located above the oil reservoir, and arranged to draw oil therefrom, and a steam-supply regulator, through which the steam passes on its way from the boiler to the atomizer, substantially as and for the purposes set forth."

The prior state of the art is illustrated by United States patents granted to Van Norman, Brown & Morrison, dated August 1, 1865; to Joseph K. Caldwell, dated September 12, 1871, and March 19, 1872; to Abner Burbank, dated November 5, 1878; to J. L. Kite, dated March 8, 1881; to Park & Heath, dated October 11, 1881; and to E. N. Dickerson, Jr., dated April 18, 1882. The patent to Van Norman, Brown & Morrison is cited by the defendant as showing all the devices of Shipman's apparatus in combination. The patent describes a complicated apparatus for commingling oil vaporized in a retort with superheated steam. The apparatus is a hydro-carbon furnace, in which the steam is carried from a boiler through a coil in the fire-box, by which it becomes superheated, and is then delivered to a steam jacket or chamber, which adds heat to a retort already heated by the fire below it. Oil is delivered by means of another coil into the retort, and, after being there vaporized, the gas escapes through small holes in the retort, mingles with the superheated steam escaping through small holes in the steam jacket, and they are burned together. It does not contain an atomizer in any sense. It does contain an automatic regulator which operates by pressure in the boiler to shut off the steam in the coil. The apparatus is so remote in principle, as well as in detail of construction and arrangement, from Shipman's apparatus, that it could never have suggested any important feature in his. The patent does not contribute any light of value upon the case, and only incumbers the record. The patent to Park & Heath was not deemed of sufficient importance to be commented upon in the argu-

ment of counsel at the hearing, but in the brief which has since then been submitted for the defendants it is cited as describing an apparatus which contains an atomizer, a steam-generator and furnace, and an automatic regulating device, in combination with these parts. The apparatus contains an injector, in which three tubes are located concentrically, one for oil, one for steam, and one for air, all three of which materials are to be burned together. The defendants' expert says, "The steam does not meet the oil in the manner of the Shipman apparatus." In other words, there is no atomizer. The regulator is described in the specification as one by which "the amount of fuel and the combustion are steadily maintained without regard to the amount of pressure in the boiler," and in this respect differs radically in principle from Shipman's regulator. The patents to Caldwell, Burbank, and Kite do not show any apparatus in which an automatic regulator is employed, but the regulator in the apparatus of each is a common stop-cock, to be manipulated by hand. The hydro-carbon furnace of each of these patents would contain the combination of steam-boiler, oil reservoir, oil and steam pipes, and atomizer arranged and constructed substantially as described in Shipman's patent, and operating together to perform all the functions of his apparatus, if his did not contain a regulator. In the first Caldwell patent the specification states:

"This invention consists of an arrangement of two or more pipes adjustably connected together in such a manner that the passage of steam, heated or superheated, through one pipe, produces a vacuum in the other pipe, by means of which oils of any gravity are drawn out, driven into a mist or spray, and, combining with the steam, form into hydro-carbon vapor."

The later Caldwell patent describes an oil-pipe leading to an oil reservoir located on a lower plane, a steam-pipe leading from a boiler, and an arrangement of orifices of the two pipes at a right angle to each other so as to make an atomizer, substantially such as is described in his earlier patent. The specification states that he uses these devices in connection with the boiler which supply steam to an engine, and that the dry steam crossing the orifice of the oil-pipe causes a sufficient vacuum in the latter to induce the hydro-carbon to rise, and the moment it reaches the orifice it is forced into spray by, and is intimately mixed with, the steam. The devices, thus combined, resemble the devices of the Shipman apparatus so closely that it is unnecessary to refer to the other prior patents which do not contain an automatic regulator. The patent to E. N. Dickerson, Jr., describes apparatus which approximates much more nearly to Shipman's apparatus than anything shown in the other prior patents. His specification states that the invention "relates to a method of automatically regulating the combustion or heat produced by a hydro-carbon burner under boilers or other similar places where pressure is generated; and it consists in combining with the naphtha or naphtha and water supply-pipes leading to such burner, a valve or valves controlled automatically by the pressure produced by the combustion, and so arranged as to automatically control the supply of liquid fuel without completely cutting off the same." The apparatus described contains a fire-box under

the boiler in which a naphtha burner or retort is located. In this retort, water from the steam-boiler and naphtha are burned together. The vaporized oil is conducted through an orifice in the retort by a pipe terminating under the retort, where it escapes, and where combustion takes place. Two pipes enter the retort, one connecting with the steam-generator, and the other with the naphtha reservoir, from which the naphtha flows by gravity into the retort. The regulator is described as follows:

"H represents a valve controlling the water supply, and J a valve controlling the naphtha supply. K is a connecting rod, moved vertically by the Clark damper, L, which may be made adjustable by sliding weight, M. The stems controlling valves H and J are controlled by adjustable nuts. The upward movement of the rod K, may be limited by an adjustable stop, P, for a purpose to be explained."

The specification then describes the operation of the apparatus as follows:

"In the ordinary condition, and before steam has been generated, water and naphtha will be allowed to flow into the burner and be there consumed, thereby heating the boiler and making steam. As soon, however, as the pressure in the boiler is sufficient to counter-balance the weight, M, the rod, K, will begin to rise, thereby shutting off the water and naphtha supply. The extent to which this supply is reduced can be determined by the adjustment of the stop, P, because it will be undesirable to shut off the flow altogether, as doing so would necessitate kindling the fire afresh. By having the positions of the valves relatively adjustable the apparatus may be so arranged that the water will be entirely shut off, leaving a limited supply of naphtha, which will burn at the point, G, (under the retort,) and keep the apparatus hot, and ready to start fresh when the steam falls in the boiler."

From this description it is obvious that not only there is no atomizer in the Dickerson apparatus, but the mode of operation necessitated by the differences between his apparatus and Shipman's is different from Shipman's. In Shipman's apparatus the oil supply is controlled solely by the steam supply, and, when the steam supply is diminished or wholly cut off, the oil supply is thereby likewise diminished or cut off; the regulator is not applied to the oil-pipe, but the flow of oil is controlled by the steam suction which is automatically regulated in the steam-pipe. As in Dickerson's apparatus the oil supply is not obtained by suction, but by gravity, his regulator required to be applied to the oil-pipe as well as the steam-pipe, and it is therefore so devised as to cut off the supply of naphtha by shutting off the naphtha supply pipe. Undoubtedly Shipman has only combined in effective relations an automatic regulator that was not novel in itself with the atomizers of earlier patents. One test of invention in such cases is whether a new result has been obtained by the combination of old parts as distinguished from an aggregation of old results. The new combination of Shipman can meet this test, because it is perfectly clear that this combination enables the steam supply pipe to perform a new function in an atomizer,—that is to exercise a varying suction upon the oil-pipe, graduated by the degree of steam-pressure in the boiler. That Shipman's apparatus is exceedingly useful

cannot be disputed; certainly the defendants who have appropriated it completely can hardly dispute the proposition. Everybody recognizes the advantage of having the fuel supply and the steam-pressure reciprocally regulated, so that when the pressure in the boiler reaches the designated point of safety or convenience the diminished fuel supply will relieve the pressure, and, when it falls below the proper point, the increased supply will bring it back to the required power. Dickerson devised one set of contrivances adapted to his particular form of burner to accomplish this object. Shipman devised another set adapted to the particular form of atomizer employed in his furnace to accomplish it. There was inventive thought in the idea that he could make a valve in the steam-pipe of existing atomizers to do the work of a valve in both the steam-pipe and the oil-pipe of Dickerson's apparatus. Still more was there inventive thought in the idea that he could make any form of existing regulators lend a new function to the steam-pipe of existing atomizers. It is a significant fact that Shipman's apparatus immediately commended itself to the public for its practical efficiency, and has met with an extensive and increasing patronage both in this country and abroad, while none of the devices described in the prior patents have ever gone into public use. This circumstance, while it suggests that the former devices may not have been practically operative, is persuasive that what Shipman did by way of improving them was not such an obvious thing as to deprive it of the merit of ranking as invention. A decree is ordered for the complainants.

HUBER *et al.* v. MYERS SANITARY DEPOT.

(Circuit Court, S. D. New York. April 16, 1888.)

PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION—PARTIES.

The sole owner of one patent and exclusive licensee of another may, in one action, joining his licensor as plaintiff, enjoin an apparatus infringing on both patents.

In Equity. Bill for infringement.

Albert Comstock, for complainants,

William H. Sage, for defendant.

LACOMBE, J. The complainant Huber is sole owner of letters patent No. 260,232. The complainant Boyle is sole owner of letters patent No. 255,485. Huber is also exclusive licensee of Boyle's patent. The defendant manufactures and sells machines which, it is alleged, infringe both patents. Defendant demurs for misjoinder of parties. The point raised is a new one, and in determining it the "court is governed by those analogies which seem best founded in general convenience, and will best promote the administration of justice, without multiplying unnecessary litigation on the one hand, or drawing suitors into unnecessary expenses

on the other." *Hayes v. Dayton*, 8 Fed. Rep. 704. The complainant Huber, if sole owner of both patents, could in a single suit enjoin an apparatus which infringed both. *Nourse v. Allen*, 4 Blatchf. 376. He is in fact the sole owner of the one, and, except for the payment of his royalties, entitled to the whole beneficial interest in the other. As exclusive licensee, however, he is required to join the owner of the legal title. *North v. Kershaw*, 4 Blatchf. 70. It would, however, unnecessarily multiply expensive litigation to hold that the invariable consequence of thus bringing in the owner must be to compel the complainant to bring two actions, instead of one, to suppress a single infringing apparatus. The demurrer is overruled.

BLESSING *et al.* v. JOHN TRAGESER STEAM COPPER WORKS.

(Circuit Court, S. D. New York. April 28, 1888.)

1. PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—DEFENSE OF NON-PATENTABILITY.

A demurrer for non-patentability apparent upon the face of the patent should not be allowed unless the instrument is so palpably destitute of invention that the court can say that no question of fact can arise upon it.

2. SAME—COMPLAINT.

A complaint for the infringement of letters patent must state that the invention had not been in public use or on sale for more than two years prior to the application therefor. It is not sufficient to state that it was not in public use or on sale with the consent of the inventor.

At Law. Demurrer to a complaint for infringement of letters patent.
George G. Frelinghuysen, for plaintiff.

Frederic H. Betts and *J. E. Hindon Hyde*, for defendant.

SHIPMAN, J. This is a demurrer in an action at law for the infringement of letters patent No. 80,441, dated July 28, 1868, for an improvement in copper-lined bath-tubs. Two grounds of demurrer are assigned: (1) That the complaint, of which the letters patent are made a part, by profert, does not state facts sufficient to constitute a cause of action, because it is apparent on the face of the patent that it does not contain a patentable invention. (2) That the complaint does not state that the invention had not been in public use or sale in this country for more than two years before the date of the application. It avers that the invention was not, at the time of the application, in public use, or on sale with the consent or allowance of the inventor, contrary to the provisions of the statute of the United States.

The first ground of demurrer raises the question whether the described improvement is so obviously the result of a mere exercise of mechanical skill that the patent is void upon its face, and must be adjudged to be invalid. It is well settled that, in a bill in equity for the infringement

of a patent, if the patent is void on its face by reason of want of patentable invention or of novelty, when the pre-existing device is a thing in the common knowledge and use of people throughout the country, the court may stop at the instrument itself, and, without looking beyond it, adjudge in favor of the defendant. *Brown v. Piper*, 91 U. S. 37; *Slawson v. Railroad Co.*, 107 U. S. 649, 2 Sup. Ct. Rep. 663. In an action at law upon the patent, if it is plainly void upon its face, it is likewise true that the court has the power so to adjudge, upon a demurrer; or, if a demurrer is not interposed, and after hearing the evidence upon the alleged question of fact, the court is of opinion that there is no question which can be submitted to the jury, it is its duty to direct a verdict. Where the question whether the improvement required inventive skill for its production actually exists, it is one of fact for the jury. *Poppenhusen v. Fulke*, 5 Blatchf. 46, 49; *Shuter v. Davis*, 16 Fed. Rep. 564. In almost all cases the nature of the subject demands that the triers should be instructed by the testimony of those skilled in the art to which the patent relates, and therefore a demurrer for non-patentability apparent upon the face of the instrument should not ordinarily be allowed. *Teese v. Phelps*, 1 McAll. 17. To decide, in advance of an opportunity to give evidence, that no evidence can possibly be given upon the question of invention which would permit the case to be submitted to the jury, seems to me to be ill advised, except in an unusual case. I am aware that there probably are patents which, upon their face, are so palpably destitute of invention that a court would not hesitate to decide, upon demurrer, that no question of fact can arise upon them; but, except in that class of cases, it is not expedient to anticipate a result at which the court may properly arrive after a trial upon the merits, and an opportunity to give testimony. In this case the patent was granted in 1868, and while it seems to me to have been a very weak one, and while the invention appears not to have been worthy of the favorable notice of the patent-office, my memory does not inform me that it was easily accessible when it was made, and I do not wish to assume that I cannot be better instructed than I am at present as to the degree of ingenuity which the improvement required. The first ground of demurrer is not sustained.

The second ground is founded upon the decision in *Andrews v. Hovey*, 123 U. S. 267, 8 Sup. Ct. Rep. 101, which was affirmed upon rehearing. Id. 676. That the effect of the seventh section of the act of March 3, 1839, (5 St. 359,) was "to take away the right (which existed under the act of 1836) to obtain a patent after an invention had for a long period of time been in public use without the consent or allowance of the inventor. It limited the period to two years, whether the inventor had or had not consented to or allowed the public use." The supreme court then decided that a patent could not properly be granted, under the act of 1839, for an invention which was in public use or on sale for more than two years prior to the application therefor; and it seems that, in regard to patents which were issued under that act, the same necessity exists for the averment that the invention was not in public use or on sale for the specified period which has existed in regard to patents which have

been issued under and since the act of 1870. This complaint was drawn before the decision of the supreme court in *Andrews v. Hovey*, and the pleader followed the usual practice which then prevailed. The second ground of demurrer is allowed, with liberty to the plaintiff to amend within 20 days, without costs.

BLAUM v. NATIONAL BARROW & TRUCK Co.

(Circuit Court S. D. New York. April 24, 1888.)

PATENTS FOR INVENTIONS—WHAT CONSTITUTES INFRINGEMENT.

Letters patent No. 349,681 on a device for fastening the cross-bars of a wheelbarrow to the handles by an adjustable eye, integral with the cross-bar, one portion being detachable and fastened to the cross-bar by a bolt or bolts, these bolts drawing the eye tightly around the handle, cannot be extended so as to include all detachable clamps which encircle the handles and clamp them to the cross-bars.

In Equity. Bill founded upon the infringement of letters patent.

Worth Osgood, for plaintiff.

W. B. H. Douse, for defendant.

SHIPMAN, J. This is a bill in equity which is founded upon the alleged infringement of letters patent No. 349,681, dated September 28, 1886, to William Benjamin, assignor to the plaintiff, for an improvement in metal wheelbarrows. The patented invention was an improvement upon a metallic wheelbarrow, the frame of which was composed of two tubular metallic handles or side-bars, and two cross-bars provided with eyes, which fitted upon the handles and were shrunk thereon. This device is shown in letters patent No. 246,584, dated August 30, 1881, to William C. Wren; assignor to Joseph Annin. Its method of construction was defective, because the barrows could not be "knocked down," or taken apart, and thus economically transported in quantities. The improvement consisted, in brief, in dividing the eyes. The eyes, as shown in the drawings, are composed of curved or semi-circular portions upon the ends of the cross-bars, and movable U-shaped portions or clips, which are pressed towards the cross-bars, and, being held in position by one or more bolts, clamp the side-bars in place. The specification says that "the part of the clips or eyes that encircle the side-bars or handles must be formed somewhat smaller than the outside diameter of the handles, so that, when the bolts are screwed together, they will draw the eyes tightly around the handles, thus making a rigid and substantial frame, with or without the tray." The claims of the patent are as follows:

"(1) In a wheelbarrow, the combination, with the metal tray, of the cross-bars, C, D, for supporting and strengthening the bottom of the same, and the side-bars or handles, B; the cross-bars being provided with eyes of adjusta-

ble size and bolts by which said handles may be detachably clamped therein, substantially as set forth. (2) The herein-described frame for a wheelbarrow, consisting of the front and rear cross-bars, C, D, for supporting and strengthening the bottom of the tray, the substantially parallel side-bars or handles, B; the cross-bars being provided with eyes of adjustable size for the reception of the handles, and bolts for detachably clamping the handles, substantially as set forth."

The defendant makes wheelbarrows under letters patent No. 355,245, dated December 28, 1886, to Joseph Annin. The cross-bars of this barrow are straight, flat bars of iron, which project beyond the handles. Each extremity is provided with a U-shaped clip for clamping the handles, which clip is provided at one end with a claw, which passes around the end of the cross-bar, and at the other end with a flange which is perforated for the reception of a bolt which secures the clip.

The question of infringement depends upon the construction of the Benjamin patent, and, in my view of the case, is the only question which demands consideration. I therefore omit discussion in regard to the authorship or the patentability of the invention. The eyes upon the cross-bars of the William C. Wren patent were integral with the cross-bars, and, having been heated, were slipped over the handles and were shrunk thereon. The form of the improvement which is described in the patent consisted in making one portion of the eye a detachable clip, which was fastened to the cross-bar by a bolt or bolts, these bolts drawing the eye tightly around the handles, and thus enabling the eye to be called "adjustable." The Benjamin patent admits the fact that clips and clamping eyes had been used in various situations, and it is manifest from the history of the art that they had been used to fasten the tubular metallic handles of a wheelbarrow to its tray, and to secure the metallic transverse springs of a carriage to its wooden side-bars. Inasmuch as in no pre-existing device detachable eyes had been virtually a part of the cross-bars, the effort is made to have the patent broad enough to include all detachable and adjustable eyes, although not integral with the cross-bar, which are secured to, and, by means of the fastening, can be called, in effect, a part of the cross-bars. Any one of these various eyes can be considered adjustable, because the interior diameter of the eye may be varied by screwing or unscrewing the bolts. The claims of the patent are also broad enough to include a split eye, which is integral with the cross-bar, the several parts being united by bolts, which detachably clamp the handles in the cross-bars. Neither one of these constructions is permissible, because the invention simply consisted in dividing the eye of the Wren patent, in which handles and cross-bars had been united by the eyes of the cross-bars, and making one portion of the eye detachable. Detachable clamping eyes, which screwed the tray to the handles, were old. An eye which was part of the cross-bar and clamped the handle was old. Assuming that there was patentable invention in dividing this eye into two parts, and making one part detachable, it is improper to extend the patent so as to make it include all detachable clips which encircle the handles and clamp them to the cross-bars. That was not

the invention of the patentee, who sought only to improve upon the conception of the pre-existing Wren patent. The invention consisted in the manner in which the eye was constructed, by which method a portion of the eye was integral with the cross-bar, and does not include detachable clips which are secured to a straight cross-bar. There is no infringement. The bill is dismissed.

THE NEW YORK.¹

THE NORWICH.

CORNWALL v. THE NEW YORK. SAME v. THE NORWICH.

(District Court, S. D. New York. March 24, 1888.)

1. SHIPPING—LIABILITY FOR TORT—INJURIES FROM SWELL OF STEAMER.

The duty of a passing steamer to guard against the injurious effects of her swell and suction upon the smaller craft in rivers and harbors, has often been enforced in courts of admiralty.

2. SAME—NEGLIGENCE—COSTS—FIFTY-NINTH RULE.

The steamer New York, going up the Hudson river against the tide, and the steam-boat Norwich, coming down with a tow, passed each other in the channel opposite to where libelants canal-boat lay along the shore taking in cargo. The suction and swell caused the latter to strike the bottom, causing damage, for which this suit was brought. The channel at the point was about 250 to 300 feet wide, and the steamers passed port to port, both moving slowly. The New York was notified before reaching the place of the presence of the canal-boat by the whistles of a steam-tug lying near, and her pilot recognized the fact that he must pass close to her. *Held*, that the Norwich, going slowly with the tide, committed no fault, and the libel against her should be dismissed. *Held*, that it was the duty of the New York, in the situation which her pilot foresaw, to have waited below the landing until the Norwich had passed, so that the New York could have gone further to port; or else to have stopped her wheel entirely while passing libelant's boat; and for her failure to do either she should be held liable for the damage. The Norwich's costs of trial were also imposed on her, as she opposed the libelant's offer to discontinue as to the Norwich, and required that she be retained under the fifty-ninth rule.

In Admiralty. Libel for damages.

Hyland & Zabriskie, for libelant.

R. D. Benedict, for the Norwich.

C. & A. Van Santvoord, for the New York.

BROWN, J. On the 16th of August, 1887, the libelant's canal-boat, W. F. O'Rourke, was taking a cargo of ice at a landing by some spiles driven close alongside the dike opposite Mould's ice-house on the east side of the North river, a little below Greenbush, and about a quarter of a mile above Dow's point. At 6 P. M., when her cargo was nearly completed, she was drawing about six feet of water in a depth of about seven

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

feet or a little over. At that time the large passenger steamer New York, of the day line from New York to Albany, passed the landing, and through the suction and swell thereby produced caused the boat to strike the bottom, and the sides of the spiles, so that parts of her bottom were broken. Outside and along-side of the libelant's boat was the steam-tug Robertson, whose pilot, seeing the New York coming up from below, gave several short blasts of his whistle, which were heard by the pilot of the New York when off Dow's point. The pilot of the latter understood that it was a signal that he should be careful in passing the ice-house, and that there was a boat there loading. The landing had been used in the same manner for loading boats with ice for about six years, and was regarded by the ice-men as a specially good place for the purpose. The bottom was of hard sand. The steam-tug Norwich, with a fleet of canal-boats in tow upon a hawser, was at the same time coming down river. The Norwich and New York passed port to port. When abreast of the landing, the available channel-way was only about 250 to 300 feet wide. The evidence shows that the Norwich passed as near to the west side as was safe; that she was going very slow; and that with the ebb-tide, she could not stop, nor safely diminish her speed. The New York passed about midway between the Norwich's tow and the Robertson, leaving some 25 or 30 feet space on each side of her. The evidence does not show any fault on the part of the Norwich. There is no reason to suppose that any part of the suction and swell that caused the damage was attributable to her. Nor was she under any obligation to stop for the New York, if it were not safe for both to pass through the passage at the same time; the obligation to wait would in that case be upon the New York, as the steamer going against the tide. The libel as against the Norwich must, therefore, be dismissed.

On the part of the New York, I am satisfied that when abreast of the ice-house she was going at a very moderate speed. Some half a dozen witnesses on her part say that her speed at the time she passed the landing was not over three or four miles per hour. Her pilot testifies that she was going half slow, *i. e.*, at a speed of about seven miles, before reaching Dow's point, or a little below; and that, seeing the boats at the landing, he then reduced her speed to dead slow, before the Robertson's signals were heard; and that they continued dead slow until after passing the landing. The Norwich, however, had been seen, and whistles exchanged, by which it was understood that the New York was to pass to the right, which would necessarily bring her very close to the libelant's boat at the landing. She was bound, therefore, to take extra precautions against the danger from the suction and swell in passing. The necessity of such precaution was well known. The pilot understood the signals. The New York is the largest day boat upon the river, and her suction and swell among the most dangerous. The river is for the common use of boats, large and small, in all legitimate business. *The Daniel Drew*, 13 Blatchf. 523. The need of precaution and the practice and necessity of guarding against the injurious effects of the heavy swell and suction of large boats upon the smaller craft that have equal rights in the

rivers and harbors, are well understood, and have been often enforced in the decisions of this court and elsewhere. *The Drew*, 22 Fed. Rep. 852; *The Rhode Island*, 24 Fed. Rep. 295; *The Batavier*, 9 Moore, P. C. 286. The evidence does not show that the place of this landing was specially unfit or dangerous, so as to exclude any right of other craft to use it as a landing. Its use for six years without accident, so far as appears, affords a very strong presumption to the contrary. I cannot hold the presence of the canal-boat there to have been an unlawful obstruction, or a fault. I think it was the legal duty, therefore, of the New York, in the situation which her pilot foresaw, either to wait below the landing until the Norwich and her tow had passed, so that she could go farther to the westward abreast of the landing; or, if she did not wish to do that, to stop her wheel while approaching and passing the ice-house landing. Either of these courses was entirely practicable; either would have avoided injury, and neither would have imposed any unreasonable burden upon the New York. Quite a number of the libellant's witnesses estimated the New York's speed at from 11 to 15 miles. I think this estimate is altogether incorrect. I think the New York came to dead slow, as her own witnesses testify; and from the number of revolutions which they give at the various rates of speed, it is probable that she was going from five to six knots. The ebb-tide was slack; the current weak. There was no sufficient reason, in my judgment, for not stopping her wheel for one or two lengths while approaching and passing the landing. She had abundant motion for steerage-way. Nor would there have been any difficulty in maintaining her place and heading below the ice-house, by occasionally stopping her wheel, until the Norwich and her tow had passed by her, so as to allow the New York to go farther to the west, if she preferred that course.

The libellant's boat is without fault, and is, therefore, entitled to be compensated for the damage that she suffered. Loading to the depth of six feet draft within about a foot of the depth of water there, was not in my judgment unreasonable, or any fault on her part. The libellant is therefore entitled to a decree for damages and costs against the New York only. As against the Norwich, the libel must be dismissed, with costs; but as the libellant, at the beginning of the trial, offered to discontinue as to the Norwich, and the New York required that she be retained at her costs, under the fifty-ninth rule in admiralty, the Norwich's costs of trial must be also taxed against the New York.

THE PHOENIX.

LOWNDES v. THE PHOENIX.

(District Court, D. South Carolina. April 5, 1888.)

1. SHIPPING—LIABILITY OF VESSEL FOR TORT—MASTER AND SERVANT—DEFECTIVE APPLIANCES.

Libelant, who was one of the gang of the stevedore, was at work in the hold stowing cotton, when a sling containing three bales parted, and one of them fell down the hatchway and struck him, inflicting serious injuries. The vessel at the time was in full charge of the stevedore, who was selected by the charterer and paid by the ship, and who furnished all the hands, including a man at the gangway whose duty it was to warn the men in the hold when the cotton was on the way. This duty he failed to perform. The ship supplied the appliances for loading, and among these were the slings, which, owing to the hard usage, rapidly wore out. The stevedore, his foreman, the gangway man, and the man at the winch all testified that at least one of the slings (there were two) furnished by the mate for this particular gangway had all the appearance of being an old one, and the stevedore and his foreman, to whom the master showed the broken sling after the accident, swore that not only was it dark in color like an old sling, but that its ends at the break were stranded. The testimony of the officers of the ship was to the effect that both slings were entirely new, and had never been used before. The mate, who got possession of the broken sling, and kept it, admitted on his examination, which was *de bene esse*, that it was on the ship. The ship was then in port, but the sling was not produced at the trial. In addition, the foreman of the stevedore testified that he had frequently called the attention of the mate to the unsafe character of the slings. *Held*, that as a matter of fact the sling was an old one, and it being the duty of the ship to furnish the stevedore with safe appliances, the ship was liable.

2. SAME—NEGLIGENCE OF FELLOW-SERVANT.

A vessel taking in a cargo of cotton was in full charge of the stevedore, who furnished all the hands, including a man at the gangway and others in the hold. It was the duty of this man to warn the men below when the cotton was on the way. This he failed to do, and, a sling breaking, one of the bales fell down the hatchway and struck the libelant, who was employed by the stevedore to stow the cotton. The immediate cause of the accident was the rope of which the sling was made, and which was old. It was the duty of the ship to supply these slings, and to see that they were in good condition. The libelant was permanently disabled by the accident for the most exacting duties of a longshoreman, though he was not incapacitated, with his experience and skill, from making a living. He was confined to bed a considerable period by his injuries, and lost much time. *Held*, the negligence of the ship being the immediate cause of the accident, that the fact that the negligence of a fellow-servant contributed thereto was not, in admiralty, matter in discharge, but only in mitigation of damages; and that \$1,500, with \$75 as doctor's fees, should be allowed.

In Admiralty. Libel for damages for personal injuries.

Ingleby & Miller and *I. P. K. Bryan*, for libelant.

I. N. Nathans, for respondent.

SIMONTON, J. The libel is for injuries sustained by libelant on board of the steam-ship *Phoenix*, on 11th February, 1888, she being at the time at Adger's wharf, in this port. The steam-ship, taking in a cargo of cotton, was in full charge of a stevedore, selected by the charterer, and paid by the ship. She furnished the appliances for loading,—derrick, windlass, blocks, chains, rope slings, and the steam for the winch. The

stevedore furnished all the hands, including a man at the steam-winch, and a man at the gangway. The duty of the latter was to pass out the slings, and to give notice that the cotton was coming aboard, so that the men working in the hold should keep from under the hatch. The stevedore had been engaged during the week in loading at the other hatches of the steamer. On Saturday, a little after 1 o'clock p. m., he began for the first time to put cotton into the No. 4 hatch. He asked for rope slings for that hatch. The mate, whose duty it was to furnish them, gave him two. Two rope slings are needed for each hatch. In each sling are put three bales. They are then hauled from the wharf by the appliances mentioned, going up towards the hatch on a skid, which is an incline of some 55 or 60 deg. As they reach the combing of the hatch, they are raised above it, over the hatchway, and should be let down gradually into the hold. The gangway man gives notice as the bales are on their way. Between 4 and 5 o'clock on this afternoon libellant was at work, one of the gang of the stevedore in the hold of hatch No. 4. He had just reached forward to get from under the hatchway an implement of his calling, known as a "Dolly Varden," when a bale of cotton was precipitated down the hold, striking him, and inflicting serious injuries upon him. No warning whatever was given by the gangway man. His excuse is that the bales came so fast he had no time to give it. The circumstances attending the accident are these. Three bales, as is usual, were put into the sling. They came up the skid, steam having been put on the winch. When they got to the combing of the hatch, perhaps just as they got on a level with the top of the combing, the sling parted. Two of the bales fell on the deck, the other went down the hold and struck libellant.

When a stevedore has full charge of the loading or unloading of a vessel, and one of his gang suffers injury by reason of defective tackle furnished by the vessel, she is responsible if there be absence of due care upon the part of her master in furnishing the tackle, or in maintaining it in a safe condition; that is to say, if he knew, or if the circumstances were such as to put him on the inquiry so that he could know, that the tackle was not safe. *The Rheola*, 19 Fed. Rep. 926; *The Harold*, 21 Fed. Rep. 428; *The Carolina*, 30 Fed. Rep. 200, affirmed, 32 Fed. Rep. 112; *The Dago*, 31 Fed. Rep. 574. The general principle appears in *The Malek Adhel*, 2 How. 210, and it is illustrated in *The Yoxford*, 33 Fed. Rep. 521. The question in this case is, was the sling thus furnished by the ship on this afternoon defective within the knowledge of the officer furnishing it, or were the circumstances such as to put him upon inquiry as to its condition? The sling had been in use only two hours when it parted. On this essential question the testimony is contradictory. The stevedore, his foreman, the gangway man, and the man at the winch, all of whom handled the sling, swear that one at least of the slings furnished for and used in hatch 4 that afternoon was very dark in color, having all the appearance of an old sling. Two of these, the stevedore and his foreman, to whom the master exhibited the broken sling after the accident, swear that it not only was very dark in color, like an old sling,

looking on the outside black and scraped, but that its ends at the break were stranded. On the other hand, the officers of the ship swear that the two slings furnished for hatch 4 on that afternoon were entirely new, had never been used, had been cut from a fresh coil of rope recently purchased; that it had the bright color of new Manilla rope; that its edges at the points of parting were clean, appearing to have been cut short off with some sharp instrument. The testimony cannot be reconciled. New Manilla rope used on smooth skids for two hours and a little more could not be made to assume the appearance of old rope. In this contradiction of testimony we must examine even small facts. Just after the accident occurred the first mate of the steam-ship sent a man into the hold and got the broken sling. He kept possession of it. It was shown on Monday to the stevedore. The master, mates, and crew were examined *de bene esse* a few days afterwards. The mate, on cross-examination, was asked as to this sling. He replied that it was aboard ship. The ship was in port. The examination of respondent's witnesses went on the next day. The rope was never produced, nor was any offer made to produce it. Now, the issues between these parties were: What caused the sling to break? Was it of new rope or of old? Did it part because of its inherent weakness, discernible on examination? Was it cut by the iron bands around the bales, as was very possible? Was it broken in a violent concussion of the bales against the combings of the hatch through the unskillfulness of the winchman? If the rope was a new one, if the ends were clean cut, if the break was the result of a sharp and violent blow, the ship would not be liable. The bare production of the rope would have demonstrated the theory of respondent. He had full notice of its importance, and opportunity to produce it. The rope was not produced. Why? It is difficult, if not impossible, to escape the conclusion that the rope was not produced because its production would have contradicted the theory of the defense. As matter of fact, I find that the sling which parted was an old one. This being the case, was the ship responsible? The wear and tear in use of these slings is very great. They cannot be used with safety after loading a vessel with 1,000 bales of cotton. When the cotton in the slings comes aboard it moves rapidly and always, or almost always, strikes violently against the combing of the hatch. When, therefore, the foreman of the stevedore asked for new slings for this hatch he was entitled to new ropes or ropes as safe as new ones. If an old sling was furnished, it should have been examined. An examination may have developed that it was not safe. No examination was had. Thus there was a want of due care, which is negligence, and for this the ship is liable. Add to this the evidence of the foreman of the stevedore, that he had repeatedly called the attention of the mate to the unsafe character of the slings, and the conclusion is strengthened.

In determining the extent of the liability of the ship other considerations, however, enter into the question. The gangway man failed in his duty, and gave no warning. It may be—but on this point the evidence is not strong—that the man at the winch was unskillful. Both of them

were in the gang of the stevedore, paid and employed by him. But for the negligence of the one, perhaps the action of the other, the accident might not have happened. The libelant was the fellow-laborer with these men, and their negligence was one of the risks of his employment. He assumed this, and is affected by it. *Hough v. Railway Co.*, 100 U. S. 213; *The City of Alexandria*, 17 Fed. Rep. 390; *The Harold*, 21 Fed. Rep. 428. This, however, does not exonerate the ship. Even in the narrow administration of the common-law courts the negligence of an employe will not excuse the common master for an injury to a fellow-servant if the master himself was negligent, (*Railway v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493;) and in the broad and liberal administration of admiralty contributory negligence on the part of the libelant himself would not exonerate the ship. This being so, still the negligence for which libelant would have been directly responsible, and the negligence of a fellow-servant, the risk of which he assumed, will diminish the amount of damages to be awarded to him. This, then, is the last question in the case. The libelant has been disabled, in some respects; for the most exacting duty of a longshoreman, permanently disabled. With his experience and skill, he can still make a living. He has been confined to his bed,—still is,—and has lost much time. I award him as damages the sum of \$1,500, not including his physician's fees. Towards these I allow him \$75. Let a decree be entered accordingly; respondent to pay costs.

THE ST. JOHNS.¹

THE GEN. ROSECRANS.

HEATH v. THE ST. JOHNS AND THE GEN. ROSECRANS.

(*District Court, S. D. New York. April 6, 1888.*)

1. COLLISION—SIGNALS—CONTRARY MANEUVERS.

A vessel that agrees by signal to pass ahead of another vessel, and thereafter stops without reasonable necessity, is in fault if collision ensues.

2. SAME.

As the steam-tug R., with a canal-boat on her starboard side, was turning from the North into the East river, another tug, the D., being a little astern, and going in the same direction, she observed the steamer St. J. coming up on her starboard hand. She signaled her intention to pass ahead of the St. J., to which the latter, by whistles, agreed; and the St. J. at the same time agreed to go ahead of the D. As the vessels drew nearer, the R., fearing that she would not clear the St. J., stopped and reversed. As soon as this was perceived by the St. J., she also stopped and reversed, but collided with the R.'s tow, striking it about 10 feet from her stern. Had the R. kept on, she would have cleared the St. J. by at least 100 feet, the same distance that the St. J. passed ahead of the D. All the vessels were moving slowly, and on direct lines. *Held*, that there was no reasonable or apparent necessity for the stopping of the R., contrary to the agreement under which both had been acting, and such stopping was the fault that caused the collision; that the St. J. owed no duty to the R., except the duty of not thwarting her in keeping out of the

¹Reported by Edward G. Benedict, Esq., of the New York bar.

way, and except that, after risk of collision appeared through the R.'s fault, the St. J. was bound to do what was possible to avoid her, which she did. The R. was therefore held solely liable for the damage.

8. SAME—SAFE MARGIN IN CROSSING.

It is not culpable navigation in the harbor of New York for vessels of moderate size, moving at moderate speed, upon direct lines, in the day-time and in clear weather, to shape their courses so as to pass 100 feet from each other.

In Admiralty.

Carpenter & Mosher, for libellant.

R. D. Benedict, for the St. Johns.

Frank D. Sturges, for the Gen. Rosecrans.

BROWN, J. On the 4th of January, 1887, at about 10 o'clock in the morning, as the large side-wheel passenger steamer St. Johns was making her daily trip from Sandy Hook to New York, she came in collision with the libellant's canal-boat S. A. Pyatt, off Castle Garden, striking with her stem the starboard side of the canal-boat about 10 feet from her stern, and making a deep wound, which caused large damage to the boat and cargo; to recover which this libel was filed. The canal-boat was in tow along the starboard side of the steam-tug Gen. Rosecrans, bound from near the Pennsylvania Ferry dock, Jersey City, to pier 34, East river. The tide was ebb, and the tug and tow going at the rate of four or five knots. They were moving across the river, and were probably heading about two or three points down river, so as to round the Battery within about 400 or 500 feet of the shore. The tug had the St. Johns on her starboard hand, and was therefore bound to take proper steps to keep out of the way. She had given a signal of two whistles, to which the St. Johns had responded with two, importing that the tug should go ahead of the St. Johns. For the tug it is contended that the steamer, contrary to her signal, improperly sheered to starboard and across the course of the tug, which the steamer denies. The latter claims that the collision was wholly owing to the tug's stopping and backing shortly before the collision, instead of keeping on her course, as she should have done.

The case has to be considered, however, with reference to the presence of another steam-tug, the Delaware, which, soon after the Gen. Rosecrans left Jersey City, also left the dock next below, with a car-float about 200 feet long upon her starboard side. She also was bound for the East river, and followed a course about parallel with that of the Gen. Rosecrans, and from 100 to 300 feet below her in the river. Her speed was greater than that of the Rosecrans, so that at the time the last signals were exchanged her float had got nearly abreast of the latter's stern. When the two tugs were about one-third of the way across the river from the Jersey shore, the master of the St. Johns, then abreast of Fort William, and probably about one-fourth of a mile from it, observed them from two to three points on his port bow; the Rosecrans being then considerably in advance of the Delaware. When he was a little way above the fort, the Rosecrans blew him two whistles, and then the Delaware blew to him two. He replied to the Delaware with one, to which the Delaware answered with

one; thus agreeing that the St. Johns should pass ahead of the Delaware. The Gen. Rosecrans then repeated her former signal of two whistles to the St. Johns, to which the latter replied with two, and received an answering signal of two whistles from the Rosecrans; and it was thus agreed that the Rosecrans was to go ahead of the St. Johns. By these signals, about which there was no misunderstanding, the St. Johns was to pass between the two tugs, i. e., ahead of the Delaware and astern of the Rosecrans. She was heading nearly up the river, probably a little to the right; and, being bound for her usual landing place, pier 8, North river, her course was, I have no doubt, directed so as to pass as usual within 100 yards of pier 1. The St. Johns, until she passed Fort William, was going at her full speed of about 13 or 14 knots. Upon receiving the single whistle from the Delaware, and when about 300 yards distant, as the master estimates, her engines were slowed, and her speed was soon reduced to about 5 or 6 knots. The Delaware reversed her engines as soon as it was understood that the St. Johns was to go ahead of her, and her head swung around somewhat to the northward, so that the St. Johns passed about 100 feet to the eastward of her. The pilot of the Delaware testifies that the St. Johns sheered a little to the eastward in order to pass him, and that that was necessary to clear the Delaware. The pilot of the Rosecrans also testified that the St. Johns sheered to the eastward, so as to point to his bows when only 200 or 300 feet below him, in consequence of which, believing collision to be inevitable, he ordered his engines reversed, and gave notice to the persons on the canal-boat of the danger, leaving the pilot-house and going aft for that purpose. The master of the St. Johns denies that the St. Johns sheered to the eastward at all, or that any sheer was necessary in order to avoid the Delaware; and, as the latter was herself swinging to port, the St. Johns would seem to those on the Delaware to go to starboard, though she did not change at all. No reliance can be placed on the supposition of the pilot of the Delaware under such circumstances. Any such sheer is positively denied by the witnesses for the St. Johns, and is not corroborated by any further testimony, or by any apparent necessity or probability; and it must therefore be regarded as not proved. As soon as the Rosecrans was observed to be reversing, the St. Johns reversed full speed, gradually ported her wheel, and must have been nearly stopped at the collision. She struck the canal-boat, as above stated, about 10 feet from her stern. The pilot of the Rosecrans testifies that shortly before the collision the engines were again ordered ahead, and the engineer says he got one or two turns ahead before he felt the blow. The master of the St. Johns testifies that the bells to go ahead were rung on the Gen. Rosecrans only at the moment of collision, and that, when the vessels struck, the tow was substantially at rest; and that his stern remained imbedded in her side for some little interval, until he backed out, without any further breaking or tearing of the wood-work, as would have happened had the tow then had any forward motion.

There is considerable difference as to the place of collision. Most of the witnesses for the Gen. Rosecrans put it abreast of Castle Garden, and

about 200 yards from it, *i. e.*, inside of the line of the piers. The master locates it about 400 yards S. W. by W. from the end of pier A, some 400 feet outside of the line of pier 1, which would be about 450 yards from Castle Garden. Several of the witnesses were not in a position to observe the distance from the shore with any accuracy. I have no doubt, as above stated, that the place was near the line of the usual course of the *St. Johns* in approaching the landing, and not far to the eastward of the place stated by her master. Holding to that fact, the precise place is not further material.

Upon the above view it is clear that the immediate cause of the collision was the fact that the *Rosecrans* stopped in the water instead of keeping on in accordance with the previous understanding by signals. She was the vessel bound to keep out of the way. She selected her own mode of doing so. She adhered to this choice, and repeated it, after she knew that the *St. Johns* was to go ahead of the *Delaware*. It is plain that, had she kept on, she would have cleared the *St. Johns* on the latter's starboard side by at least 100 feet, *i. e.*, by as much space as the *Delaware* had on the *St. Johns'* port side, and probably more; and that without any change of the *St. Johns'* helm. This was sufficient space. The mode agreed on for avoiding each other was a proper one. Under this agreement, had the *Rosecrans* kept on, there would have been no risk of collision. The *St. Johns*, under such circumstances, owed no duty to the *Rosecrans*, except not to thwart her attempts to keep out of the way by going ahead as agreed, which the *St. Johns* did not do; and except that, after risk of collision appeared through the *Rosecrans'* fault, she was bound to do what was possible to avoid her. *City of Hartford*, 11 Blatchf. 72, 75; *The Nereus*, 23 Fed. Rep. 455, 456; *The Vanderbilt*, 20 Fed. Rep. 650; *The Governor*, 1 Abb. Adm. 108; *The Greenpoint*, 31 Fed. Rep. 231. Even with this stopping by the *Rosecrans*, she lacked but 10 or 12 feet of clearing. There was no reasonable or apparent necessity for stopping contrary to the agreement under which both had been acting. The *St. Johns* had a right to rely on the *Rosecrans* keeping on as agreed; and stopping, instead of being "necessary," was the maneuver that tended to bring on collision, instead of avoiding it. Rule 21 has no application in such circumstances. *The Northfield*, 4 Ben. 112; *The Britannia*, *ante*, 546. For stopping, the *Rosecrans* must therefore be held to blame.

I do not think any fault is established in the *St. Johns*. The courses of all these three vessels were direct, straight, and capable of being determined with reasonable certainty by pilots of ordinary skill. For vessels of but moderate size, all going at such moderate speed as these were going, and upon direct lines, in the day-time, and in clear weather, I cannot find that shaping their courses so as to allow a space of say 100 feet on each side for one to pass between the two other tugs with tows along-side is unusually close, or is dangerous or culpable navigation in this harbor, so as to involve the *St. Johns* in fault, as well as the *Rosecrans*. The ordinary practice, and the necessities of the harbor, do not require and often would not admit of more room being taken, without

using unreasonable embarrassments and delays in navigation. The question of a reasonable space and margin for safety is almost wholly a question of circumstances. The situation here was as simple and as little complicated as possible. It was quite different from that in the case of *The* 22 Fed. Rep. 175, and from that of the *Britannia* and the *Beacons*—the case above cited. There, the *Britannia's* course, instead of being fixed, and determinable, like the *St. Johns'*, involved a swing of points, and was therefore largely indeterminable. The fault of *Britannia* was in coming into the wrong part of the river; and the only question as regards her was whether that fault actively and proximately contributed to the collision. It was the same in the case of *The Active*. Here the *St. Johns* was going where she had a right to go; she was pursuing her direct and proper course; she did not, as I find, materially, if at all, deviate from it; she was not guilty of fault in shaping her course, or in consenting to go between the two tugs, as the *Rosecrans* proposed she should go; and the *St. Johns* had already slowed. The *Rosecrans* had no right to expect more; and she would have had a reasonably sufficient margin of safety had she kept on, as she was bound to do, and as the *St. Johns* had the right to rely on her doing. There was no apparent necessity for her contrary maneuver, and when the *St. Johns* saw this dangerous maneuver she instantly reversed, and hailed the *Rosecrans* to go ahead. It is urged that the *St. Johns'* helm ought to have been put instantly hard to starboard, instead of gradually; but any difference in the rapidity of putting the wheel over, when so near as they then were, could not have avoided this collision. The whole fault, I think, was with the *Rosecrans*. Decrees accordingly, with a reference to compute the damages.

THE GRAND ISLE.

NICOLE v. THE GRAND ISLE.

(Circuit Court, E. D. Louisiana. April 6, 1888.)

COLLISION—PROOF—WEIGHT OF EVIDENCE.

The owner of a lugger brought a libel for damages against the *G.*, a steam-tug. Two witnesses and libellant testified that the *G.* collided with the lugger in passing. Four employes of the *G.* testified positively that they passed the lugger without colliding in any way. Many circumstances corroborated claimant's witnesses, while some favored libellant and his witnesses. Held that, the weight of evidence being for claimant, and the record showing that libellant had grossly exaggerated the circumstances and damages, the libel should be dismissed.

In Admiralty. Libel for damages.

The *Grand Isle*, a steam-propeller, was plying between New Orleans and Grand Isle, through the "Company Canal," an outlet from the Mississippi river. On the 9th of November, 1886, she was on her way

to Grand Island, having a model barge in tow, which a man was steering. On her way, just after leaving the canal lock, she approached the lugger San Pierre, which boat she was charged with having run into and damaged. The rules and custom which regulate the navigation of the canal are that luggers, when a steamer is about to pass by them, are to be held by poles or ropes to the bank. The lugger was on her way to New Orleans, in charge of her owners, with a cargo of oysters.

J. D. Grace and F. Armant, for libelant.

O. B. Sansum and C. McRae Selph, for claimant.

PARDEE, J. The liability of the Grand Isle in this case turns upon the fact whether or no the Grand Isle collided with the lugger. If she did, she was in fault, and the lugger was not in fault thereafter in swinging out into the stream and colliding with the barge. If she did not, then the lugger was not properly held or secured to the bank of the canal, as the rules required, and whatever collision there was with the barge in tow was the result of the lugger's negligence. On this point Joseph Balsamo, crew of the lugger, swears "that the steam-boat struck us, and gave us a side lick in passing;" and he says, "the shock of the steam-boat caused the oysters to open." Pierre Nicole, the libelant, swears. "The steam-boat struck me; the shock broke the pole I was holding, and it struck me a blow which knocked me down." Salvadore Picone, witness for the libelant, who was with the lugger *Eva*, says, in his examination in chief, "that the steam-boat did not strike the lugger;" but on cross-examination says "that the steam-boat did strike the lugger." This constitutes the libelant's entire evidence on this material and turning point. The claimant produces the testimony of Michael McSwensy, Jacob Prevost, Francisco Payreagan, and Joseph Worley, all at the time employes of the Grand Isle, and all of them swear positively that the steamer passed the lugger without colliding in any way. William Appel, another employe of the Grand Isle, swears positively both ways. There are many circumstances developed by the testimony in the case which corroborate to some extent the testimony of claimant's witnesses, and there are some circumstances which corroborate the libelant and his witness. Where the truth lies, the court cannot undertake to say. The weight of the evidence is with the claimant. Considering this, and the fact apparent from the record that, if the libelant's boat was injured at all, he has grossly exaggerated the circumstances and damages, it is clear that the libel in this case should be dismissed; and it is so ordered, with costs of both courts.

J. B. BREWSTER & Co. v. TUTHILL SPRING Co. *et al.**(Circuit Court, N. D. Illinois. April 30, 1888.)*

1. SPECIFIC PERFORMANCE—REMEDY AT LAW.

Complainant, the owner of a patent for an improvement in carriage springs, made a contract with defendants, spring makers, by which defendants agreed to collect a certain royalty for each set of springs manufactured by them under complainant's patent, and sold to carriage manufacturers and dealers in carriage hardware, and to render quarterly accounts of such sales, and to permit complainant's agents to examine their books, a certain portion of the royalty to be paid to complainant. *Held*, that for a failure on the part of defendants to render accounts or to permit an examination of their books, complainant had an adequate remedy at law, and could, under Rev. St. U. S. § 724, compel a production of the books; and that specific performance would not be decreed.

2. SAME—MISTAKE—PATENT.

Complainant's patent, reissue of August 18, 1874, No. 6,018, was merely for the combination of a carriage spring with other elements, and not upon the manufacture of the spring itself; but the device was known in the market as the "Brewster Spring," and defendants supposed that the patent covered its manufacture, and there was evidence that complainant's agent so represented to them. Complainant knew of this mistaken impression on the part of defendants, but did not attempt to correct it, and the license was procured on the basis that defendants had no right to manufacture the springs without it. During the life of the contract other parties manufactured and sold the "Brewster Spring," without license or royalty, thereby injuring defendants' business, but complainant never took any legal steps to prevent such sales. *Held*, that complainant's conduct in obtaining the license, and in failing to protect its licensees, excluded it from the protection of a court of equity by specific performance.

In Equity. Bill for specific performance.

Gifford & Brown, B. F. Thurston, and Jesse A. Baldwin, for complainant.

Judd, Ritchie, Esher & Judd, for defendants.

BLODGETT, J. This is a bill in equity to compel a specific performance of a contract entered into between the complainant and the defendants F. H. Tuthill and W. H. Tuthill, and which it is claimed the defendant the Tuthill Spring Company is bound to perform and carry out as the successors of the individual defendants. It appears from the pleadings and proofs that the complainant, a corporation existing under the laws of the state of New York, is the owner of a patent granted to complainant, as assignee of Thomas H. Wood, on May 27, 1873, for "an improvement in carriage springs," which patent was reissued August 18, 1874, to complainant, as reissue No. 6,018. The patent in question is for a device for connecting the body of a buggy or light carriage with the side-bars by means of two transverse semi-elliptic springs, and the claim of the patent is in the following words: "The semi-elliptic springs, G, G, interposed between the side-bars, F, F, and the wagon body, all combined substantially as specified." It appears that after the patent in question was issued and placed before the public, buggies or light road wagons containing the device covered by this patent became popular, and quite an extensive demand was at once created for this class of ve-

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hicles, which became known to the trade as the "Brewster Buggy;" and the springs in question became known as the "Brewster Springs;" so that manufacturers of springs adopted the practice of making springs adapted to the combination covered by this patent, with the shackles or clips by means of which the springs were attached to the side-bars; and these springs became known to the trade as the "Brewster Springs" and "Brewster Cross-Springs," and were kept in stock by dealers in carriage makers' supplies. The complainant issued licenses to a large number of manufacturers, authorizing the use of the patent in the construction of vehicles; but after a time complainant adopted a method, which seems to have been wholly unique and new at that time, of licensing spring makers to manufacture and sell springs adapted to use in the combination covered by this patent; the spring makers to collect from the carriage makers a royalty for the use of the complainants, in addition to their price for the springs as manufacturers; and also to accompany each set of springs sold for use in the combination covered by the patent with a plate with the word "patented" stamped thereon, and the date of the patent; the object of this arrangement being to make the spring makers collect for the complainant its royalties; and to the extent of the springs sold and royalties so collected to license the use of the patent. Among other spring makers to whom licenses of this character were issued, were the defendants F. H. and W. H. Tuthill, then doing business as manufacturers of springs in the city of Chicago, under the firm name of Tuthill & Co. This license, which bears date on the 7th of September, 1880, gives and grants to the firm of Tuthill & Co. a license to make and sell springs adapted to be used as shown and specified in this reissued patent, and provides that the licensees shall collect for each set of springs they shall sell to carriage or wagon manufacturers a royalty of five dollars for each set of springs; and for each set of springs sold by them to dealers in carriage hardware, a royalty of four dollars from the purchaser thereof; but they were not to collect any such royalties from purchasers who had been licensed by the complainant to use the said patented device. The licensees were bound by the terms of the license contract to keep a correct and separate account in a suitable book or books of all such springs—that is, the "Brewster springs"—that they should make or cause to be made; and also of all such springs which they should sell, or cause to be sold, with the names of the parties to whom they were sold; including those sold to parties holding licenses from complainant, which book or books should be at all suitable times open to the inspection of the complainant or his authorized agent, with authority to make copies thereof; and the licensees also agreed to render to the complainant, on the 1st days of January, April, July, and October, of each year, a correct account in writing of all said springs made by them during the preceding three months, of all said springs sold or caused to be sold by them during the three months preceding the rendition of said account, and also a correct account of the names of all the licensees to whom they had sold, or caused to be sold, any of said springs during the said period, and the number of sets of said springs so sold to each; the correctness of which report

and account was to be verified by the oath of some person having the best means of knowing the truth thereof. And the said Tuthill & Co., as such licensees, were also within 10 days after the rendition of such account, to pay to complainant three dollars for each set of springs reported in said account as having been sold or caused to be sold by them, except those which had been sold to parties holding licenses from the complainant to use said patent. The licensees were also to furnish the purchaser of each set of springs with a plate, which was to be provided by complainant, which should bear the following inscription, "Patented May 27, 1873." It also appears that complainant has, since the making of this license, from time to time, reduced the amount of royalty to be charged and collected by the manufacturers for the use of said patented device; but the main features of the license have not been in any other respect materially modified. It further appears that similar licenses were given by the complainant to about 20 other spring manufacturers in the United States; and that there are about 100 manufacturers of carriages and buggies licensed by the complainant, who, by the terms of the licenses given to Tuthill & Co. and to other spring makers, were to pay no royalty for the springs purchased by them. It further appears from the pleadings and proof that in May, 1883, a corporation was organized known as the "Tuthill Spring Co.," and that since the organization of such corporation the said firm, and the individual members thereof, have ceased to do business as spring manufacturers, and said corporation has succeeded to the business formerly conducted by the firm, the said F. H. and W. H. Tuthill being the principal stockholders and business managers of said corporation; and that since the formation of said corporation it has manufactured and sold Brewster springs quite extensively. It also appears from the proof that the firm of Tuthill & Co. and the Tuthill Spring Company have sold a large number of these springs adapted for use in the patented combination, upon which they have failed to collect the royalties called for by the license, and have failed and refused to report, as called for by the terms of the license, the number of springs made and sold, and to whom sold, and to pay over the royalties collected on said springs; that neither said firm nor said company have made any reports of springs sold since October, 1884; and by their answer in this case the defendants say they have determined to pay no more royalty, and to render no more accounts for such springs. It also appears that the defendants have refused to allow the agents of the complainant to inspect their books of account for the purpose of ascertaining the number of springs sold, and to whom sold, pursuant to the provisions of the contract. The bill asks that the defendants, Tuthill & Co., and the Tuthill Spring Company, be compelled to specifically perform their said agreement to render on the 1st days of January, April, July, and October of each year correct accounts, as called for by their said license; and that the defendants be compelled to specifically perform all the provisions of said agreement, and to give complainant's agents the right to inspect their books which contain accounts of the sales of said springs, and to take copies thereof.

The defenses set up, briefly stated, are: (1) That equity has no jurisdiction in this case, because the complainant has a plain, adequate, and complete remedy at law; (2) that the license contract was obtained from the defendants Tuthill & Co. by fraud and misrepresentation; and ought not to be enforced in a court of equity; (3) that the patent in question is void for want of novelty; (4) that the reissued patent is void by reason of its expanded claim.

As to the first point made, that complainant has an adequate remedy at law, I can see no reason why the complainant in an action at law cannot recover all the damages for the breach of this contract that could be awarded by a court of equity, and could have action for successive breaches of the same; and by section 724 of the Revised Statutes complainant can compel the production of defendants' books to the same extent that this court can do sitting as a court of equity.

Upon the second point made by the defendant, that the contract was obtained from the defendant by fraud and misrepresentation, and hence ought not to be enforced in a court of equity, there is a conflict of testimony. The defendant William H. Tuthill, states in substance, that some time before the date of the license, a man purporting to be from J. B. Brewster & Co. called on him, and represented that it would be necessary for Tuthill & Co. to take a license from Brewster & Co., before the firm could manufacture "Brewster springs;" that at this time he, William H. Tuthill, was entirely ignorant of the scope and claims of the complainant's patent; that he knew there were springs in the market known as "Brewster Springs," but did not know, until he was so informed by complainant's agent, that it was necessary to have a license in order to manufacture them; and that at the time he applied for the license he was laboring under the impression or supposition that the complainant's patent covered the manufacture of the spring itself; and was also led to believe, from what was stated to him by complainant's agent, that complainant's patent was upon the spring, and not upon the combination of the spring with other elements. Mr. Tucker, the complainant's agent, who had the interview with W. H. Tuthill, testifies, in substance, that he told him that a license would be necessary in order to entitle them to manufacture the springs; but he did not tell young Tuthill that the patent was upon the spring. This is the substance of the testimony upon the question as to the circumstances under which the license was applied for; and, taking the allegations of the bill, and the statements of Mr. Tucker as to the fact that soon after the issue of this patent the springs used in the combination became known as "the Brewster Springs" or "Brewster Cross-Springs," and were dealt in by dealers in carriage makers' hardware and supplies and others, by that name. I have no doubt that the impression on young Tuthill's mind, at the time he was called upon by Mr. Tucker, was that the patent was upon the springs. This was a natural impression from the manner in which the springs were spoken of in the trade and business; and, if Mr. Tucker did not actually tell Mr. Tuthill that the patent was upon the springs themselves, I have no idea that he attempted to disabuse his mind of the erroneous impression he had upon

that subject, but allowed him to remain under the supposition that the patent was upon the springs. While the circumstances were such that Mr. Tucker ought, as complainant's agent, to have frankly informed Tuthill & Co. that the springs were not patented alone or by themselves, but that complainant had adopted the plan of licensing spring makers as the easiest method of collecting its own royalties, and then left them at liberty to decide whether they would take a license or not. The complainant, as the owner of this patent, had adopted a novel expedient or attempt to make the spring makers its agents for the introduction of its patents, and the collection of its royalties, acting probably under the advice that manufacturers of these springs adapted to be used in the patented combination were contributory infringers of the patent, if they did so without license. The agent or agents of the complainant would naturally claim to a spring manufacturer that such spring maker had no right to make and sell the "Brewster Springs," as they were known, without a license from complainant; and the natural inference of any person untrained in the technicalities of the patent law, or the peculiar procedure of the complainant with reference to this patent, would be that the patent was upon the springs themselves. Hence, I have no doubt that this license was taken by the firm of Tuthill & Co. under the impression that the patent was upon the springs, and that they could not manufacture them without a license from the complainant. This firm was just starting in business, and was undoubtedly desirous of manufacturing any and all articles in their line for which there was a demand, and also cautious about getting into trouble by infringing any one's patent, and for these reasons this junior member of the firm was easily persuaded to take a license, the sole terms of which were dictated by complainant; and these terms, if lived up to and enforced, if not in themselves inequitable and unjust, are, to say the least, embarrassing to the licensee, as they virtually make the licensee admit that he is a contributory infringer of complainant's patent by making and selling these springs; leaving the field open for bolder men, who refuse to take a license to make springs, and sell them to whoever will buy them; and to contest not only the question of contributory infringement, but also the validity of the patent itself. The complainant has instituted no prosecution which has been brought to trial, and apparently has sought to force no prosecution to trial against these manufacturers on the ground of their being contributory infringers of its patent; so that, in effect, the market for cross-springs of this character has been supplied mainly by manufacturers who have taken no licenses from the complainant, and were free to sell to whoever they saw fit, making their own price merely as manufacturers, and with no royalty or patent fee added. That this conduct on the part of complainant has had the effect to interfere with the business of the firm of Tuthill & Co. and the Tuthill Spring Company, is clearly shown by the proof; and it would seem that every dictate of justice and fair dealing required that this complainant should protect its licensees if it expected them to live up to the terms of their licenses; and, not having done so, I am of the opinion that the conduct of the complainant in obtaining this license

under what in effect amounted to a false statement as to the scope of the patent, and the conduct of the complainant since the license was obtained, in not protecting its licensees, is such as to exclude the complainant from the protection of a court of equity by the specific enforcement of this contract. Complainant has put defendants in such relations to it under this license that every dictate of fair dealing required that they should not only establish and maintain the validity of the patent as against those who used the entire combination, but also that they sustain by judicial proceedings the position on which they exacted this license from defendants, viz., that all who made and sold springs adapted and fitted for use in the combination were infringers, and thus have protected the defendants in the manufacture of the springs; and this complainant has wholly failed to do. The law is well settled and elementary that where a contract is harsh and oppressive, or where it has been obtained by fraud, or where even one party has executed it under a mistaken impression of its scope and provisions, a court of equity will not interfere to specifically enforce it, but will leave the complainant to his remedy at law. 2 Story, Eq. Jur. §§ 693, 769, 770; Bigelow, Fraud, 390, 391; Adams, Eq. 83; *Race v. Weston*, 86 Ill. 94. I am, therefore, of opinion that upon this second ground, if not upon the first, the complainant is entitled to no relief in this court.

The third and fourth points made by the defendants, which challenge the validity of the patent for want of novelty, and by reason of the reissue with expanded claims, while not necessary for consideration in the view I take of the case upon the other points made, may, I think, be so far considered as to say that the defendants have put into the record a large amount of proof bearing upon these questions; and in my estimation this proof could never have been considered by the court, because, if this contract was binding upon the defendant, and could be enforced in this court, I have no doubt the defendants were estopped from denying the validity of the patent from any cause; and hence, while dismissing this bill for want of equity, it will be with the provision that the defendants pay their own costs, as the bulk of the costs on the part of defendants has been made by taking proof upon these two latter points.

ST. LOUIS & C. R. Co. v. THOMAS *et al.*

(Circuit Court, S. D. Illinois. February 9, 1888.)

EMINENT DOMAIN—TRANSFER-BOAT LANDING.

Act Ill. July 1, 1887, known as the "Water-Craft Act," provides that all railroad companies having a terminus upon any navigable river bordering on that state shall have power to own for their own use any water-craft necessary in carrying across such river any cars, etc., "provided that no right shall exist under this act to condemn any real estate for a landing for such water-craft, or for any other purpose. And this act shall only apply to such railroad companies as own the landing for such water-craft." *Held*, that a rail-

road company whose road terminated on the Ohio river at Cairo could not condemn land for an incline track and transfer ferry-boat landing, in order to connect with another railroad company.

Condemnation Proceedings. On motion for rehearing.

John M. Lansden, A. Leek, and Greene & Humphrey, for petitioner, and resisting motion.

Brown, Wheeler & Brown, and John M. Butler, for defendants, and also for the motion.

Before GRESHAM and ALLEN, JJ.

GRESHAM, J., (*orally*.) This proceeding was commenced by the St. Louis & Cairo Railroad Company and the Mobile & Ohio Railroad Company, in the old Wabash case against Thomas and Tracy, trustees of the Cairo, Vincennes & Chicago Railroad Company and the Cairo Transfer Company, to condemn a piece of land on the bank of the Ohio river, at Cairo, for an incline track and transfer ferry-boat landing. We have given such consideration to the questions arising on the petition for a rehearing as the limited time justified, and are prepared to announce our conclusion.

One of the objections urged against the proceeding is based upon what is known as the "Water-Craft Act," passed by the Legislature of Illinois on July 1, 1877. So much of that act as it is material to notice reads thus:

"Be it enacted by the people of the state of Illinois represented in the general assembly, that all railroad companies incorporated under the laws of this state having a terminus upon any navigable river bordering on the state shall have power to own for their own use any water-craft necessary in carrying across such river any cars, property, or passengers transported over their line, or transported over any railroad terminating on the opposite side of such river, to be transported over their line: provided, that no right shall exist under this act to condemn any real estate for a landing for such water-craft, or for any other purpose. And this act shall only apply to such railroad companies as own the landing for such water-craft."

This act confers upon Illinois railroad corporations terminating upon navigable rivers along the border of the state the right to own and operate transfer boats between the opposite sides of such rivers. The St. Louis & Cairo Railroad Company owns a line of road terminating on the Ohio river at Cairo, and the Mobile & Ohio Railroad Company owns a line of road terminating on the same river immediately opposite; and the former company needs, or supposes it needs, land at Cairo upon which to construct its track down to the river, and for a landing, from which it may run its cars upon boats to be transferred to the Mobile & Ohio road on the opposite side of the river, and to enable it to receive the cars of that company. The question is whether land can be acquired by the petitioner for this purpose by condemnation. If this act governs this case, —and it seems to me that it does,—the petitioner cannot own a transfer ferry-boat, unless it also owns a landing; and it is not permitted to own the land for a landing unless it acquires it by purchase. Why the legislature denied to corporations thus situated the right to acquire land by

condemnation for a necessary purpose we do not know, nor is it material to inquire. It is sufficient to say that the legislature was authorized to pass such an act, and the courts must enforce it.

The facts stated in the petition seem to bring the case squarely within the statute; indeed, the act seems to have been passed with reference to the conditions which now exist at Cairo. I doubt if similar conditions exist elsewhere on the border of Illinois. As already stated, the road of the petitioner terminates at Cairo. It does not need the land in controversy except for the purpose of constructing an incline, and a landing for transfer boats. It is not contended that additional terminal facilities are needed for any other purpose. I find no difficulty in agreeing with the counsel for the petitioner on all other points discussed in the argument. Under the Illinois statutes, the petitioner and the Mobile & Ohio Company are authorized to consolidate; and, but for the act of 1877, I should feel inclined to hold that the petitioner might condemn the land in controversy, and own transfer ferry-boats, solely for the purpose of transferring cars from one side of the river to the other. In *Railroad Co. v. Railroad Co.*, 13 N. E. Rep. 141, the supreme court of Illinois held that the right of way of a railroad company in Illinois could be condemned and appropriated by another railroad company, under the statutes of that state, only to the extent of crossing or intersecting. The land in controversy is not part of the right of way of the Cairo, Vincennes & Chicago Railway Company.

Judge ALLEN is not yet prepared to hold that the act of 1877 is an obstacle to the prosecution of this proceeding, but he has such doubts upon the question that he has united with me in allowing a rehearing.

ALLEN, J. I am not satisfied that the water-craft act of 1877 presents an insuperable objection to the condemnation of the strip of land sought to be condemned under the eminent domain rule. The St. Louis & Cairo Railroad, having established a business connection with the Mobile & Ohio Railroad, seems entitled to facilities to transfer cars over the Ohio river. I have sufficient doubt on this question, however, to induce me, in view of its great importance, to concur in sustaining the motion for a rehearing, in order that the question may receive further and more mature consideration.

BROWN v. CARBONATE BANK OF LEADVILLE.

(Circuit Court, D. Colorado. May 8, 1888.)

1. BANKS AND BANKING—NATIONAL BANKS—INSOLVENCY—FRAUDULENT TRANSFERS—PLEADING—MISJOINDER OF CAUSES.

The complaint in an action to recover the value of certain notes alleged to have been the property of a bank of which plaintiff was receiver, and to have been wrongfully converted by defendant, contained two counts. The first charged that an officer of plaintiff's bank surreptitiously took these notes from its vaults, and delivered them to defendant, which took with knowledge,

etc.; the second charged that plaintiff's bank, in contemplation of insolvency, and with a view to prevent the application of these assets in the way prescribed by law, transferred them to defendant. *Held*, that a demurrer on the ground of a misjoinder of causes of action would not lie, the two counts in reality stating but one cause of action.

2. **SAME.**

The first count states clearly and distinctly what would be tantamount to the common-law action of trover, and does not attempt to unite that form of action with one under Rev. St. U. S. § 5242, declaring void all preferences made by a national bank after, or in contemplation of, insolvency.

3. **SAME—CONCLUSIONS OF LAW.**

The allegation in the second count of the complaint, that plaintiff's bank, having refused to pay its circulating notes, and suspended payment to its creditors, and, being in default, and in contemplation of insolvency, assigned and transferred certain notes to defendant, with a view to prevent the application of its assets among its creditors in the manner provided by law, is not open to objection as stating merely conclusions of law.

At Law. On demurrer to complaint.

A. W. Rucker, for plaintiff.

S. D. Walling, for defendant.

BREWER, J. In the case of *J. Sam Brown, Receiver, v. The Carbonate Bank of Leadville*, there is a demurrer to the complaint. The gist of the complaint is the recovery of the value of certain notes alleged to have been the property of the First National Bank of Leadville, of which the plaintiff is receiver, and to have been wrongfully obtained and converted by the defendant. The complaint is in two counts. The first charges in substance that one of the officers of the First National Bank surreptitiously took these notes from the vaults of that bank, and delivered them to the defendant, which took with knowledge of the circumstances; the second alleges that the First National Bank, in contemplation of insolvency, and with a view to prevent the application of these assets in the way prescribed by law, transferred them to the defendant. The demurrer raises—*First*, the question of a misjoinder of causes of action. Obviously this is not well taken, for a demurrer lies on the ground of misjoinder only when there are two causes of action united in one complaint, which, by reason of a dissimilarity in their nature, ought not to be prosecuted together, as, for instance, one cause of action in ejectment with one for libel. Under the statutes, no such joinder can be had. Here, even if there were two different transactions,—two separate causes of action for the recovery of distinct and independent assets,—each cause of action would rest upon an implied promise to pay, would be similar in nature, and the two could be joined in one complaint. As a matter of fact, there is but one cause of action stated in two counts. The *second* ground of the demurrer running to the first count is that there is an attempt in it to unite a cause of action—the old common-law action of trover—with one under the statute. Section 5242, Rev. St. I think this is a mistake. It states clearly and distinctly what would be tantamount to an old common-law action of trover,—the wrongful receipt and conversion of these notes by the defendant. Other matters are stated which may not be necessary to a full presentation of that cause of action,

—statements of facts surrounding and accompanying the transaction, which may be unnecessary,—but no objection of that kind can be reached by demurrer. The other objection is to the second count, and it is claimed that that states merely conclusions of law. It charges briefly that the First National Bank of Leadville, having refused to pay its circulating notes, and suspended payment to its creditors, and being in default, and in contemplation of insolvency, assigned and transferred to the defendant, with a view to prevent the application of its assets among its several creditors in the manner in such cases made and provided by law, certain notes then described. That is enough. It states a cause of action clearly under the statute. It is not necessary to state the evidence,—describe what circumstances created the condition of insolvency or the manner in which the transfer was made. It is enough to allege that the bank acted in contemplation of insolvency, and with a view to prevent the application of these assets as required by law.

The demurrer will be overruled. Leave to answer in 15 days.

HAAG v. BOARD OF COUNTY COM'RS.

(Circuit Court, D. Colorado. April 18, 1888.)

TURNPIKES AND TOLL-ROADS—COUNTY AID—BONDS—MISNOMER OF COMPANY—ESTOPPEL.

Under act Colo. Jan. 10, 1868, §§ 52, 53, (Rev. St. c. 18,) requiring the approval of the voters to the issuance of county bonds to aid in the construction of wagon roads, where the voters approve the issuance of such bonds in the name of the Del Norte & Summit Wagon Road Company, and the county thereupon issues and registers bonds, but in the name of the Del Norte & Summit-Wagon Toll-Road Company, the companies being one, and the bonds reciting that the voters have approved their issue in the latter name, and where the county pays the interest regularly, and assumes the management of the completed road, the bonds are valid in the hands of a *bona fide* purchaser notwithstanding the misnomer.

At Law. Action on county bonds.

The plaintiff, Joseph Haag, brings this action on bonds issued by the board of county commissioners of Rio Grande county, Colo., to aid in the construction of a wagon road.

Rogers & Cuthbert, for plaintiff.

R. D. Thompson and *E. F. Richardson*, for defendants.

BREWER, J. This is an action on county bonds, of which the plaintiff is the *bona fide* holder. They were issued July 1, 1876, and contain this recital:

"This debt is authorized by an act of the legislative assembly of the territory of Colorado, approved the 10th day of January, 1868, and under the provisions of sections 52 and 53 of chapter 18, Revised Statutes of Colorado. In pursuance whereof, upon the 13th day of August, 1875, the commissioners of Rio Grande county, of said territory, submitted, upon written applica-

tion of one hundred voters of said county, to the electors thereof, in manner prescribed by law, the following proposition: 'Shall the county of Rio Grande, territory of Colorado, issue six thousand dollars of its coupon bonds, to be dated July 1, 1876, and bear interest at the rate of eight per cent. per annum; the interest payable annually at the office of the treasurer of the territory of Colorado, the principal payable in ten years after the 1st day of July, one thousand eight hundred and seventy-six; said bonds to be used by the county of Rio Grande in aid of the Del Norte & Summit-Wagon Toll-Road Company?'—which said proposition, upon the 14th day of September, 1875, at a special election held in said county, was decided in the affirmative by a majority of the electors of said county."

They were duly registered on August 8, 1876, and the certificate of of the territorial auditor affixed. The statutes of Colorado make such certificate evidence of the legal issue. If by that were meant conclusive evidence, nothing more need be said, for there is nothing on the face of the bonds to show a want of authority on the part of the county to issue, or a failure to comply with prescribed conditions. It may mean, however, only *prima facie* evidence; and yet, would not that be sufficient to uphold the bonds in the hands of a *bona fide* holder, as against any mere defect not apparent on their face? I do not care, however, to rest this case on either of these suggestions, for there has been a full showing of the facts attending their issue, and I am satisfied therefrom that they are both legally and equitably the valid obligations of the defendant. The statute authorized a subscription to the capital stock of an organized road company, and the payment of that subscription in bonds. The recital does not affirmatively show whether a subscription or a donation was made, or whether the recipient was an incorporated company or not; but the testimony puts the matter at rest. The company was incorporated, stock was subscribed, was issued to and received by the county; it took part in the corporate proceedings as a stockholder, fixed the rates of toll, offered some shares for sale, and, finally, took possession of the road.

The defense presented—at least the only one which requires notice—is that the bonds were issued to the wrong party, and thus the intention of the voters thwarted. In 1874 a company was formed, but not incorporated, known as the "Del Norte & Summit Wagon Road Company." The petition for an election, the election notice, and all proceedings connected with the election, spoke of a subscription to the capital stock of the Del Norte & Summit Wagon Road Company. This petition was filed with the county commissioners on July 23, 1875. Three days before, articles of incorporation of the Del Norte & Summit Road Company were signed. On the 23d, the day the petition was filed, they were acknowledged by the incorporators, and on July 27th they were filed in the office of the secretary of state, and the incorporation perfected. This was the only incorporated company in existence until some time after the issue of the bonds. On June 30, 1876, this company changed its name to the "Del Norte & Summit Wagon Toll-Road Company,"—the name found in the bonds. This declaration of change of name was filed in the office of the county clerk of the county, and also in the office of the sec-

retary of state. On July 6, 1876, the county commissioners passed a resolution authorizing its president to subscribe to the capital stock of the Del Norte & Summit Wagon Toll-Road Company, "which said company," as the resolution reads, "was formerly known and designated as the 'Del Norte & Summit Road Company,' it being the same company for which bonds to the amount of six thousand dollars were voted in aid of, at the election held in said county on the 14th of September, 1875." The resolution also provides for a certain disposition of all the stock of the company, both that belonging to the county and that retained by the incorporators, which was to be placed in the hands of a trustee as guaranty for the completion of the road. Thereafter, at the solicitation of the county officers and other citizens, a banker in the county purchased the bonds, and the proceeds were used in the construction of the road. The county, as heretofore stated, voted on this stock, participated in the proceedings of this company, fixed the rates of toll, offered the shares for sale, and finally took possession of the road. Further, it paid the interest on the bonds until they matured,—a period of 10 years. Now, although the name used in the election proceedings was not technically correct, yet the whole conduct of affairs from the commencement to the close shows what company was intended, and that the right company received the bonds. The identification is complete, and a mere misnomer in no manner affects the validity of the subscription or the bonds. *Moultrie v. Fairfield*, 105 U. S. 370; *Anderson Co. v. Beal*, 113 U. S. 227, 5 Sup. Ct. Rep. 488. Legally, therefore, the county is bound to pay this debt; equitably, also, it is bound, for it secured that which a subscription was intended to secure,—the completed road; it received the stock promised for its subscription; and, finally, took possession of the road itself. It recognized for 10 years the validity of the bonds by the payment of the annual interest, and only challenged their validity when the maturing of the debt made the necessary payment a burden. Under those circumstances, the language of DRUMMOND, C. J., in *Bank v. Springfield*, 4 Fed. Rep. 276, is pertinent:

"But the equity of the holders of these bonds does seem so strong that no court, unless under a sort of moral or legal compulsion, would feel inclined to say, under all the circumstances of this case, that these bonds were invalid. Having been issued for so long a time, the interest on them having been paid, their validity having been recognized again and again in after years by the city authorities, it does seem as though it is too late now, under all the circumstances of this case, for the city to question their validity. I therefore hold that they are valid, and the city is liable. It has issued the bonds, obtained the money, and the benefits it has conferred; and law and equity declare that the debt shall be paid."

Pertinent, also, is the language of the apostle:

"Finally, brethren, * * * whatsoever things are honest, whatsoever things are just, * * * whatsoever things are of good report, if there be any virtue, and if there be any praise, think on these things."

The plaintiff is entitled to judgment.

BLISS v. UNITED STATES.

(Circuit Court, E. D. Missouri, E. D. April 14, 1888.)

1. CLAIMS AGAINST UNITED STATES—JURISDICTION OF CIRCUIT COURTS—PREVIOUS REJECTION.

Act of March 3, 1887, giving to United States circuit courts jurisdiction of claims against the United States, contains a proviso "that nothing in this section shall be construed as giving either of the courts herein mentioned jurisdiction to hear and determine * * * claims which have been heretofore rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same." *Held* that, the comptroller of the treasury having charge of the adjustment of accounts against the government, a rejection of an account by him is a rejection by a department authorized to hear and determine the same, within the meaning of said proviso.

2. SAME.

Where an account against the United States for legal services has been approved by the attorney general, adjusted by the first auditor, certified to the first comptroller, and by him approved, but not paid, the United States circuit court has jurisdiction of an action to recover the amount thereof, under act of March 3, 1887.

At Law. Plea to the jurisdiction of the United States circuit court.

William H. Bliss, pro se.

Thomas P. Bashaw, Dist. Atty., and *Thomas M. Knapp*, Asst. Dist. Atty., for the United States.

BREWER, J., (*orally.*) In the case of *William H. Bliss v. United States*, there is a plea to the jurisdiction of this court. The action is one against the United States, to recover for services as United States district attorney, and under special employment. It is brought under the act of March 3, 1887, which gives to the circuit courts jurisdiction of claims against the United States, with this proviso:

"Provided, however, that nothing in this section shall be construed as giving either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late civil war, commonly known as 'war claims,' or to hear and determine other claims which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same."

The plea is one running to the entire petition, there being several counts; and it rests upon this last proposition, that this court has no jurisdiction in cases where the claims have been heretofore rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same. It appears from the amended petition that the treasury department refuses to pay any of these claims. That the comptroller is an officer having such charge of the adjustment and settlement of accounts against the government that his action amounts to that of the treasury department in rejecting a claim, is, we think, clear. Section 2169 gives to him the power and makes it his duty to superintend the adjustment and preservation of the public accounts, subject to his revision. Section 191, after providing for the presentation of claims, declares: "But the decision thereon shall be final and conclu-

sive, as hereinbefore provided." That is, he is the officer of the treasury department to whom the subject of accounts is intrusted, and when he acts upon those accounts, it is the action of the department. When he rejects an account, it may be said, within the scope of this act of 1887, that there has been a rejection by a department authorized to hear and determine the same. Plaintiff insists that this language in the act of 1887 implies a judgment, or that which is equivalent to a judgment, and that it means simply to say that the court shall have no jurisdiction of claims which have been once adjudicated. If it meant only that, the language was surplusage, because if there has been once an adjudication, of course the matter would not be open to readjudication. What is meant by that, as we construe it, is that when, in 1887, congress said the court should have jurisdiction of suits against the government, it was intended to apply prospectively and to claims which should originate in the future, or, if they originated in the past, that no claim which had once been presented to any court, department, or commission, and had been rejected or reported on adversely,—for that is the language of the section,—should be suable in the courts. With that construction, whenever a claim has been presented to a department, or an officer of that department authorized to pass on the claim, (and act upon it conclusively, so far as the government is concerned, except when congress intervenes,) and rejected or reported on adversely, that claim is not the subject of litigation in the courts, if so acted on before the 3d of March, 1887; and, according to the admission here, these claims were acted upon and payment refused prior to such date.

There are, however, in the first count, allegations which compel us to overrule the plea to the jurisdiction, whatever the facts may be as developed hereafter. They are that the plaintiff was employed to render special services by the attorney general; that the account was approved by the attorney general, and adjusted by the first auditor, and a balance of \$2,530 found to be due the plaintiff, and that it was certified by the auditor to the first comptroller, and by him approved, but not paid. So, on these allegations, it appears that all the officers of the government charged with an examination of the facts have approved this claim, and it never has been rejected. The plaintiff simply has not received the money. He stands in the attitude of a man with a claim against a corporation, which the corporation audits, approves and orders paid, but does not pay. That is the *status* of this claim, according to the allegations of the first count, and so it is a claim which has never been rejected or reported on adversely by any department or commission, and the plea, being to the petition as a whole, will have to be overruled, though on the main question discussed by counsel in their briefs we think the views of the district attorney are right, and the views of the plaintiff are wrong.

SMITH *et al.* v. DAVIS.*(Circuit Court, N. D. Illinois, S. D. April 23, 1888.)*

1. PATENTS FOR INVENTIONS—PATENTABILITY—PRIOR USE.

In support of prior use set up as a defense to a bill for infringement of letters patent No. 371,524, of October 11, 1887, to Elias Smith, for an induction coil, whereby a current of electricity may be used with advantage to deaden the pain caused by dental operations, defendant showed that one Grimes, a dentist, had in 1869 taken a galvanic battery and attached to it a third wire which in turn he attached to the operating instrument, and that the apparatus was successfully worked to prevent pain in dental operations in the same manner as in the Smith patent. He used the apparatus for about a year, and then abandoned it until August, 1887, when he took it up again after the Smith machine had gone into use. The only witness to this effect was Grimes himself, and he was unable to produce his apparatus. It was also shown that Grimes had copied bodily the certificates contained in Smith's circulars as to the value and usefulness of that patent, and had used them to advertise the machines made by himself in 1887. *Held*, that the evidence failed to establish prior use.

2. SAME.

Defendant also showed by one Froeckman that he, F., had made batteries with three wires, similar to those of Smith, as early as 1873, and that batteries of his make had been used about that time in a dime museum in St. Louis, and on the streets of that city by one James or Jacques, a sort of street fakir, to cure toothache, earache, neuralgia, etc. The battery was, however, not produced, although it was shown to be in the possession of Jacques' widow, in St. Louis, and the case was tried in Peoria, Ill. The widow also testified that the battery had but two wires, and in this she was corroborated by two other witnesses. *Held*, that the evidence did not establish prior use.

In Equity. Bill for infringement.

H. W. Wells, for complainants.

C. N. Mihegan, for respondent.

BLODGETT, J. In this case defendant is charged with the infringement of patent No. 371,524, granted October 11, 1887, to Elias Smith, assignor of one-half to Fred. Kimble, for an induction coil. The purpose of the invention, as stated in the specifications, is to produce means whereby a current of electricity may be used with advantage to deaden the pain caused by dental operations. The apparatus, described at length in the specifications and drawings, consists of a galvanic battery, with two jars and provision for raising and lowering the cells into the jars, with wires leading from the cells to the poles, and from the poles are insulated wires terminating in electrodes, which are to be taken in the hands of the patient. The current from the positive pole is divided, and a third wire is taken from this pole and attached to the forceps or other instrument with which the dental operation is to be performed, and, when in use, the cells are dropped, by a device shown, into the liquid, so as to create the galvanic current. The patient takes the two electrodes, one in each hand, while the operator applies the forceps, or other instrument, to which the third wire is attached, to the tooth or other part upon which the operation is to be performed; the effect being, as is claimed, to deaden the nerves to such an extent as to make

the operation substantially painless. The patent contains seven claims, but infringement is only charged in this case of the fourth claim, which is in the following words: "(4) In an electrical apparatus for dental purposes, a generator, an induction coil, the electrodes, and the wire from one of the discharge posts connected with a pair of forceps or the like, substantially as described." There are several other features in the patent, upon which no infringement is charged in this case. The defendant, upon the hearing, substantially admitted the infringement of this fourth claim of the complainants' patent; that is, the defendant uses an electrical or galvanic apparatus organized for the purpose of use by dentists to deaden or prevent pain, with two electrodes to be held in the hands of the patient, and a third wire to be attached to the forceps or instrument in the hands of the operator; so that we have a machine organized for the same purpose, and operating in substantially the same manner, as is shown in the complainants' patent.

The defense interposed is prior use—*First*, by F. T. Grimes, in 1859, at Liberty, Mo.; *second*, the manufacture of a similar battery by E. A. Froeckman, who testifies that he made such batteries as early as 1873, with three wires, to be used for the purpose of alleviating pain. The only question is whether such prior use is sufficiently established to defeat this patent.

Dr. Grimes testifies in substance that in 1859 he was a dentist at Liberty, Mo., and that he borrowed from the college at that place a galvanic battery, to which he attached a third wire to be attached to the forceps or other dental instrument, and that he used this battery, organized and arranged as stated, for the purpose of preventing pain in the extraction of teeth and other dental operations for about one year thereafter, and that it was successful, and operated to prevent pain in such operations in the same manner as does the complainants' machine. The testimony of this witness seems to me wholly improbable. I can hardly believe it possible that a man, nearly 30 years ago, could have discovered a mode of preventing pain in dental and surgical operations, so effective as the proof shows this method to be, and had brought it into successful use for a year or thereabouts, and then to have abandoned it wholly, and not resumed its use until about 1886 or 1887. The story seems to me so improbable that it should require strong corroboration to induce belief. This witness in his direct examination not only testifies to the use of this battery in 1859 by him for dental purposes, but also testifies that he made another battery in 1886, of the same character; but upon cross-examination it very clearly appears that he did not make the last battery until some time in August, 1887, and after the complainants' battery had gone into use, and after he, the witness, had seen the circulars and the description thereof, if he had not seen the complainants' battery. It also appears from the proof that this witness entered upon the manufacture of this kind of batteries; and, for the purpose of giving currency and publicity and making a proper impression upon the public mind to secure sales, he copied bodily the certificates which were contained in complainants' circular in regard to the value and usefulness of the com-

plainants' machine. This unconscionable act on the part of this witness goes far, in my estimation, to create doubts as to his integrity, and, of course, operates to throw doubt upon his truthfulness. If such a machine as he says he made in 1859 was in fact made at Liberty, Mo., and if he successfully performed dental operations with it, it would seem at least not improbable that he could produce the witnesses, if he could not produce the machine with which he claims to have made such a success. It is hardly possible that a patient whose teeth were extracted without pain by the use of a galvanic battery by this witness would have forgotten the circumstance; and, if there was any extensive use, some, if not many, such patients could be produced to testify to the fact. Standing alone, this witness' testimony, therefore, it seems to me, is not sufficient to establish such prior use as should defeat this patent.

The testimony of the witness Froeckman is, in substance, that he made such batteries,—that is, batteries that had three wires, one of which was adapted to be attached to the surgical instrument with which the operation was to be performed,—as early as 1873, but he produced no batteries of that character, and the defendant does not produce any such battery. He testifies, however, that he made one of these batteries as early as 1873, and made others afterwards for one Leon James or Jacques,—the man seems to have been known by both these appellations,—which James used, from the time he so made it, for the purpose of curing toothache, earache, headache, neuralgia, etc., at the dime museum in St. Louis, and upon the streets in that city, as a sort of street fakir, and testifies that this battery had the divided current and third wire of the complainants' battery.

The complainants' rebutting proof shows that this battery, or one of the batteries—and probably the last one—which this witness made for James, is still in existence in the possession of James' widow in St. Louis, and yet the battery is not produced, but Mrs. James states that it has only two wires. She says it had six posts, which Froeckman says were all poles of the battery; yet she states emphatically and positively that only two of those posts were used in applying the battery by her husband; and this statement is corroborated by the witnesses Kline and Stahl. The failure of the defendant to produce this Froeckman machine, although the proof shows that it is accessible, casts a doubt upon the testimony of Froeckman as to its organization.

The rule is well settled that where a defendant seeks to defeat a patent by showing prior use, such prior use must be established beyond a reasonable doubt. As was said in *Thayer v. Spaulding*, 27 Fed. Rep. 66: "Parties asserting the prior use of a device covered by a patent have the burden of proof, and are bound to establish such prior use by strong and convincing, if not absolutely conclusive, proof." And in *Coffin v. Ogden*, 18 Wall. 120, Mr. Justice SWAYNE said:

"The invention or discovery relied upon as a defense must have been complete, and must have been capable of producing results sought; that is, the defendant must show beyond a reasonable doubt that the devices or discoveries which are set up to defeat the patent were not only similar to the improv-

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ments described in the patent, but that they produced the results which were accomplished by the devices covered by the patent."

In *Mattress Co. v. Bed Co.*, 8 Fed. Rep. 87, the defense of prior use was interposed. Defendant relied upon the evidence of one Pohl to defeat the patent. He testified that he made, in Baltimore, in 1865, five iron frames, describing them. The court said:

"None of these bed bottoms are produced; they probably cannot be found. The testimony of Pohl stands alone; that is, the unsupported oral testimony of a person in regard to the way in which a few frames were made fifteen years ago. This is not sufficient to overcome the presumption which belongs to the patent."

And the same rule was applied in *Manufacturing Co. v. Haish*, 4 Fed. Rep. 900; *Doubleday v. Beatty*, 11 Fed. Rep. 729; *Campbell v. New York*, 9 Fed. Rep. 500. Tested by these rules, this testimony falls far short of being so convincing and satisfactory as to establish in my mind the fact of the prior use of this device as alleged by the defendant.

That batteries were constructed and used for the avowed purpose of allaying pain or preventing pain in dental operations long prior to the complainants' invention is undoubtedly true from the exhibits from the patent-office put in evidence in this case, but all these devices show the use of a two-wire battery, and, so far as the proof in this case goes, there is no evidence that a third wire battery or divided current was used until it was invented by the complainant Smith, except the testimony of the defendant's witnesses; and I do not think it probable that a change which the proof shows is so marked between the old two-wire and the three-wire machines could have been made as testified to by the witnesses Grimes and Froeckman without its becoming a matter of such public notoriety that their testimony could be easily corroborated. It will be noticed that neither of these witnesses corroborate the other. The prior use in 1859, testified to by Grimes, is nowhere corroborated; and the prior use by Froeckman, instead of being corroborated, is contradicted.

I am therefore of the opinion that the defense of prior use is not established, and that the complainants are entitled to a decree for an injunction and an accounting.

O'BRIEN BROS. MANUF'G CO. v. PEORIA PLOW CO.

SAME v. PIERCE *et al.*

(Circuit Court, N. D. Illinois, S. D. April 23, 1898.)

1. PATENTS FOR INVENTIONS—PATENTABILITY—NOVELTY.

The invention in reissued letters patent No. 6,606, of August 24, 1875, (original granted September 29, 1874.) to William S. O'Brien, for an "improvement in that class of harrows which are made in sections connected to each other by eye-bolts and a coupling rod," consists in making the coupling rod with a loop or crook, which may be engaged with a hook on one of the sections to retain it in its place, and may be released therefrom simply by turning it.

Held not anticipated by harrows which had been made in sections prior to the date of the invention; the sections in such harrows being coupled together only with hinges and with hooks, eye-bolts, and straight coupling rods passing through eyes located in the sides of the adjacent sections.

2. SAME—REISSUE—DESCRIPTION OF CLAIM.

In letters patent No. 155,548, of September 29, 1874, to William S. O'Brien, for an "improvement in that class of harrows which are made in sections connected to each other by eye-bolts and a coupling rod," the device is described in substantially the same manner in which it is described in the reissue, (No. 6,606, of August 24, 1875,) but the claim is: "The combination of the coupling rod, having the bend, with the harrow sections and eyes by means of the hook." The claim in the reissue is: "The coupling rod having a crook or loop arranged to operate with a hook for securing said coupling rod in the eyes, and the harrow sections to each other." *Held*, that "combination," as used in the original claim, was synonymous with "connection," and that the reissue was therefore valid; it being evident from the original specification that what the inventor wished to secure was his new coupling rod, which was his invention, and which consisted of the combination of two or more harrow sections, by means of a coupling rod having a hinged or pivotal connection, centrally on the side of one section.

8. SAME—INFRINGEMENT—WHAT CONSTITUTES.

Sectional harrows coupled loosely with a looped or bent coupling rod, but having the band or loop made wide enough to allow its back to engage with two hooks projecting from the side of the opposite section, and at some distance apart, instead of one hook only, as in reissued letters patent No. 6,606, of August 24, 1875, (original granted September 29, 1874,) to William S. O'Brien, for an improvement in harrows, is an infringement thereof; the looped coupling rod, for the purposes to which it is applied, constituting the invention, and the fact that strength is gained by the use of an additional hook and an improvement over the original device thus secured being immaterial.

In Equity. Bill for infringement.

Frank F. Reed, for complainant.

Hopkins & Hammond, for respondents.

BLODGETT, J. By the bills in these cases defendants are charged with the infringement of reissued letters patent No. 6,606, granted August 24, 1875, to William S. O'Brien, assignee to the O'Brien Bros. Manufacturing Company, for an "improvement in harrows," the original patent having been granted September 29, 1874. In the specifications the inventor says:

"The nature of this invention relates to improvements in that class of harrows which are made in sections connected to each other by eye-bolts and a coupling rod; and the invention consists in making the coupling rod with a loop or crook, which may be engaged with a hook on one of the sections, to retain it in place, and may be released therefrom simply by turning it."

He then describes the sections with eye-bolts inserted near the ends of each side-piece of the respective sections, and a hook projecting from near the middle of one side of a section, so that the looped coupling rod, by passing through the eyes of two adjacent sections, connects them loosely together, giving them each an independent vertical movement, and also a lengthwise movement on the coupling rod to the extent of the space between the eye-bolts on the sections so held together; and by engaging the loop of this coupling rod with the hook located in the side of one of the sections, and near the middle of such section, the coupling rod is kept in place, while it secures a loose coupling between the sections,

which allows to each section a free movement up and down and alongside each other. The claim of the patent is:

(1) The coupling rod, C, having a crook or loop, c, arranged to operate with a hook, d, for securing said coupling rod in the eyes, B, B, and the harrow sections to each other, substantially as described, and for the purpose specified.

Defendants, by their answer, deny the novelty of the device covered by the patent, and also deny the infringement; but as no anticipations of the device are set up in the pleadings, or shown in the proof, I take it that no serious contest is made as to the patentability of the machine. It is conceded that harrows had before this invention been made in sections, and the sections coupled together with hinges, and with hooks and eye-bolts, and also with straight coupling rods passing through eyes located in the sides of the adjacent sections; but there is no proof of the use of a looped coupling rod for the purposes to which this inventor applies it, or for any such analogous purpose as would anticipate this device. Defendants, however, insist that the patent is void because, as it is claimed, the reissue is not for the same invention described in the original patent. An examination of a copy of the original patent,¹ which is in evidence, shows that the device was described in substantially the same manner in which it is described in the reissue; but the claim is in these words: "The combination of the coupling rod, c, having the bend with the harrow sections, A, A, and eyes, B, B, by means of the hook, substantially as set forth." This claim is certainly obscure, and did not, I think, secure to the inventor the thing which he claimed to have invented,—that is, his looped coupling rod, so arranged to operate with the hook as to secure the rod in the eyes of the eye-bolts,—but, if the original claim is for anything, it is for the combination of the coupling rod with other members; while it is evident that the inventor wished to secure the patent on his new form of coupling rod, because he says in his original specifications that his invention consists in the combination of two or more harrow sections by means of a coupling rod having a hinged or pivotal connection centrally on the side of one section, and he evidently uses the word "combination" in this statement as a synonym for the word "connection." and hence he in apt time surrendered his original patent, and obtained this reissue, specifically covering his coupling rod, not as an element or member of a combination, but as a new invention or device for connecting harrow sections together. I am therefore of opinion that the reissue is valid. Defendants make and sell sectional harrows coupled loosely with a looped or bent coupling rod, but the bend or loop is made wide enough so that its back engages with two hooks projecting from the side of the opposite section, and at some distance apart, instead of one hook, as shown in complainant's patent. This, in my opinion, is a mere change of form, with no change of principle. After O'Brien had taught the world the utility of one loop and hook to keep the coupling rod in place, and thus hold the sections together, his

¹No. 155,543.

invention cannot be evaded by making a broader loop and adding another hook. It may be that there is a gain of strength by using two hooks, and I will not say that defendants' rod is not an improvement on the O'Brien rod, but, at best, they must be held to use O'Brien's device with this improvement, and herein they infringe the O'Brien patent.

Decrees may be prepared finding that the complainant's patent is valid, and that defendants infringe, and referring the cases to the master to take proofs and report as to complainant's damages.

LYON v. DONALDSON.

(Circuit Court, N. D. Illinois, S. D. April 23. 1888.)

1. PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—DEFENSE OF WANT OF NOVELTY—EVIDENCE.

In "case" for alleged infringement of a patent of date June 30, 1885, defendant pleaded the general issue, with notice of special matter to the effect that he himself was the original and first inventor, a patent having issued to him for substantially the same improvement, July 8, 1884. It was in proof that shortly after plaintiff filed his application, which was done on April 5, 1884, interference had been declared by the patent-office between plaintiff and defendant, and that the examiner had decided the priority of invention in favor of plaintiff, and granted him the patent in suit. No appeal was taken from this decision. *Held*, that under the plea defendant was confined as to proof upon the question of novelty to what led up to his own alleged invention.

2. SAME.—ANTICIPATION—MACHINE FOR SWAGING SAWS.

The chief feature of the improvement covered by letters patent No. 321,876, of June 30, 1885, to William Lyon, for a "machine for swaging saws," (circular,) is a movable anvil upon which the saw-tooth rests while it is swaged to the width necessary for clearance by means of a hammer in the hand of the operator, the anvil also resting upon an adjustable support. In "case" for an alleged infringement, defendant set up that as early as 1883 he had perceived the utility of such a machine, and he then devised an experimental working model, and tested it so far as to prove that a saw could be swaged upon it. The portion of this machine produced in court did not contain the movable arm which carries the anvil or die of the Lyon patent, nor the support on which the die rests while the operation of swaging is performed, nor anything which would suggest those operative parts. *Held* not an anticipation.

3. SAME.—PATENTABILITY—DESCRIPTION OF CLAIM.

The first claim of letters patent No. 321,876, of June 30, 1885, to William Lyon, for a "machine for swaging saws," is: "In a saw-swaging machine, the combination of a frame, a horizontal, adjustable shaft or arbor, a horizontally adjustable rest, and a die secured to an arm pivoted to the frame." In the specifications "the horizontally adjustable rest" is spoken of as the "support," and is described as being moved by the "shaft working in a threaded perforation in the frame and in the support." *Held*, the purpose of the shaft being to move the support in its sliding groove, so as to make the support adjustable, the support was not intended to be threaded; but that the screw-thread on the shaft was only to operate in a thread in the perforation or head-block of the frame through which it passed, and the shaft was to work or turn in the support in such manner as to adjust the support; and that the claim was valid.

4. SAME.—DAMAGES FOR INFRINGEMENT—TREBLE DAMAGES.

In "case" for infringement of a patented "machine for swaging and jointing saws," it was in evidence that plaintiff's machine with the jointing appa-

ratus cost \$100, and sold for \$150. The infringing machines included only the swaging apparatus, and sold at a profit of about \$10 each. *Held*, that the damages should be \$10 for each sale of an infringing machine, and, the violation of plaintiff's rights being flagrant, that the recovery should be trebled, under Rev. St. U. S. § 4919.

5. SAME—INFRINGEMENT BEFORE APPLICATION.

The fact that defendant knew, at the time he made and sold the infringing machines, that plaintiff was the inventor, does not render him liable in damages for sales made before plaintiff had made application for patent.

At Law. Action on the case under Rev. St. U. S. § 4919, for an alleged infringement of a patent.

Jack & Tichenor, for complainant.

Kellogg & Cameron, for respondent.

BLODGETT, J. This suit was tried by the court, under a stipulation of the parties, without a jury. It is an action on the case for alleged infringement of patent No. 321,376, granted to plaintiff, June 30, 1885, for a "machine for swaging and jointing saws." The device, as shown and described, is only applicable to circular saws, and the chief features of the improvement covered by the patent are a movable anvil upon which the saw-tooth rests while it is swaged to the width necessary for clearance by means of a hammer in the hand of the operator, the anvil also resting upon an adjustable support. The patent also covers a device for jointing the saws after the process of swaging, but, as that feature of the invention is not in controversy, it need not be described. The patent contains five claims, but infringement is only charged as to the first and second, which are:

(1) In a saw-swaging machine, the combination of a frame, a horizontal, adjustable shaft or arbor, a horizontally adjustable rest, and a die secured to an arm pivoted to the frame as set forth. (2) The combination of the pivotal anvil-bearing arm, the die thereon, and the rest therefor, substantially as described.

It will be seen that the movable anvil which is spoken of in the introductory description of the patent is called a "die" in these claims.

The defendant has pleaded the general issue, with notice of special matter, the material portions of which are, first, that plaintiff was not the original and first inventor of the devices covered by the patent, or any substantial part thereof, and that in fact defendant was the original and first inventor of the material and substantial parts of the machine described in the patent, and that a patent was granted defendant therefor on the 8th of July, 1884. The proof shows that plaintiff, as early as February, 1883, had conceived the invention covered by his patent, and made a drawing of it; and that as early as the 1st of March, 1883, he had a full-sized working machine constructed and in operation at the mills of the Burlington Lumber Company, in Burlington, Iowa. That defendant, who was then and still is in business as a manufacturer of saws at Rock Island, Ill., ordered one of plaintiff's machines in May, and the same was constructed and shipped to defendant on the 27th day of June, 1883, containing substantially the mechanisms covered by the plaintiff's patent. And on the 13th of September, 1883, defendant filed

an application in the patent-office for a patent on a machine which, in all its working parts, is a substantial reproduction of plaintiff's machine, so far as the swaging devices are concerned. It is true, defendant's machine shows some minor changes,—such as a divided movable arm for carrying the die or anvil, instead of the single bar shown in plaintiff's patent; and the support, H, upon which the anvil rests while the tooth is being swaged, is so arranged as to slide along the side of the frame timber, instead of sliding on the top of the same timber, as it does in plaintiff's machine. But these are mere colorable changes, so far as the question of infringement is concerned. It is true, the double arm may have some advantages over the single arm of the plaintiff, and the change of location of the sliding block may be an improvement of the plaintiff's machine; but the principle of the plaintiff's machine, as made by plaintiff, and sold to defendant in June, 1883, in construction, mode of operation, and result, is faithfully followed in defendant's machine. The proof also shows that plaintiff applied for his patent on the 5th of April, 1884; that soon after his application an interference was declared by the patent-office between defendant's patent and plaintiff's application, and upon the proof taken the examiner decided the priority of invention in favor of plaintiff, and plaintiff's patent was issued, from which no appeal was taken. This decision is conclusive upon defendant on the question of priority of invention, (*Greenwood v. Bracher*, 1 Fed. Rep. 856;) and while the defendant is not estopped by this decision from contesting the novelty of plaintiff's invention by proof showing that he, the defendant, was in good faith mistaken as to the fact that the device covered by the patent was old, yet, as defendant laid no foundation in his pleadings for the introduction of proof upon the question of novelty save by reference to his own machine, the only proof to be considered upon this branch of the case is that of the defendant himself as to an experimental machine, which he says he made in 1882, for swaging saws.

The defendant states, in substance, that in 1882 his attention was attracted to the demand for such a machine, and that he devised a sort of experimental working model of the machine, which he had then conceived; that about the time he got his working model made, and tested it so far as to see that a saw could be swaged upon it, the Kinney saw-swaging machine came out, and that he then abandoned further experiment with his machine. It is very evident from the portion of this old machine produced in court that it does not contain the movable arm which carries the anvil or die of the plaintiff's patent, nor the support, H, on which the die rests while the operation of swaging is performed, nor anything which would suggest these operative parts. And it is too palpable to admit of discussion that defendant has taken those two features of his machine bodily from plaintiff's machine, so that I am compelled to the conclusion that the defense of want of novelty has wholly failed. Defendant also insists that the first claim of plaintiff's patent is void, because it includes the "horizontally adjustable rest," which is the "support, H," described in the specifications, and that by the terms of the specifications this rest is not movable or adjustable, because the speci-

fications say on the first page in the second paragraph of the right-hand column that the support is moved by the "shaft, L, working in a threaded perforation in the frame, A, and in the support;" and it is urged that this language implies that the shaft, L, works in a thread in the support as well as in the perforation in the frame, and hence that it would not operate to move the support. But I do not think the language implies that the support is to be threaded. I think that when we consider that the purpose of this shaft is to move the support in its sliding groove, so as to make the support adjustable, we must conclude that the screw-thread on the shaft was only to operate in a thread in the perforation or head-block of the frame through which it passes, and that the shaft was to work or turn in the support in such manner as to adjust the support. This construction does no violence to the language used; and it is undoubtedly the duty of the court to so read and construe the specifications and drawings of a patent as to make the device operative if it can be done. I must therefore find the defendant guilty of the infringement charged.

The question of damages is more difficult. The proof shows that plaintiff's machine with the jointing attachment cost \$100, and sold for \$150; thus showing a profit to plaintiff on his machine of \$50 per machine. Defendant, however, does not use plaintiff's jointing mechanism, but uses a different arrangement for jointing or evening the saw-teeth after they are swaged with the hammer. The proof also shows that before plaintiff obtained his patent defendant manufactured 13 machines, and sold 6 of them, and that since the issue of the patent he has sold the remaining 7, and that defendant's machine sold for from \$80 to \$65, and that his profits did not exceed \$10 per machine. I do not think defendant should be mulcted in damages for machines sold prior to the issue of plaintiff's patent. At the time these sales were made plaintiff had no patent, and, although we may assume from the proof that defendant knew when he made his machines that plaintiff was the inventor, yet, until plaintiff made his application for a patent, it was not certain that he would ever apply for or obtain one. Hence defendant cannot be said to have been a trespasser upon plaintiff's property before his (plaintiff's) patent was obtained. After plaintiff had been adjudged in the interference proceeding to be the prior inventor as against defendant, and plaintiff's patent had been issued, all sales made by defendant were in violation of plaintiff's rights, and plaintiff is entitled to damages. The defendant's machine not containing all that is covered by the plaintiff's patent, but only the device for the swaging operation, it is obvious that the profits made by plaintiff in the manufacture and sale of his combined swaging and jointing machines furnish no standard for fixing the plaintiff's claim for damages against defendant; so that the only proof we have is the defendant's profits of \$10 on each machine sold after the issue of plaintiff's patent; and, as the proof shows that defendant only sold seven machines after that date, the finding will therefore be that the court finds defendant guilty, and assesses the damages at \$70. And upon this finding, which stands in the place of the verdict of a jury, the court, under the provisions of section 4919, Rev. St., fixes plaintiff's actual damages at

three times the amount found by the verdict, which makes the actual damages \$210, for which judgment will be rendered; for the reason that defendant's infringement appears to me from the proof to have been a flagrant violation of plaintiff's rights. If, after the controversy in the patent-office had been decided in plaintiff's favor, and the patent awarded to him, defendant had offered to sell to plaintiff the machines he had on hand at cost, or for a fair manufacturer's profit, he would have placed himself in a far different position before the court from that in which he appears in the light of the proof in this case.

KAMPFE *et al.* v. ALOE *et al.*

(Circuit Court, S. D. New York. April 28, 1888.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—RAZORS.

The first claim of letters patent No. 229,127, of June 22, 1880, to John Heitner, for an improvement upon the Monks razor, described in letters patent No. 206,473, of July 30, 1878, to John Monks, is: "The combination, with the cutting blade, of a guard-plate constructed in sections, which are hinged to fold on each other,—one adapted to support the cutting blade and the remainder forming a handle,—interstices at the junction of the blade section with the handle sections, and means for holding the blade sections substantially at a right angle to the handle sections, and holding the latter substantially flush with each other, the whole constructed and adapted for use." *Held* not infringed by the Aloe razor, the sections of whose guard-plate are not so hinged as to fold on each other.

2. SAME.

The second claim of said Heitner patent is: "The combination, with the cutting blade, of a guard-plate constructed in sections, which are hinged together, and constructed with the stops for regulating the positions of the sections, one section adapted to support the cutting blade, and the remainder forming a handle, interstices at the junction of the blade section with the handle sections, and the spring for clamping the cutting blade and holding the sections in a spread, or unfolded condition, the whole constructed and adapted for use." *Held* not infringed by the Aloe razor; the latter not having a spring which permits the sections, when not in use, to be folded together.

In Equity. Bill for infringement.

Louis C. Raegenar, for complainants.

James A. Hudson, for respondents.

SHIPMAN, J. This is a bill in equity to restrain the defendants from the alleged infringement of letters patent No. 229,127, dated June 22, 1880, to John Heitner, for an improved razor. The patented invention is an improvement upon the Monks razor, which is described in letters patent No. 206,473, dated July 30, 1878, to John Monks. The Fontaine razor, first patented in France in 1879, and afterwards in this country in 1881, is of the type of the Monks razor. The Monks razor consisted of a blade-holder, which was bent at right angles, one section of which held the blade, and the other served as a handle. The blade was held in place by ears bent around its ends. The cutting edge of the

blade was adjacent to the angle in the blade-holder, and at this angle the blade-holder had a series of interstices which permitted the escape of the lather. Heitner's object was to turn the rigid blade-holder and handle into a folding razor-handle. He accomplished it by dividing the plate into three sections, which were hinged together by butt hinges so as to limit their movement, and were so hinged that the part which held the blade folded down upon the section of the handle nearest to the blade, and the third section, or the end of the handle, folded over the blade-holding section, so as to inclose the blade. The device was then folded together in book form, so that it occupied a very small space, and could be safely carried in the vest pocket. When the razor is in use, the sections are retained in a rigid position by a spring, which is pivoted to the middle section by a rivet, and which can be turned so that its free end rests upon the back of the blade and serves as a brace to keep the blade-holding section in a perpendicular position, while the other end bears upon the third section and serves as a button to hold it in line with the second section, and prevent its folding up. When the razor is not in use, the spring is turned at right angles to its former position, and parallel with the folded sides of the razor case. The invention was an ingenious and a patentable one, but it simply consisted in the method of folding, and, when unfolded, of holding the three sections in place by the laterally moving spring. The claims of the patent are as follows:

"(1) The combination, with the cutting blade, of a guard-plate constructed in sections, which are hinged to fold on each other,—one adapted to support the cutting blade, and the remainder forming a handle,—interstices at the junction of the blade section with the handle sections, and means for holding the blade sections substantially at a right angle to the handle sections, and holding the latter substantially flush with each other, the whole constructed and adapted for use, substantially as described. (2) The combination, with the cutting blade, of a guard-plate constructed in sections, which are hinged together, and constructed with the stops for regulating the positions of the sections,—one section adapted to support the cutting blade, and the remainder forming a handle,—interstices at the junction of the blade section with the handle sections, and the spring, *g*, for clamping the cutting blade and holding the sections in a spread or unfolded condition, the whole constructed and adapted for use, substantially as described."

The Aloe razor is also a folding razor, and an improvement upon the Monks implement. It is made of four sections, which are hinged together; the first constituting the blade-holder, and the other three constituting the handle. When the razor is in use the three handle sections occupy positions relatively to each other, so that when viewed edgewise they are of Y shape, the blade-holder being arranged across the open end of the Y, the second section being hinged to the blade-holder adjacent to the cutting edge of the blade, and the third and fourth sections being hinged to the opposite edge of the second section, and extending from the hinging axis in opposite directions, "the third section projecting away from the blade, and the fourth section extending towards the blade and terminating at the back of the latter." The fourth section answers the purpose of the Heitner spring in keeping the blade pressed down in its

place, and preventing any movement of the blade-holder. When the razor is to be put away, the second and fourth sections are sprung apart, so as to release the blade-holder from the fingers of the fourth section, the blade-holder drops into line with the second section, and the fourth section drops upon the second section, with which the third section is in line. The first, second, and third sections are thus in line with each other, and the fourth section lies down upon the second section. The razor is flattened out, the blade is no longer held in place, and the whole is placed in a shallow box for safe-keeping. The two devices differ in this respect: the blade-retaining spring of the Heitner razor swings laterally, and the two end sections fold upon the third, as the two ends of a sheet of note paper fold upon the middle part of the sheet. The blade-retaining section of the Aloe razor does not swing laterally; it drops upon the second section, while the other three sections fall into line with each other, and a flattened device is formed which must be put into a case. The Aloe razor is included in the literal terms of each claim of the Heitner patent, and if the claims are to receive a literal construction, there is no doubt of the infringement. I do not think that the patent should be thus construed, and include all folding razors which come within the general language of the claims. The entire scope of the Heitner invention may properly be said to consist in the manner in which the Monks razor was permitted to be folded. The spring was swung around laterally, and then, in the language of the specification, "the blade section, B', is folded down on the handle section, B", and the handle section, B"', is folded down upon the whole." The Aloe razor was folded up in a different way, and does not have the advantage of the peculiar and ingenious compactness of the Heitner device. Inasmuch as the sections of the guard-plate of the Aloe razor are not hinged to fold on each other, the first claim of the Heitner patent is not infringed; and inasmuch as the Aloe razor does not have a spring which permits the sections, when not in use, to be folded together, the second claim is not infringed. The bill is dismissed.

AMERICAN BELL TEL. CO. *et al.* v. SOUTHERN TEL. CO. *et al.*

(Circuit Court, E. D. Arkansas. April 21, 1888.)

1. PATENTS FOR INVENTIONS—TELEPHONES—INFRINGEMENT.

The Bell telephone patent, having been held by the supreme court to extend to the idea of, and not the mere device for, the transmission of vocal sounds by means of electrical undulations which are similar in form to the air vibrations that constitute the sounds to be transmitted, defendants' instruments, which, although in some respects different from the Bell patent, produce electrical changes corresponding to the vibrations of sound waves caused by articulate speech, must be held to be an infringement of the Bell patent.

2. SAME—LACHES.

Defendants resisted an application for a preliminary injunction on the ground that complainants were guilty of laches. Defendants engaged in their enterprise in the summer of 1885, and this suit was brought in the fall of 1887. For

two years before suit defendants had been in operation, and had built up a business of 400 telephones. The fact that they were establishing the business was well known to complainants, who took no steps to restrain them. But, before and at the time defendants began their business, complainants and their patentees were carrying on litigation in several courts of the United States, and in many ways were vigorously asserting and enforcing their claims, and a case involving the validity of that patent was then pending in the supreme court, all which facts were well and publicly known. *Held* that, as defendants chose to rely upon their belief that the supreme court would hold the Bell patent invalid, they could not complain of the consequences of a different decision, nor urge laches on the part of the complainants, and the injunction should issue.

In Equity. Bill to restrain infringement of patent.

James J. Storrow, John McClure, and Eben W. Kimball, for complainants.

U. M. Rose, Casey Young, and Jefferson Chandler, for defendants.

BREWER, J. When I came here I did not expect the burden of this case to fall on me, but thought I had only come to assist my Brother CALDWELL, and advise with him. But the circumstances were such that it seemed necessary that I should take the sole responsibility, and that he should look after other matters pending, aside from this case. I did not want to take the case. I avoid patent cases when I can. And yet this happened to be one involving questions to which my attention has been directed as a matter of intellectual interest for the last two or three years; and from time to time, as the opinions of the various courts have been announced, I have examined each opinion, and studied with interest and curiosity the various questions presented and passed upon. When this bill was filed, no decision had been announced by the supreme court of the United States, although several opinions had been promulgated by circuit courts, and hence much of the testimony taken in this cause was with reference to matters which it was apparently thought might be presented for examination here. But on the 19th of last month the supreme court decided the *Telephone Cases*,¹ and that decision puts out of consideration many matters that would otherwise be fair subjects for discussion. Of course, the decision in that cause is not a final adjudication as between these parties. The proceeding there was *res inter alios acta*, and not conclusive upon this litigation. Many questions of fact which, as between the parties thereto, were settled,—such as the question as to the priority of discovery,—are not settled as between these parties by that decision. That question is still so far open that when that court has a new case before it, if brought between other parties, and upon different testimony, it may declare that Mr. Bell was not the first discoverer and inventor. Thus the supreme court, about two years ago, after a careful investigation, sustained what is known as the “Drive-Well Patent,” but in the next year the same court declared that patent void, because the testimony showed the entirely new fact of a prior public use. Some years ago I sustained the Glidden patent for barbed-wire fence. Afterwards Judge SHIRAS held it invalid, because of a prior use and invention not shown in the case before me. But it unquestionably appears from

¹8 Sup. Ct. Rep. 779.

the decision of the supreme court, not only that it upheld Mr. Bell's patents, but that after carefully considering its construction it gave it a very broad scope. In cases, even, between other parties—certainly on motions for preliminary injunctions—that decision must be accepted as conclusive, unless perhaps there should be developed unexpectedly a clear showing of new matter. If, for instance, in this case there was presented something which was absolutely new in this litigation, something that was very clear and conclusive, this court might refuse an injunction, notwithstanding the decision of the supreme court affirming the validity and determining the scope of that patent. But in all ordinary cases on an application for a preliminary injunction the decision of the supreme court must be accepted as conclusive, both as to the validity of the patent and as to its scope and extent. That relieves me of much labor.

I understood the counsel in their argument to state that from previous decisions it must have been expected, and that it was expected, by the profession generally, that the supreme court, if it found against the validity and priority of Mr. Drawbaugh's claim, would sustain the Bell patents as broadly as they have been sustained. This may have been the expectation and belief of the bar in the east, but I am inclined to think, from conversations with members of the bar who have given this matter investigation, that that was not the expectation here, and that the belief was that even if the patent was sustained, and Mr. Bell decided to be the first who made the invention, the patent would be so limited as to make it a patent for the particular apparatus described, or for the particular and limited mode which was embraced and developed in the precise apparatus shown. But I think no man can read this opinion of the supreme court and compare it with other deliverances of that court upon patent cases without perceiving that, in language as clear and potent as it is possible for language to be, it has affirmed the validity of the patent, and has decided its scope, without limiting it to the mere apparatus, and has held that it extends to his whole method of transmitting and reproducing vocal sounds. His method, as he states it in his patent, and as the supreme court construes it, covers the whole matter of the telephonic transmission of speech, because the essential part of it consists in the transfer to the electric current, and the transfer by that current, of the vibrating motions caused by the human voice in the utterance of speech. Let me turn now to the opinion. The chief justice says:

"The important question which meets us at the outset in each of these cases is as to the scope of the fifth claim of the patent of March 7, 1876, which is as follows: 'The method of an apparatus for transmitting vocal or other sounds telegraphically, as herein described, by causing electric undulations, similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth.' "

That is the idea of the transmission of these sounds by means of electrical undulations which are "similar in form" to the air vibrations that constitute the sounds to be transmitted. The court continue:

"The question is not whether 'vocal sounds' and 'articulate speech' are used synonymously as scientific terms, but whether the sound of articulate

speech is one of the 'vocal or other sounds' referred to in this claim of the patent. We have no hesitation in saying that it is, and that, if the patent can be sustained to the full extent of what is now contended for, it gives to Bell, and those who claim under him, the exclusive use of his art for that purpose, until the expiration of the statutory term of his patented rights. In this art—or, what is the same thing under the patent law, this process, this way of transmitting speech—electricity, one of the forces of nature, is employed, but electricity, left to itself, will not do what is wanted. The art consists in so controlling the force as to make it accomplish the purpose. It had long been believed that if the vibrations of air caused by the voice in speaking could be reproduced at a distance by means of electricity, the speech itself would be reproduced and understood. How to do it was the question. Bell discovered that it could be done by gradually changing the intensity of a continuous electric current so as to make it correspond exactly to the changes in the density of the air caused by the sound of the voice. This was his art. He then devised a way in which these changes of intensity could be made, and speech actually transmitted. Thus his art was put in a condition for practical use. In doing this, both discovery and invention, in the popular sense of those terms, were involved; discovery in finding the art, and invention in devising the means of making it useful. For such discoveries and such inventions the law has given the discoverer and inventor the right to a patent—as discoverer, for the useful art, process, method of doing a thing he has found; and as inventor, for the means he has devised to make his discovery one of actual value. Other inventors may compete with him for the ways of giving effect to the discovery, but the new art he has found will belong to him, and those claiming under him, during the life of his patent."

That is, the intensity of the current was changed in accordance with the form or character of each vibration. And then, again, the language of the court implies, what seems to me from my study of the telephone to be a necessary physical fact, that in no other way can electricity be actually made operative to convey those peculiar vibrations. That is the main idea of the patent. There must, of course, be something more than the bare idea; there must be some machine to make it practically useful. But the patent is not limited to the employment of it by that particular apparatus. The court further says:

"An effort was made in argument to confine the patent to the magneto instrument, and such modes of creating electrical undulations as could be produced by that form of apparatus; the position being that such an apparatus necessarily implied a closed circuit, incapable of being intermittent. But this argument ignores the fact that the claim is—*First*, for the process; and, *second*, for the apparatus. It is again said that the claim, if given this broad construction, is virtually 'a claim for speech transmission by transmitting it; or, in other words, for all such doing of a thing as is provable by doing it.' It is true that Bell transmits speech by transmitting it, and that, long before he did so, it was believed by scientists that it could be done by means of electricity, if the requisite electrical effect could be produced. Precisely how that subtle force operates under Bell's treatment, or what form it takes, no one can tell. All we know is that he found out that by changing the intensity of a continuous current, so as to make it correspond exactly with the changes in the density of air caused by sonorous vibrations, vocal and other sounds could be transmitted and heard at a distance. This was the thing to be done, and Bell discovered the way of doing it. He uses electricity as a medium for that purpose, just as air is used within speaking distance. In effect, he prolongs the air vibrations by the use of electricity. No one before him had

found out how to use electricity with the same effect. To use it with success it must be put in a certain condition. What that condition was he was the first to discover, and with his discovery he astonished the scientific world."

Then the court quotes from some of the scientific commendations, and adds: "Surely a patent for such a discovery is not to be confined to the mere means he improvised to prove the reality of his conception." It follows, and this, to my mind, is supreme as to the scope of the patent, that by its terms, and by the decision of the court, it covers the idea of the transmission of the vibrations of articulate sounds by undulatory currents of electricity. These undulations are the means of reproducing human speech at a distant point, because they repeat electrically the same vibrations. The sound vibrations are, so to speak, converted into corresponding and similar vibrations of electricity, as though these forces of nature, though different, were convertible, and what was done by the one could be, and in the telephone was, copied by the other. The idea was that when the vibrations created by the organs of speech acted on the electrical current they set up in the electrical force the same variations or vibrations, transferred these vibrations to the electricity, which in turn transferred them to the distant point. That is the idea on which Mr. Bell's instrument is based. The difference between putting into the current of electricity undulations which are copies of the vibrations caused by the human voice, and using a regular and uniform current of electricity, merely broken up by intermissions, or what is called a "make and break," is very clear. Take the old Morse instrument. In that the currents of electricity are uniform; they are merely made and broken, and there is nothing like any change in form or strength. Suppose we load each barrel of a revolver with a bullet of the same size, density, and shape, and shoot one after the other, they impact upon the object on which they strike with successive blows which are uniform, systematic, and regular. When a current of water flows through a pipe, if we suddenly turn a stop-cock we simply break the current; as soon as it is opened, and the water moves again, it flows with a uniform motion, and makes only a similar impression upon a far-off object. But Bell's idea of the transmission of sound is that the vibrations are irregular and different for each word; somewhat as if you put a paddle in the water and wave it backward and forward irregularly. Then the wave-like motion of the water is like that of the paddle. That is Mr. Bell's idea. The wave-like changes in his current are irregular, just like the irregular to and fro movement in the air which produces his electrical waves. That is what the supreme court says his patent is for. He takes a current of electricity which is uniform and regular, and continuous in its flow, and changes that current by the vocal impulses, such as are made by articulate speech; so that the current, instead of being simply continuous and uniform, corresponds exactly with the variations of the vibrations in the air. Looking at it from that stand-point, it seems to me impossible to transmit human speech by electrical currents otherwise than by giving to those currents variations harmonious with and corresponding to the various vibrations of the air. It would be impossible to do it by sending

regular and uniform currents merely broken up. If you should merely break up a uniform current, preserving in successive volumes its uniformity of flow, it would be a physical impossibility ever to transmit speech by means of it; for it seems a physical impossibility ever to transfer human speech otherwise than by getting the current itself to correspond to the peculiarities of the vibrations which constitute that speech, and which the current must transfer. That there is in all articulate speech something that may be called a "pause" between one vibration and another, and that that infinitesimal pause will cause a corresponding instant of no motion or no change in the electrical current which transmits that speech, is obvious. When I speak there is not, in one sense, an unbroken and continuous flow of sound. In every vibration of the air there is an instant when, having moved in one direction, it ceases to do that, and begins to move in the other; and so, in an electric current which copies that vibration, there would be the same corresponding infinitesimal break and flow again. And besides that, between each sound, or between each word or each syllable, there is a pause in the air vibrations, and so there would be in the electric undulations which copy them. But that is not a broken current, like the current of the Morse telegraph. When we speak of a continuous current in the telephone we mean a current which has such continuity as the air vibrations and motions have in speech. It was argued at the hearing that the defendant's instrument had breaks of current which accompanied the various changes in the motion of the instrument acted on by the voice. It was said that the use of the induction coil showed that there were breaks in the currents, and also that there were two separate circuits, the primary and the secondary, and that the current did not flow, and was not continuous, from one into the other. Neither of these considerations are new in this litigation. Both were presented to the supreme court. Suppose all that to be true, just as stated. If the supreme court had decided that there must be only one current, and that the current must be absolutely continuous, there might perhaps be force in that contention. But the idea which the supreme court rested on was that of a current continuous and undulating in the sense in which I have described it, like the vibrations of the air, corresponding to its motion, and not "merely" intermittent. It would not make any difference, in my opinion, if there were half a dozen currents co-operating with each other, so that at the last the transmitting current took up the undulations corresponding to the air vibrations, and carried them to the distant point. The idea expressed by the supreme court is that stated by the language of the specification: Causing and employing electrical undulations "similar in form" to the air vibrations accompanying the vocal or other sounds to be transmitted. That is the idea. That is the art or method which is patented; the same variations in the electricity as in the air,—similar to the changes in the air vibrations, and co-extensive with them. To one who has read this opinion of the supreme court with that view of the operation by which speech is transmitted, there can be but one conclusion as to the fact that the various instruments which are used by these defendants infringe. Whatever

else they do or do not produce, they produce electrical changes which correspond to the vibrations of sound waves caused by articulate speech, and those are the "undulations similar in form to the air vibrations" described in the patent. Thus far I have very little trouble in reaching a view which disposes of this part of the case.

The other question is more embarrassing, and that is whether a preliminary injunction under the circumstances of this case would be proper. These defendants engaged in this enterprise in the summer or fall of 1885. This suit was brought in the fall of 1887. For two years before this suit was instituted the defendants had been in operation, and had built up a business of some 400 telephones. The fact that it had established or was establishing its business was well known to the Bell Company, and still no suit was instituted for a period of two years. Generally, a doubtful question of fact ought not to be settled on *ex parte* affidavits. In this application for an injunction the case is presented on both sides by affidavits, and affidavits are not very reliable testimony. The case, it is urged, ought to wait until the witnesses could be examined and cross-examined; and only after that full investigation, which is more certain of eliciting the truth, ought an injunction to be issued. At the hearing the important question which the counsel relied upon as doubtful was whether the process by which their instruments transmitted speech consisted in the use of undulatory waves, or of the absolute make and break of a current which was uniform between the breaks; and they urged that that question ought not to be settled on a preliminary investigation, or by any means short of a full hearing upon the examination and cross-examination of witnesses. Where there is a doubtful question of fact the court will generally wait until witnesses have been produced and been examined and cross-examined. And if this case was a case which turned upon the weight to be given to the testimony of witnesses on such a subject, the argument would be forcible. Suppose that I entered into, or claim to have entered into, possession of a tract of real estate, and, having left it, come back 20 years after, and upon the question of an injunction the defendant claims a continuous occupation, and I produce affidavits and he produces affidavits as to whether there was actual entry and possession by me at that distant time,—that presents a question that in the very nature of things may be doubtful, and affidavits on such a matter may control the courts very little. It is a question that particularly presents a subject for cross-examination of the witnesses. But I have had enough experience in patent cases to know there never was a patent of any intricacy in which experts could not be produced on either side, men of intelligence and scientific acquirements, ability, and integrity, who would file their affidavits on one side or the other. But no amount of that kind of evidence, as a rule, will overcome what the court can clearly learn from an intelligent examination of the instruments themselves. The examination of those instruments, with the explanations given by Mr. Young and Mr. Storrow, on one side and the other, in regard to the respective apparatus, is testimony that is full and satisfactory. You see the instruments, and

you examine them to ascertain the process, with the explanations of these gentlemen, who are fully competent to explain. This is not a case where the investigation is surrounded with doubtful questions of fact, which could be cleared up by cross-examination of the witnesses.

Another argument urged against this motion is that of laches, and rests upon the delay of complainant. A man who stands by and sees his neighbor go onto his land and dig a cellar and put in a foundation and build a house, and waits from day to day and month to month and year to year, and says nothing to restrain him from the use and waste of his money, and afterwards wants to turn round and take his money and the products of his labor and time, does that which shocks any man's sense of right. If he knew this man was using his time, labor, and money to improve his property, he should have tried to restrain him; then, if the trespasser still persists, it is the trespasser's own fault. The defendants claim that the plaintiffs did not bring their suit until two years after the defendants built their exchange, and that is the fact. But no definite length of time constitutes laches. This defense always depends upon the circumstances of the case. If these defendants had proceeded to make their investment, believing that they had a right to use their telephones, and believing that no claim was made to the contrary, and had been led into this condition by inaction and silence on the part of the plaintiffs, with full knowledge of what the defendants were doing, of course it would be unfair to stop them now, before the case is tried in the usual way. But in this case the fact that Mr. Bell had these patents, and that he was insisting upon his claims in the broadest extent, as broadly as he does now, and was carrying on litigation in several courts of the United States, and that several courts in the various circuits had confirmed their validity and their scope as he contended for it, and that a number of these cases were pending in the supreme court of the United States, and that most earnest and vigorous proceedings were being carried on by the Bell Company to enforce its claims, and that one department of the government was affirming fraud in the patents, and was about to institute proceedings for the purpose of canceling them,—these matters were of common knowledge. The defendants, in the face of those universally known facts, and, it is proved, with actual knowledge of the existence of the litigation and the decisions, and of the fact that litigation was pending in the supreme court of the United States, which would sooner or later be determined, entered into this business. They say they believed that the patent would be decided to be void, and that they believed that the government suit would be a protection; and I have no doubt they believed this. If the patent had been defeated in the supreme court, there would be no injunction, and they would be free. But this was one of the matters to be determined by that court. Under those circumstances, can it be said, when these suits were finally determined and Mr. Bell sustained to the fullest extent claimed by him, that he should be answered here by the claim that, as he had waited until his rights were determined, he was too late to enforce them; and, because the defendants had infringed for two years during the litigation they

were watching, they should not be interfered with for six months, or nine months, or some other time afterwards. It is a case where, to use a common phrase, a man buys into a lawsuit, and must take his chances of the result; for here the defendants knew all about the litigation, and what the consequence of a decision by the supreme court must be, and based their expectations on the belief that the litigation would terminate adversely to Mr. Bell. But it has ended in his favor.

This case is of much importance, and I have heard several days' argument on the motion, and given it all the consideration possible during the week. It is evident from what has been said that the complainants are entitled to the preliminary injunction asked for, and it is granted.

AMERICAN BELL TEL. CO. *et al.* v. SOUTHERN TEL. CO. *et al.*

(*Circuit Court, E. D. Arkansas. April 17, 1888.*)

1. PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—PLEADING.

The averment, in a bill for injunction against infringement of a patent, that complainant's patent has been adjudicated by another circuit court, and held valid, being in accordance with the rule that a party seeking relief by injunction must first establish his title at law, is proper.

2. SAME.

The allegation that complainant has a patent, describing it in a general way, coupled with proof of the patent, is sufficient. The proof is equivalent to an averment that he has title to all the rights specifically described in such patent.

3. SAME.

In a bill for injunction against infringement of a patent, the simple averment that the defendant has infringed, without specifying in what particulars, is sufficient.

In Equity. Bill for injunction against infringement of patent. On exceptions and special demurrer to bill.

James J. Storrow, John McClure, and Eben W. Kimball, for complainants.
U. M. Rose, Casey Young, and Jefferson Chandler, for defendants.

BREWER, J. In reference to the matters that were argued yesterday, I have but these few words to say: One of those matters is the exceptions to the bill, for impertinence. The defendants say that the matters contained in said bill, beginning with the words, "The most important in said suits," in section 7, and ending with the words, "are owned by the said respective defendants," at the close of section 24 in said bill, are irrelevant and impertinent. Their challenge is to the substance of those statements, rather than the manner in which they are made. They are averments of the fact of prior adjudications on the validity of the patents. This is a bill for injunction; and the old equity rule—a rule which is not enforced, perhaps, with the same strictness, or in as many cases now, as formerly—is that a party must establish his title at law

before he comes into equity for injunctive relief; and it is in carrying out that idea that these averments are introduced, and commonly introduced, into bills for injunction, because the complainant's title of course is his patent. When he has an adjudication elsewhere that it is valid, while it may not be conclusive,—of course is not conclusive,—and may not be any evidence as to whether the defendant has infringed, yet it is an adjudication in favor of and sustaining his title. He has a judgment or decree, and, as the patent is a grant from the federal government of certain rights,—a grant which depends not at all upon any local statute or state law for validity or extent,—whenever anywhere in the United States, by any circuit court, there is an adjudication that the patent is valid, it is an adjudication which, though not conclusive upon any other circuit court, is certainly very persuasive upon all; and this, because there should be a uniformity of ruling as to the validity and extent of a title given by a patent granted by the government. When a party comes in applying for injunctive relief in a patent case, it is the commonest thing in the world for him to aver that his patent has been adjudicated elsewhere by some circuit court, as showing that there has been such an adjudication upon the validity of his title as may justify a court in granting a preliminary injunction. It is only in carrying out that idea that those averments are introduced; and it seems to me, both upon reason and upon the general practice in patent cases, that it must be held that such averments are proper, and the exceptions to them should be overruled. *Parker v. Brant*, 1 Fish. Pat. Cas. 58; *Manufacturing Co. v. Rubber Co.*, 3 Sawy. 542; *Tilghman v. Proctor*, 102 U. S. 707.

So far as respects the other matter,—the special demurrer to the bill,—the bill alleges that the complainant has a patent, giving number and date, and, in a general way, that it is one for the process of telephonic transmission of words, and makes profert of the patent. The weight of authority is that the profert of any recorded instrument is equivalent to annexing a copy, (*Bogart v. Hinds*, 25 Fed. Rep. 484, and cases cited; *Post v. Hardware Co.*, 26 Fed. Rep. 618;) and if a party avers that he holds title to anything by a certain instrument, which he annexes, and that instrument both grants the title and describes the full extent of the rights conferred,—and the patent does that; it is a grant from the government, and it describes exactly and specifically what is granted,—it is equivalent to an averment that he has title to all the rights specifically described in such instrument. It would not be assisted or strengthened by separate averments that he held a right to this claim and that claim, enumerating them specifically. He avers that he has title to all when he says that he has a patent which contains all. I should think, therefore, both upon principle as well as upon authority, that that objection ought to be overruled. On authority, the other objection must also be overruled; that is, the objection that there is simply a general averment that the defendant infringes. It is not so easy to sustain that upon principle, because, as was well stated by counsel here, the exactness and certainty of equity pleadings would seem very properly to require that, instead of a simple averment that the defendant has infringed, particu-

larly in a case where a patent covers many claims,—in this case also covering both a process and an apparatus,—it would narrow the inquiry if the averments were made specific that the infringement was in reference to one claim, and not in reference to the rest. Still, whatever might be the decision if the matter was open to question, the practice is very general in bills in patent cases to simply aver that the defendant has infringed. Practically, so far as the present application is concerned, the certainty which is desired will be made patent by the facts that are presented in the moving papers; and practically, too, in all litigation before the question comes up for final hearing, the exact point of the infringement is so developed, by the testimony or otherwise, that the parties are not misled. So, while as a matter of principle it may not be so easy to sustain this practice, yet, in view of the great weight of authority as to the form of pleadings that are sufficient in patent cases, this objection must also be held not well taken, and the special demurrer will be overruled. *Pitts v. Whitman*, 2 Story, 609; *Turrell v. Cammerrer*, 3 Fish. Pat. Cas. 462; *Haven v. Brown*, 6 Fish. Pat. Cas. 413; *McMillan v. Transportation Co.*, 18 Fed. Rep. 260; *McCoy v. Nelson*, 121 U. S. 484, 7 Sup. Ct. Rep. 1000.

THE SIDONIAN.¹

GENTILI v. THE SIDONIAN.

(District Court, E. D. New York. April 19, 1888.)

SHIPPING—LIBERTY TO CALL AT ANY PORT—QUARANTINED PORT—DETENTION—DAMAGE TO FRUIT CARGO—BILL OF LADING—EVIDENCE.

The shipper of a cargo of fruit took from the ship a bill of lading containing permission to the vessel to call at any port or ports. One port, at which the ship was accustomed to call, was known to all parties to be quarantined. Evidence was given to show that the agent of the ship gave the shipper to understand that the vessel would not call at the quarantined port. Nevertheless the shipper thereafter accepted the bill of lading containing the permission, without objection. Thereafter the ship did so call, and was detained in quarantine, and by such delay the shipper's fruit was damaged. *Held*, that the bill of lading governed, and that he could not recover in an action brought upon it.

Ullö, Ruebsamen & Hubbe, for libellant.

Wing, Shoudy & Putnam, (*C. C. Burlingham*), for claimant.

BENEDICT, J. This is an action to recover damages for a breach of a contract of affreightment. The libel sets forth a bill of lading, issued for the transportation in the steam-ship *Sidonian* of 1,500 boxes of lemons from the port of Genoa to the port of New York. It also avers a payment of the freight, and a failure to deliver the lemons in like good order and condition as they were shipped. The libel further avers that the

¹Reported by Edward G. Benedict, Esq., of the New York bar.

damage to the lemons arose from the length of the voyage, owing to the fact that the steam-ship, after leaving Genoa, called at Palermo, in Sicily, when it had been agreed that she should not call there. The bill of lading, which is made part of the libel, describes the voyage as from Genoa to New York. It contains also the following clause: "With liberty to call at any port or ports, in any rotation, for any purpose whatever." It appears from the evidence that, prior to the shipment of these lemons, a quarantine had been established at the port of Palermo, whereby a vessel coming from Genoa was compelled, before entering the port of Palermo, to go to the island of Gaeta, and there remain for the period of 10 days. There is evidence to show that, prior to the shipment of the lemons the agent of the ship-owner gave the shipper to understand that the ship would not call at Palermo on this voyage. But it also appears that, upon the shipment of the lemons, the bill of lading upon which this action is based was issued by the ship, and received by the shipper without objection; the fact of the establishment of the quarantine at Palermo being then known to all parties. Thereafter the ship called at Palermo, that being one of the ports ordinarily touched at by the vessels of this line on their voyage to New York, and in consequence was detained by the quarantine 10 days. Upon these facts the libelant asks at the hands of this court a construction of the bill of lading so as to exclude the port of Palermo from the liberty to call mentioned in the bill of lading, upon the ground that, after the establishment of the quarantine, the port of Palermo could not be entered under ordinary circumstances, and so was not within the contemplation of the parties to the contract. But I am unable to see how such a construction can be given to the bill of lading. The words of the liberty to call are plain, and clearly include the port of Palermo. If the shipper had desired to exempt the port of Palermo from the liberty to call contained in the bill of lading, because of the quarantine then known to have been established, he should have procured a modification of the bill of lading. Instead of so doing he accepted the bill of lading without objection, and now brings his action upon it. It is impossible to permit him to recover in such an action, without setting aside the established rule which makes the written contract the evidence of the agreement between the parties. The libel must be dismissed, and with costs.

THE LONE STAR.¹

(District Court, E. D. New York. April 7, 1888.)

1. SALVAGE—SALVAGE SERVICES—VESSEL AT DOCK—FIRE.

The steam-ship Lone Star lay on the lower side of pier 37, North river, New York, when fire broke out on the wharf, which spread with great rapidity, until the steam-ship herself caught fire. Various tugs came to her assistance, and when the hawsers which fastened her to the pier were burned away, some of them drew her out into the stream, where other tugs came along-side, and she was towed, water being pumped on her mean time, to the flats at Weehawken, where she sank, and the fire was extinguished. *Held*, that the tugs were entitled to salvage.

2. SAME—COMPENSATION—DIFFERENT GRADES OF SERVICE—TOWAGE AND PUMPING.

The services rendered by the tugs to the steam-ship differed in degree. *Held*, that the most important service was rendered by the tug Pioneer, which put the line on the Lone Star by which she was towed out from the burning pier into the river. To her was awarded \$1,800 as salvage. *Held, further*, that other grades of salvage services were rendered by the tugs which assisted in towing the steam-ship to the flats, and by the tugs which pumped water on the fire. To these tugs various sums, from \$1,000 to \$250, were awarded.

3. SAME—IRON VESSEL—VALUE OF SALVORS' SERVICES—BASIS OF COMPUTATION.

The Lone Star was an iron steam-ship. She was so much damaged by this fire that she was sold as a wreck. If she had received no assistance she would have been sunk in her slip, and would have been raised and sold as old iron. *Held*, that in ascertaining the value to the ship-owner of the services rendered by the salvors, the amount that the owners would have realized from her sale as old iron, if she had so sunk, should be deducted from the proceeds of her sale as a wreck. For the purposes of this computation of salvage, such amount saved to her owners was found to be from \$22,000 to \$29,000. The total award to the tugs was \$8,350.

In Admiralty. Libels for salvage.

Eleven different suits were brought against the wreck of the steam-ship Lone Star for salvage services rendered to her in the fire at Morgan's Line pier, in February, 1887. The suits were consolidated on motion.

Alexander & Ash, for Howard.

Wing, Shoudy & Putnam, for Kinny, Love, and Chapman.

Wilcox, Adams & Macklin, for Bridges.

Buller, Stillman & Hubbard, for McCaldin.

Anson B. Stewart, for Hofman.

Edward D. McCarthy, for Hicks and Sullivan.

Charles H. Tweed and *R. D. Benedict*, for the Lone Star.

BENEDICT, J. This is a consolidated action to recover salvage compensation for services rendered by 12 different steam-tugs to the steamer Lone Star, on the occasion of the fire at the pier of the Morgan Line, in the North river, which occurred on the 28th day of February, 1887. The fire broke out upon a lighter loaded with cotton lying at the outer end of pier 37. The pier was a covered pier, and its shed was full of cotton and other goods. The tide was ebb, and a gale was blowing from the north-west.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

The steamer Lone Star was fast by hawsers to the lower side of the pier, her bow being about 200 feet inside the outer end of the pier. She had no cargo on board. Shortly after the fire broke out the steamer became enveloped in flames, and all on board left. In time the fire burned off the hawsers by which she was fast to the dock, and, under the influence of the strong wind and ebb-tide she would then have drifted across the slip, and beyond the reach of assistance, had she not been at once towed out of the slip. This was done by tugs, requested to perform the service by the superintendent of the pier, then present. One of the tugs which towed the steamer out was the Pioneer. This tug, in anticipation of the burning of the fastenings of the steamer, placed herself along-side, and sent a deckhand named Bridges on board the steamer, at considerable personal risk, who made fast on the steamer's bow a line hauled by him from the Pioneer. At this time the fire was furious on board the steamer, so that the master of the Pioneer required an assurance from the superintendent of the pier that means of escape would be furnished to Bridges when the Pioneer should move away from the steamer in order to tow her. As soon as the fastenings of the steamer burned off, the Pioneer, being fast to her by a line from her bow, began to move her out of the slip. In rendering this service she was aided by the steam-tug Missisquoi, which tug, at the request of the Pioneer, made fast along-side of her after the steamer began to move, and with her towed the steamer out of the slip. At the same time, abaft of the Pioneer, under the steamer's port quarter, was the tug Harry Roussel. This tug, at some time before the steamer began to move, had made a line fast to the steamer, and began to throw water into her through one of the dead-lights. She had also a line to the lighter Angeline Anderson, which lighter was loaded with cotton, and on fire. The tugs Missisquoi and Pioneer were sufficiently powerful to tow the steamer out of the slip, and to a place where she could be beached, but shortly after they reached the mouth of the slip the towing line of the Pioneer was cut by the master of the steam-tug America, (who, by the way, makes no claim to salvage in this action,) and thereby the steamer was at once placed in peril of going upon the Guion dock, pier 38. In fact, before another line could be got to her, she did touch that dock, without, however, doing or receiving damage. As soon as possible after the Pioneer's line parted, another line was got on the steamer from the steam-tug Runyon. This tug, aided by the tugs Reba, Missisquoi, Myers, and Coffin, towed her to Weehawken, where she was beached. During this time the steamer was burning furiously.—"her forecastle all roaring with fire," as the superintendent says,—and she was deluged by water thrown from various tugs which came along-side as soon as she was clear of the slip, and continued to pour water upon her, until the fire was extinguished at Weehawken. The damage done to the steamer was so great that it was thought undesirable to attempt to repair her, and she was accordingly sold in her damaged condition at auction, and brought the sum of \$37,500.

That an important salvage service was rendered on this occasion has not been denied; but a controversy has arisen in regard to the extent and

value of the services rendered by the respective tugs, and the amount of property saved to the ship-owners by the exertions of the salvors. In determining these questions it will be convenient to consider in the first place the amount of money saved to the ship-owner by the exertions of the salvors. It is conceded that the steamer was so injured by the fire as to render it proper to sell her as a wreck, and that the proceeds of her sale were \$37,500. This sum, the salvors claim, should be taken to be the value of the property saved, in computing the amount of the salvage award. But in a case like this, where the only danger was of fire, and where the vessel, being of iron, would not be wholly destroyed by fire, and where the vessel, if she had received no assistance, would certainly have been sunk in the slip, and as certainly have been raised therefrom as old iron, it seems to me proper in ascertaining the value to the ship-owner of the services rendered by the salvors, for the purpose of determining the amount of salvage to be awarded, to deduct from the proceeds of the sale of the steamer as a wreck the amount that her owners would have realized from her sale as old iron if she had burned and sunk in the slip. It is not necessary for the purpose of the computation in hand to determine with accuracy the amount thus saved to the owners of this steamer. It is safe to consider that amount to be somewhere from \$22,000 to \$29,000. The case, therefore, is not one where amount of the salvage award is enhanced by the large value of the property saved.

The risk to which this property was exposed is next to be considered. The steamer was all on fire. Several tugs applied to by the superintendent to go into the slip refused to do so. If aid had been refused by the tugs that did go into the slip, it is highly probable, although not perhaps actually certain, that all that was combustible in the steamer would have burned, and the hulk sunk in the slip. It is hardly a case of derelict property saved to the ship-owner, but the ship-owner was in such great danger of losing from \$22,000 to \$29,000 that that sum may be considered as representing the value to the owner of the steamer of the services in question.

Next will be considered the extent and value of the services rendered by these various tugs, and I remark first that I consider the case one of continuous salvage service from the time the steamer began to move out of the slip until the fire was extinguished at Weehawken, participated in by different tugs at different times and under different circumstances. These services may well be divided into three classes: *First.* Services rendered in moving the vessel from the burning pier out of the slip. These I consider the most important services rendered on this occasion, and they were attended with some danger to the tugs engaged. *Second.* Services rendered in towing the steamer after she had been towed out of the slip, and the Pioneer's line was cut, until she was beached at Weehawken. These services were attended with little or no danger to the tugs, and many other tugs were present ready and willing to tow the steamer, the services differing little in character from ordinary towage. *Third.* Services which consisted in pumping water to extinguish the fire. This was a necessary service to prevent the steamer from sinking.

It involved some danger to the vessels engaged in its performance, and some hard labor and exposure in freezing weather. In regard to the services rendered in towing the steamer out of the slip from the burning pier, a serious dispute has arisen respecting the part taken by the Harry Roussel. Those on the Pioneer say that the Harry Roussel went in the slip for the purpose of saving the Angeline Anderson and her cargo of cotton, then on fire, and, while so engaged, got herself into a position across the slip, from which, in that wind and tide, she could not escape without assistance, so that she would have been herself caught and destroyed by the burning steamer when her fasts burned off, if the steamer had not been removed by the Pioneer; that the Pioneer pulled the Roussel into position by a line, and enabled her to swing along-side of the steamer, so that she, with the lighter Angeline Anderson attached to her, was in fact towed out of the slip by the Pioneer, instead of assisting the Pioneer to tow the steamer out. On the other hand, it is contended in behalf of the Roussel that her line was on board of the steamer before the line of any other tug, and that not only did she pour water into the steamer before she began to move, but also rendered efficient service by her motive power in keeping the steamer up to the tide as she moved out of the slip.

The case contains considerable testimony corroborative of the story told by the Pioneer in respect to the services of the Roussel, and much to the contrary. Considering the circumstances, confusion in the testimony is not to be wondered at. Upon the whole, I incline to believe that the Roussel went into the slip for the purpose of taking out the burning lighter; that afterwards she did get a line to the steamer, and did throw water into the steamer before she began to move from the slip, and then, when the steamer did move, she was to some extent aided by the motive power of the Roussel. But I do not consider the services of the Roussel equal in value to those rendered by the Pioneer. Her position made it impossible for her to render important towing service. The services of the Pioneer, in my opinion, were of the most value to the steamer on this occasion. She was efficient to carry out the wishes of the superintendent of the pier, and it was at his request that she put herself along-side the burning steamer. Her line run to the steamer's bows furnished the steamer the means of escape, and when, through no fault of hers, the line parted, she dropped back, and took a position where she could aid by pumping, and did pump under the direction of the superintendent of the pier or master of the steamer until the fire was extinguished at Weehawken. She received damage to her paint amounting to about \$125, and she lost a new hawser. To her is awarded the sum of \$1,800. The Roussel was a vessel twice as large as the Pioneer, but from her position at the stern of the steamer she was unable to afford much necessary aid in the towing service. Still, she was in the slip,—a position attended with some danger,—and she threw water from the first into the steamer. She was occupied about seven hours. To her the sum of \$900 is awarded. The steam-tug Missisquoi was a more powerful boat than the Pioneer. She rendered necessary assistance to the Pioneer in getting the steamer

out of the slip, and she did not obtrude her services, but waited the request of the Pioneer before she took hold. After the Pioneer's line had parted she assisted the Runyon in towing the steamer over to Weehawken. To her is awarded the sum of \$1,000. The steam-tug Charles Runyon was a powerful boat, valued at some \$20,000. She rendered efficient service in getting the steamer away from the Guion pier, on which she drifted after the Pioneer's line had parted, and she towed her to Weehawken by her hawser. When the fire broke out, she gave up a job worth \$40 to go to the steamer, and she lost a line worth \$30. What she did was done under direction of the superintendent of the pier, or the master of the steamer. To her is awarded the sum of \$650. The Reba, valued at \$6,000, assisted in towing the steamer over to Weehawken. She acted under the direction of the superintendent of the pier, or the master of the steamer. To her is awarded the sum of \$250. The Egbert Myers and the Coffin also assisted in towing the steamer to Weehawken, under the direction of the superintendent of the pier. The service involved no risk to speak of. To each of these tugs is awarded the sum of \$250. The William J. McCaldin was a steam-tug of considerable power. She claims to have rendered assistance in towing the steamer out of the slip, but I am unable to discover any services of much value rendered by her, except pumping water into the steamer. That, as I have said, was an important service. She was the largest tug present. She abandoned a tow to go to the assistance of the steamer, and a length of her hose was destroyed by fire, and she was put to expense in all about \$300. To her the sum of \$800 is awarded. The steam-tugs Nellie, John Fuller, Alice Hegarty, James A. Garfield, George H. Dentz all rendered service in pumping water into the steamer after she had been taken out of the slip. None of them went into the slip. Their aid in towing was not important, and there is some evidence tending to show that in their anxiety to put water on the fire they embarrassed to some extent the operation of towing the steamer after she reached the mouth of the slip. To the Nellie is awarded the sum of \$800; to the Fuller is awarded the sum of \$400; to the Hegarty is awarded the sum of \$400; to the James A. Garfield is awarded the sum of \$400; to the George H. Dentz is awarded the sum of \$400. To the man Bridges, who went on board the burning steamer to make fast the Pioneer's line, the sum of \$50 is awarded, in addition to his share as one of the crew of the Pioneer.

THE CITY OF ALBANY.¹

THE MUNICIPAL.

NEW YORK & N. S. Co. v. MAYOR, ETC., OF NEW YORK.

(District Court, S. D. New York. March 28, 1888.)

COLLISION—STEAMERS MEETING—MISUNDERSTANDING SIGNALS—FAILURE TO SLOW AND STOP.

Respondent's tug M. was coming down the East river somewhat on the Brooklyn side, and libellant's steamer C. was going up. A ferry-boat crossed the river between them, which required the M. to sheer a little only towards the New York shore. The C. gave two whistles to the tug, indicating that the latter should pass between her and the ferry-boat, and slowed. She heard no answer, and repeated the signals. She also stopped her engine on perceiving that the tug was still swinging towards the New York shore. The tug had given one blast, and continued at full speed, swinging across the course of the C. until near the moment of the collision. *Held*, that the tug was in fault for not slowing, as required by inspectors' rule 8, on the want of a common understanding; for her continued sheer across the other's bow; and for not reversing sooner; that the C. was without fault, and should recover her damages.

In Admiralty. Libel for damages.

Owen & Gray, for libellants.

H. R. Beekman and R. L. Wensley, for corporation.

BROWN, J. On the 26th of October, 1886, at about 2:30 P. M., as the side-wheel passenger steamer City of Albany, bound for Norwalk, Conn., was going under the East-River bridge, the Catharine-Street ferry-boat Republic was leaving her New York slip just above the bridge, and the City of Albany slowed and stopped to pass astern of her. Soon after the Republic had passed, the respondent's steam-tug Municipal was seen coming down river,—as I find, somewhat on the Brooklyn side of the stream. She also exchanged signals with the Republic to go astern of the latter; and in order to do so, as her pilot testifies, she was obliged to sheer somewhat to the New York shore. The City of Albany thereupon gave a signal of two whistles, indicating that the tug should pass between her and the ferry-boat, and at the same time she slowed. Hearing no answer, and seeing the tug still sheering towards the New York shore, she soon repeated her signal and stopped. They came in collision soon after, about opposite pier 39, not over 300 or 400 feet from the New York shore. The City of Albany, at the time of collision, was heading a little towards the New York shore; and the tug had sheered around so as to head either directly towards the shore or a little up river. Capt. Sherwood of the tug, I must find upon the weight of proof, to be mistaken as to his precise place in the river; he was at least half way across towards the Brooklyn shore, and probably more. The direct testimony of the other witnesses to this effect is confirmed by the fact that

¹Reported by Edward G. Benedict, Esq., of the New York bar.

he could not have made the turn he did before collision; and by the further fact that, if the tug had been only from a third to half way across the river, scarcely any sheer would have been necessary to enable him to pass astern of the Republic, as Coffey's evidence shows that the Republic was nearly in her slip in Brooklyn at the time of the collision. As the tug was coming nearly straight down river, it is clear that she had the City of Albany considerably on her starboard bow, and the tug was also a considerable distance off the starboard bow of the latter. In that situation, at the time when the vessels first observed each other, and when they were bound to take the proper measures to avoid each other, there was no risk of collision, since the course of each was still well clear of the other,—starboard to starboard. The collision was brought about solely by the long-continued sheer of the tug, until she had changed fully eight points in her course, so as to bring her under the bows of the City of Albany. This was wholly unnecessary, and was bad navigation. The two whistles of the City of Albany first given were heard by the pilot of the tug, it is said, as one only. Conceding that there was no fault in not understanding the first signal of the City of Albany, it was nevertheless very soon plain that she was not maneuvering in accordance with a signal of one whistle. Under the inspector's rule 3, which provides for such a case, it was the duty of the Municipal immediately to bring her speed down to "bare steerage way." In like manner, when no answer was heard by the tug to her first signal to the City of Albany, prudence required her to slow. The tug kept on, however, at full speed, till so near the City of Albany that her engineer did not have time to reverse the engine before collision. The faults of the Municipal, therefore, are these: *First*, for unnecessarily and improperly sheering across the course of the City of Albany; *second*, for not bringing her speed down to steerage way, in accordance with inspectors' rule 3, as soon as it was plain that a common understanding was not had; and, *third*, for not backing sooner than she did. Upon all the evidence, I do not find any fault in the City of Albany. As soon as she saw that her whistles were not responded to, she slowed. Soon after, on repeating them, she stopped and backed. Her previous motion was moderate; and at the collision, though she probably had a little forward motion, to be inferred from the effects on the tug, it must have been small. The tug was easily handled. Her continued sheer could not have been anticipated, contrary to the repeated signals of the City of Albany; and the latter's signals were the proper ones in the situation, and she both stopped and reversed as soon as stopping and reversing could reasonably be supposed requisite. She cannot, therefore, be held in fault. *The Greenpoint*, 31 Fed. Rep. 231. The libellant is entitled to a decree, with costs, and a reference to compute the damages.

THE ST. JOHNS.

THE FERN HOLME.

RITCHIE v. THE ST. JOHNS. BROOKS *et al.* v. RITCHIE *et al.*

(District Court, D. Massachusetts. April 21, 1888.)

COLLISION—BETWEEN STEAM AND SAIL—CHANGING COURSE UNNECESSARILY.

Where a collision occurs between a steamer and schooner on account of the schooner's violation of the sailing rules, in changing her course from starboard to port, and then back again to starboard, without any excuse arising out of the exigencies of navigation, and no negligence is shown on the steamer's part, the schooner is liable for the resulting damages.

In Admiralty: Cross-libels for a collision between the steamer Fern Holme and the schooner St. Johns.

Buller, Stillman & Hubbard, for the Fern Holme:

F. Dodge, for the St. Johns.

NELSON, J. This collision occurred on the evening of 17th March, 1887, about seven miles to the eastward of Sandy Hook light-ship. The Fern Holme, a large iron steam-ship, was approaching New York bay on a voyage from England, making a W. $\frac{1}{4}$ S. course at a speed of nine knots. The St. Johns, a three-masted schooner of about 400 tons, was bound on a voyage to the eastward, with a cargo of coal, being on the port tack with the wind N. W., her course due east, or nearly opposite to that of the steamer, and her speed about six knots. In the collision the jib-boom and bowsprit of the schooner struck the steamer on the starboard bow. The case turns mainly on the testimony given by the master of the Fern Holme, and by the second mate of the St. Johns, who were the officers in charge of their respective vessels at the time of the accident. The testimony of the master of the Fern Holme was, in substance, that, observing from his station on the bridge the red light of the approaching vessel bearing half a point on his starboard bow, he ordered his wheel to be ported, to pass the schooner on her port side; but before the order could be executed, the schooner shut in her red light and showed her green light, being then about half a mile distant and the light still bearing over his starboard bow. On seeing the green light, he ordered the wheel hard to starboard, to pass on the starboard side, but as the steamer fell off to port under the starboard helm, the schooner shut in her green light and showed her red light again. He then reversed his engine, but it was too late, and the schooner bore down on the steamer, and the collision happened. Taking this to be a true account of the accident, it is clear that the collision was owing solely to the violation of the sailing rules by the schooner, in changing her course, first from starboard to port, and then back again to starboard. Nothing appears here to show any negligence or misconduct on the part of the steamer. It is argued that even on this showing she should have reversed her engines when the green light was shown. But

it was then necessary that she should fall off rapidly to avoid running the schooner down, and this the reversing of the engines would have prevented. To this may be added also that if she was wrong in not reversing, the fault arose through an error of judgment in a sudden and unexpected emergency caused wholly by the misconduct of the schooner. For this reason also the error would be excusable.

The second mate of the St. Johns testified that the steamer's mast-head light was first discovered a little on his port or weather bow, and presently her red light was seen in the same direction; that when the two vessels were within a few lengths of each other, the steamer's red light still showing over his port bow, he ordered his helm to port; that as the schooner fell off under the port helm, the steamer made a sudden change to port, showing her green light, and heading directly across the schooner's bow from port to starboard. He denies that he made any other change of course, but admits that the order to port was given before the steamer turned to port, and at a moment when his own red light could alone have been visible to the steamer.

After full consideration of all the evidence in the case, I have come to the conclusion that the account which the master of the Fern Holme gives of this accident is substantially correct. I therefore find the principal question of fact in dispute—which was whether the St. Johns changed her course from starboard to port—against the schooner. I believe the statements of the men on the steamer, that they saw the schooner's green light over the starboard bow. The second mate admits the change from port to starboard, but defends it by claiming that the steamer was then in dangerous proximity. But so long as the port lights of the two vessels were towards each other, there was no dangerous proximity, and no ground for fearing or anticipating collision. The act looks like an attempt to dictate to the steamer on which side she should pass. As he committed this mistake, it is perhaps easier to believe he also committed the more serious one of permitting his vessel to come up so near to the wind as to open her green light to the approaching steamer. Whether this was the result of yawing and bad steering,—as there is some ground for concluding,—or of design, it is unnecessary to inquire. There is no pretense that the schooner was then *in extremis*. The fact itself is sufficiently proved, and is decisive; and as no explanation or excuse arising out of the exigencies of navigation or overwhelming necessity is shown, and as it was the cause of the accident, it is enough to condemn the schooner for the consequences of the collision. In the case of the Ferne Holme against the St. Johns, an interlocutory decree is to be entered for the libelants; the cross-libel of the St. Johns against the Fern Holme is dismissed, with costs. So ordered.

THE BENJAMIN F. HUNT, JR.

(District Court, D. Massachusetts. April 17, 1888.)

COLLISION—DAMAGES—TOWAGE.

Where a vessel, in a collision caused by the fault of another, lost her jib-boom, bowsprit, head-gear, and rigging, and all her head-sails except the fore-stay sail, had her forward bulwarks stove, and her head carried away, *held*, that the expense of a tug to tow her through dangerous navigation to her home port was a proper item of damage recoverable against the vessel causing the injury, and the action of the master in taking her to the home port, instead of going into an intermediate port for temporary repairs, would be respected, unless he acted dishonestly or ignorantly.

At Law. Exception to allowance of item of damages.

C. T. Russell, for libellant.

Frederick Dodge, for claimant.

NELSON, J. At the former hearing of this case the bark Benjamin F. Hunt, Jr., was found in fault for a collision with the three-masted schooner Anna A. Booth, on the 30th of August, 1886, off Chatham. The case was afterwards referred to an assessor, who has made his report, and has included as part of the damages the amount of a bill of \$200 paid by the libellant to the Boston Tow-Boat Company for the services of the tug Storm King in towing the schooner from the place of collision to New York. The claimant of the bark excepts to the allowance of this item, upon the ground that the expense of the tug was unnecessarily incurred. The schooner at the time was bound on a voyage from St. John to New York, which latter port was also her home port. In the collision she lost her jib-boom and bowsprit, and all her head-gear and rigging. Of her head-sails only her fore stay-sail remained. Her forward bulwarks were also stove, and her head carried away. Under these circumstances, the schooner was justified in proceeding to New York, which was both her home port and her port of discharge, for her permanent repairs. In her disabled condition she was clearly not bound to attempt the difficult and dangerous navigation of Nantucket shoals and Vineyard sound without assistance. She had, indeed, the alternative of going into some intermediate port for temporary repairs, and then proceeding on her way. But this would in all probability have increased, rather than diminished, the damages recoverable against the bark. The expense of such repairs and the demurrage, might, and probably would, have exceeded the cost of the service of the tug. Besides, the master was uncertain as to the condition of the hull, and in good faith came to the conclusion that the prudent course for him to pursue was to take the tug. His decision ought not to be overruled except upon proof that he acted dishonestly or ignorantly. Exception is overruled.

PLATT v. MANNING.

(Circuit Court, S. D. New York. May 7, 1888.)

COURTS—JURISDICTION BY CONSENT—AMOUNT IN CONTROVERSY.

Defendant in a suit involving less than \$2,000 was served with summons February 2, 1887, by an unauthorized person. He appeared generally on February 28, 1887, and subsequently answered. *Held*, that the appearance cured the defect in service, and gave the court jurisdiction, and therefore the case was not affected by act Cong. March 8, 1887, increasing the jurisdictional amount to \$2,000.

At Law. Motion by defendant for a new trial.

This is an action by Jonas H. Platt against Jerome F. Manning upon a promissory note given to the plaintiff for services rendered, and also to recover a small balance due upon a check drawn by the defendant. On the 24th of January, 1887, the clerk of this court issued a summons in the usual form. On the 2d of February, 1887, the summons and complaint were served on the defendant by an individual who was neither the marshal nor the marshal's deputy. On the 23d of February, 1887, the defendant appeared generally in the action by an attorney, and obtained an extension of time to answer. The answer was served by the same attorney on or about the 12th of March, 1887. The action was tried at the February circuit, 1888. The defendant having failed to prove a defense upon the merits, the court directed a verdict for the plaintiff in the sum of \$650. The defendant thereupon moved for a new trial upon the minutes of the court, and upon exceptions. Pending this motion a stay was granted.

Henry D. Hotchkiss and William S. Maddox, for plaintiff.

Jerome F. Manning, pro se.

COXE, J. As the defendant does not move upon a bill of exceptions, or even upon the minutes of the stenographer, nothing is before the court but the pleadings and a statement of fact relating to the question of jurisdiction. The defendant is not in a position, therefore, to review the proceedings upon the trial. But, as the arguments there presented are again asserted in the brief, it may be proper to say that, as the evidence is now recalled, the defendant entirely failed to establish a defense. The testimony was overwhelming, and hardly disputed, that the plaintiff rendered services for the defendant, or at his request, for which the defendant agreed to pay; that a note was given for these services, the note in suit being a renewal, with interest added. The plaintiff never knew any one but the defendant in the transaction; and the fact that the latter expected to collect the money from his clients is, of course, immaterial. The theory that the note was an accommodation note was wholly against the weight of evidence. As there was no material question of fact in the dispute, and as the plaintiff was entitled to recover when the defense rested, it was the duty of the court to direct a verdict in his favor.

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The only question which can properly be examined is the question of jurisdiction. It is urged by the defendant that because the amount involved is less than \$2,000 the court should dismiss the cause under the provision of the act of March 3, 1887. Section 6 provides "that this act shall not affect the jurisdiction over or disposition of any suit * * * commenced in any court of the United States before the passage thereof." The defendant argues that the suit was not commenced prior to the act, because the service by a person other than the marshal, or his deputy, was irregular and void. The plaintiff concedes that the service was irregular, but insists that the defect was cured by the general appearance of the defendant on the 23d of February, nine days prior to the passage of the act. In this contention the plaintiff is clearly correct. *Knox v. Summers*, 3 Cranch, 496; *Eldred v. Bank*, 17 Wall. 545, 551; *Farrar v. U. S.*, 3 Pet. 459; *Attorney General v. Insurance Co.*, 77 N. Y. 272; *Gracie v. Palmer*, 8 Wheat. 699; *Pollard v. Dwight*, 4 Cranch, 421; *Segee v. Thomas*, 3 Blatchf. 11. The office of a summons is to bring the defendant into court. He may come in voluntarily if he chooses, and, having done so, and having pleaded to the merits, he is not at liberty to dispute the jurisdiction of the court because not regularly served with process. The defendant consented to try his cause in this court at a time when the court had jurisdiction, and he cannot now be permitted to withdraw that consent. The court is clearly of the opinion that the suit, being in existence prior to the act of March 3, 1887, is in no way affected by its terms, and also that no error was committed on the trial in directing a verdict for the plaintiff. The motion for a new trial is denied.

Affidavits have been submitted which seem to suggest that other testimony might have been produced at the trial. These have not been considered, because no motion for a new trial on the ground of newly-discovered evidence is before the court.

GORMULLY & JEFFREY MANUF'G Co. v. POPE MANUF'G Co.

(Circuit Court, N. D. Illinois. May 14, 1888.)

COURTS—FEDERAL COURTS—VENUE—ACTIONS AGAINST CORPORATIONS.

Act Cong. March 3, 1887, § 8, provides that, except "when the jurisdiction is founded only on the fact that the action is between citizens of different states," "no civil suit shall be brought * * * against any person by original process or proceeding in any other district than that whereof he is an inhabitant." *Held*, that the circuit court sitting in Illinois had no jurisdiction of a suit for the infringement of letters patent brought by a corporation of that state against a corporation of Connecticut, having its principal office in Massachusetts, and doing business in Illinois; a corporation, under the act of 1887, being an inhabitant of the place where it has its principal place of business, where its corporate offices and records are kept, and its corporate meetings are held, and there being no statute in Illinois making it a condition of foreign corporations doing business in the state that they appoint agents upon whom process may be served.

In Equity. Bill for infringement. On motion to dismiss.

The Gormully & Jeffrey Manufacturing Company, an Illinois corporation, filed its bill against the Pope Manufacturing Company, a Connecticut corporation, but alleged to have its principal place of business in the city of Boston, in the state of Massachusetts, and to be a citizen of the state of Massachusetts, charging the defendant with the infringement of a certain patent issued from the patent-office of the United States, and praying for an injunction and an accounting for damages by reason of such infringement. This suit was commenced in April last, and the subpoena is returned served by the marshal of this district, by delivering a true copy to R. D. Gavin, manager of defendant. Defendant enters a special appearance, and moves to dismiss the suit for want of jurisdiction.

Coburn & Thacher, for the motion.

Offield & Towle, contra.

BLODGETT, J., (*orally*.) The question is whether under the act of March 3, 1887, this court has jurisdiction, or can obtain jurisdiction, in a case for infringement of a patent, of a corporation created under the laws of another state, and which is averred to be a citizen of another state, although it is alleged that it has a place of business in this district, by service upon an agent of such corporation in this district. The first section of the act of March 3, 1887, after defining the jurisdiction of the circuit and district courts of the United States, proceeds: "And no civil suit shall be brought before either of said courts against any person by original process or proceeding in any other district than that whereof he is an inhabitant; but when the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or defendant." Now, this is a suit under the patent laws of the United States, of which the federal courts have exclusive jurisdiction, without regard to the citizenship of the parties, and hence does not fall within the last clause of the excerpt just quoted from the statute; but it does seem to fall directly within the rule of the first clause quoted, that no defendant shall be sued in any other district than that whereof he is an inhabitant. From the judiciary act of 1789 to 1887 a defendant could be sued in the district whereof he was an inhabitant, or in which he was "found at the time of the service of the writ;" but the act of March 3, 1887, requires suit to be brought in the district whereof the defendant is an inhabitant, and drops from the law the provision that he may be also sued in any district where he may be found at the time of serving the process. The obvious purpose of this change was to protect persons in certain classes of cases from the expense and annoyance of being sued in districts which they might be merely passing through, or where they might be temporarily tarrying. "An inhabitant of a place is one who ordinarily is personally present there, not merely *in interne*, but as a resident and dweller therein." *Holmes v. Railroad Co.*, 9 Fed. Rep. 229. "Inhabitant: One who dwells or resides permanently in a place, or who has a fixed resi-

dence, as distinguished from an occasional lodger or visitor." Imperial Dict. "Inhabitant: 2. (Law.) One who has a legal settlement in a town, city, or parish; a resident." Webster. "Inhabitant: A dweller or householder in any place." Toml. Law Dict. I am not aware that the term "inhabitant," as applicable to a corporation in a case like this, has ever been judicially defined, but it seems to me a corporation must be held to be an inhabitant of the place where it has its principal place of business, where its corporate offices and records are kept, and its corporate meetings are lawfully held. A corporation, like an individual, may have agents representing it in a district of which it is not an inhabitant; and no reason is perceived why it can be sued outside of the district where its principal corporate business is done by service on its agent, which would not allow an individual to be so sued. And if a natural person, charged with the infringement of a patent, can only be sued in the district of which he is an inhabitant, I can see no good reason why a corporation is not entitled to the same protection under this law. This defendant is a corporation created by the laws of the state of Connecticut. The bill also avers that it is a citizen of the state of Massachusetts, and has its principal office in the city of Boston, in that state, and hence, by the showing of the bill, it may be an inhabitant of Boston; although I do not intend to pass on that question here. Waiving the question whether a corporation can be a citizen or inhabitant of any state except that from which it has obtained its corporate rights and existence, it is quite clear to me that it cannot be a citizen or inhabitant of more than one place; and although the bill states that this defendant does business in this district, that cannot make the corporation an inhabitant of the district so long as its principal offices are elsewhere. It seems to me that, according to this bill, this corporation is either an inhabitant of Connecticut or Massachusetts, and therefore it can only be sued in those states. Certain states have enacted statutes which require that corporations, like insurance companies, incorporated in other states, shall, as a condition upon which they will be permitted to do business in the state enacting such statutes, appoint agents upon whom process may be served; but there is no such statute in this state which applies to this defendant. I am therefore of opinion that this cause should be dismissed for want of jurisdiction.

WOLCOTT *et al.* v. ASPEN M. & S. Co. *et. al.*

(Circuit Court, D. Colorado. May 4, 1883.)

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

Where plaintiffs' title to the product of a mine has been established by a decree in a state court, a proceeding by plaintiffs against the same and other defendants, to obtain possession of their rights under the decree, although independent in form and involving a defendant who claims a superior title by purchase, is in effect merely a supplementary proceeding, inseparably connected with the original decree, and therefore not removable to the United States court.

On Motion to Remand.

J. T. Vaile, for complainants.

Geo. J. Boal, for defendants.

BREWER, C. J. In *Wolcott and others v. The Aspen Mining & Smelting Company and others* there is a motion to remand. Three grounds are presented. The first and third are passed with the single observation that very properly an interrogation mark might be put at the end of each of the questions presented. The second I consider more fully, because I think it the more important, and it is decisive. The proposition in that is that this suit or proceeding in the state court was merely ancillary to a case already determined in the district court, and transferred by appeal and now pending in the supreme court of the state. The facts are these: In a suit in the state court, in which these plaintiffs were intervenors, their title was adjudicated to a fraction of interest in the Emma mine. Some of these defendants were defendants in that suit. One J. B. Wheeler was the owner of a large portion of the adverse interests. After that decree an appeal was taken to the supreme court, and it is there pending. That decree, as I said, established the title of the present plaintiffs to a fractional interest in the Emma mine. This complaint, which is in the nature of a bill in equity in this court, was filed as an independent complaint; and yet the form in which these things are pursued is immaterial; we always go back to the substance of the transaction. It is a proceeding to enforce possession of the same fractional share of the product of that mine as was given by the decree. It sets forth the decree. It shows there has been a certain amount of product from that mine; and is a proceeding to enforce plaintiffs' right to that proportionate share of the product of the mine. The Aspen Mining & Smelting Company, principal and removing defendant, purchased, as alleged, after that decree, from Wheeler. In its answer, not denying that decree or those proceedings or its purchase, it sets up ownership in this ore by reason of a purchase of the apex of the vein, and, of course, that interjects into this litigation that controversy between other parties which was compromised a week ago. Now, it is settled that a proceeding which is merely ancillary, and for the purpose of carrying into effect an existing judgment or decree, is not removable; the case in which the

judgment or decree was originally entered not having been removed. The case of *Buford v. Strother*, 3 McCrary, 253, presents a careful and well-considered discussion of the question, and lays down the principle which is recognized as correct and controlling in this circuit, and which has never been challenged or overturned by the supreme court. That was a case in which three removals were sought,—two proceedings by garnishment after judgment, and the third a suit to obtain a satisfaction of judgment against a corporation out of the stockholders. In the course of that discussion Judge LOVE lays down this proposition:

"It seems to me that the true principle is this: Where the supplemental proceeding is in its character a mere mode of execution, or of relief, inseparably connected with the original judgment or decree, it cannot be removed, notwithstanding the fact that some new controversy or issue between the plaintiff in the original action and the new party may arise out of the proceeding; but where the supplemental proceeding is not merely a mode of execution or relief, but where it in fact involves an independent controversy with some new and different party, it may be removed into the federal court; always, of course, assuming that otherwise the proper jurisdictional facts exist. Every court must, in the nature of things, have the right, as well as the power, to carry its own judgments into execution. To take from any court the prerogative of executing its own judgments by proper process, or by supplemental proceedings, when necessary, would be to cripple its jurisdiction in a most essential matter."

Now, it is obvious that it would be no more than fair that a court which has established the title to property should be permitted to continue in possession of the proceedings to put the party whose title it has established in possession of that property. When the state court decreed that these plaintiffs were the owners of this fractional interest in the Emma mine, it was but executing that decree to see that they were put in possession of the same interests in the products of that mine; and that certainly in the federal court could have been accomplished by a mere petition in the case asking injunction, accounting, and receiver, as was done here by this independent complaint. As I said, the form in which this thing is done is immaterial. It is the substance we look at; and all that is sought to be accomplished by this complaint is to put these plaintiffs in possession of that property, the title to which has already been established by a decree in the state court. It is true that an independent issue is presented in that this defendant, having purchased the title of Wheeler and others, which was litigated in that case, affirms also that it has made a further purchase by which it claims a right superior to Wheeler and all the owners of the Emma mine. There is, therefore, an independent issue interjected into the controversy; but that, as Judge LOVE well says, does not make it any the less a part and parcel and continuance of the original litigation. I repeat:

"Where the supplemental proceeding is in its character a mere mode of execution or of relief, inseparably connected with the original judgment or decree, it cannot be removed, notwithstanding the fact that some new controversy or issue between the plaintiff in the original action and a new party may arise out of the proceedings."

A case which further illustrates this is cited by him,—that of *Webber v. Humphreys*, 5 Dill. 225,—where, after a judgment against a corporation under the Missouri statute, a proceeding was instituted to authorize execution against an alleged stockholder; and it was held that this latter proceeding was not removable, although in it was presented, and would be, naturally, an independent issue as to whether this party sought to be charged in execution was or was not a stockholder in the corporation. So, believing that this case, although a new issue is interjected into it, is, looking at it in substance and not in form, simply a proceeding to carry into effect a decree already rendered in the state court, and which cannot be removed to this court, the motion to remand will be sustained.

KALAMAZOO WAGON CO. v. SNAVELY *et al.*

(Circuit Court, D. Kansas. April 9, 1888.)

1. REMOVAL OF CAUSES—TIME OF TAKING.

Under act Cong. March 3, 1875, § 3, giving the right of removal "before or at the time at which the cause could be first tried, and before the trial thereof," the fact that the non-resident removing party has procured an order of the state court dismissing the case set aside, and has noted the suit for trial, does not make the application too late.

2. SAME—SEPARABLE CONTROVERSY.

A suit by a judgment creditor to subject land in the name of the debtor's brother to the payment of the judgment on the ground that the purchase price of the land was paid by the debtor, and the deed taken in the brother's name for the purpose of defrauding creditors, is not supplementary or auxiliary to the original suit, but an independent proceeding against new parties and on new issues, and is removable under the act of 1875.

On Motion to Remand.

W. A. Johnson and *A. Bergen*, for the motion.

J. H. Gullpatrick and *Osborne & Mills*, contra.

FOSTER, J. The plaintiff, in September, 1885, obtained judgment in the district court of Anderson county against M. B. Snavely for \$2,046, and on this judgment issued execution. Defendant having no goods or chattels, the execution was levied on a tract of land in Anderson county, as the property of said judgment debtor, by order of said plaintiff. Thereupon the plaintiff brought suit in said state court against said M. B. Snavely, Harry E. Snavely and others, for the purpose of subjecting said real estate to the payment of his judgment. He charges that said real estate was purchased and paid for by said judgment debtor, and that at his instance the deed was made directly to said Harry E. Snavely by the grantors, Thomas and David Lindsey, who are made defendants, and that no consideration was paid by the said grantee for said real estate, and that such purchase and transfer was so made and procured by the said M. B. Snavely while he was largely in debt to various parties, and

with the intent and purpose of defrauding and hindering and delaying his creditors in the collection of their debts. The defendants Snaveleys deny in their answer the plaintiff's allegations, and, further answering, deny that the consideration or any part thereof for said real estate was paid by said M. B. Snaveley, but allege that the consideration therefor was paid by David Snaveley, the father of said Harry, and that his father ordered the deed made as it was, and that said transaction was made in good faith, and without the participation in any manner of said judgment debtor. The plaintiff is a citizen of the state of Michigan, and the defendants are all citizens of Kansas. When the case was called for trial in the state court, at the September term, 1886, there was no one present to answer for the plaintiff, and the case was ordered dismissed for want of prosecution; but on the same day (September 9th) the attorney for plaintiff appeared and procured said order of dismissal set aside, and with his consent the case was set down for trial on the afternoon of the same day. When the case was called for trial the plaintiff presented his petition and bond for removal of the case to this court, which application was by the court denied, and said case dismissed. The plaintiff took out a transcript, filed the same in this court, and had the case docketed, and now defendants move to remand the same.

The first objection to the removal is that, as the plaintiff had procured the dismissal set aside in the state court, and with his consent the cause had been set for trial, he could not then apply for removal. This ground is not tenable, as it has been frequently decided that the party does not lose his right of removal until he has actually entered upon the trial. Section 3, act of 1875, gives the right of removal "before or at the time at which said cause could be first tried, and before the trial thereof." *Removal Cases*, 100 U. S. 473; *Yulee v. Vose*, 99 U. S. 545.

The other objection, and the one principally relied on, is that this court has no jurisdiction of the cause, for the reason that it is not an original and independent proceeding, but rather supplementary or auxiliary to the original suit. If such was the nature of this proceeding, the objection would be well taken; but in my opinion such is not the case.

This suit is an independent proceeding against new parties, and on new issues. It is a suit in equity to reach and subject the real estate claimed by a third party to the payment of the plaintiff's judgment. The principal defendant herein was a stranger to the other proceeding. The object and purpose of the plaintiff in setting up his judgment and execution against M. B. Snaveley was to show his interest in the subject-matter, and his right to contest the *bona fides* of the transaction. I can see no substantial distinction of principle between this case and that of *Bondurant v. Watson*, 103 U. S. 281. There the judgment creditor levied on the real estate as the property of his debtor, and was about to sell. Watson, whose title came through the judgment debtor, claimed the property, and contended that it was not liable to the plaintiff's judgment, and brought suit in the state court to enjoin the judgment creditor from selling,—as if the plaintiff in this case had proceeded to sell

the land on his execution, and H. E. Snavelly had brought suit to enjoin him. In the case cited the supreme court held that the cause was removable; that it was a new and independent controversy between new parties. The case of *Bank v. Turnbull*, 16 Wall. 190, to which my attention has been called, was a statutory proceeding to try in a summary way the title to personal property seized on execution, and is referred to and distinguished in *Bondurant v. Watson*, *supra*. See *Stackhouse v. Zunts*, 15 Fed. Rep. 481. This question is discussed in *Gaines v. Fuentes*, 92 U. S. 10, and *Barrow v. Hunton*, 99 U. S. 80, and the distinction between dependent and auxiliary actions on the one hand, and independent and original proceedings on the other, pointed out. This suit, in my judgment, comes under the latter class, and was removable under the act of 1875. Motion to remand denied.

SMYTHE v. NEW ORLEANS CANAL & BANKING CO. *et al.*

(*Circuit Court, E. D. Louisiana. April 28, 1888*)

1. EQUITY—JURISDICTION—RECOVERY OF LAND—ADEQUATE REMEDY AT LAW.

A bill to recover land, which shows a legal title in complainant, and alleges that defendants claim under a fictitious French grant, and that the officials of the land department have made certain rulings adverse to his title which are without jurisdiction and void, shows no ground for equity jurisdiction, since such rulings might, if void, be as well disregarded at law as in equity.

2. SAME.

The validity of complainant's legal title derived from the United States and the state depending on the question whether those under whom defendants claim had a sufficient title before the acquisition of the territory of Orleans, there is no ground for the interference of equity.

3. SAME—MULTIPLICITY OF SUITS.

Equity will not take jurisdiction of a suit to recover land on the ground of the number of defendants and the multiplicity of suits required at law, it not appearing that these would be any more numerous than in equity, and the petitory action allowing the joinder of all persons in possession of the land and claiming under the same common title.

In Equity.

J. Ad. Rozier and *J. Ward Gurley, Jr.*, for complainant.

H. C. Miller and *W. S. Finney*, for the New Orleans Canal & Banking Co.

Farrar & Kruttschnitt, *Girault Farrar*, *S. L. Gilmore*, *G. A. Breauz*, *Braughn*, *Buck*, *Dinkelspiel & Hart*, and *G. L. Bright*, for other defendants.

PARDEE and BILLINGS, JJ. The suit is one to recover real estate, and the question to be considered is whether it is within the equity jurisdiction of the court. The complainant claims 2,295 acres of swamp lands in the south-eastern land district of Louisiana. He alleges patents

from the United States and the state of Louisiana for 1,495 acres, and for the remaining 800 acres he alleges a purchase from the state of Louisiana, the whole being purchased from the state of Louisiana over one year after the completion and approval of the United States official survey by the surveyor general, and the consequent listing of the said lands as swamp lands inuring to the state of Louisiana under acts of congress approved March 2, 1849, and September 28, 1850, granting swamp lands to the state of Louisiana. There is no question but that the complainant's title as to 1,495 acres is purely legal. As to the 800 acres there may be some doubt, but it arises because the bill is not sufficiently explicit. The purchase from the state of Louisiana is alleged to be shown by a certificate of purchase. If the state law authorizes a sale, and, in the absence of patents from the United States, the issuance of a certificate of purchase,—which does not appear by the bill,—then complainant's title to the 800 acres is also a complete legal title. See *Wright v. Roseberry*, 121 U. S. 517, 7 Sup. Ct. Rep. 985. As to the effect of a receiver's certificate of purchase of land from the state of Louisiana, and as to whether it translates the title, see *Doles v. Cockrell*, 10 La. Ann. 540. In argument on this demurrer counsel for complainant claimed for him a legal title; and in fact, from the averments of the bill, we think it sufficiently appears that the title of the complainant is a legal title, and whether or no it is as against the defendants a valid title, depends entirely upon whether those under whom the defendants claim had a sufficient title before the United States acquired the territory of Orleans. The complainant can in no proper sense be said to have a standing before the court on account of the equitable nature of his title. The bill is not one for discovery, because it is not so framed, and, if it were, it would be demurrable on the ground that a bill of discovery will not lie to compel the production of titles under which the complainant does not claim, and which are not necessary to his title. 2 Story, Eq. Jur. §§ 1489, 1490; 1 Pom. Eq. Jur. § 201. It cannot be said that the jurisdiction in equity is necessary to prevent a multiplicity of suits, for by the bill it does not appear that any more suits at law will be necessary to vindicate the complainant's rights than in equity. As one suit in equity brings all the defendants before the court, so it may at law. In actions of ejectment all persons in possession of the land are made defendants. See Dicey, Parties, marg. pp. 494, 495; *Jackson v. Woods*, 5 Johns. 278; *Jackson v. Andrews*, 7 Wend. 152. In the petitory action in Louisiana all persons in possession of the land in controversy, and claiming under same common title, may be made defendants. *Derbes v. Romero*, 28 La. Ann. 644. And in actions in ejectment and in petitory actions the right to rents and profits can be joined and enforced as effectively, if not as readily, as in equity. See *Jackson v. Woods*, 5 Johns. 278; Code Pr. La. art. 7; *Winter v. Zacharie*, 6 Rob. (La.) 466; and *Hipp v. Babine*, 19 How. 271. Indeed, this last-cited case seems on the question of equity jurisdiction to be on all fours with the case in hand, and as it is a decision of the supreme court of the United States, since approved many times, it should decide the matter.

The bulk of the bill is made up of charges that the defendants claim under a pretended and fictitious French grant, which the land department at Washington has recognized; that this recognition hinders the complainant in the exercise of his rights; that the government officers in the land department are usurping jurisdiction, and that their acts are void. And it is said by his counsel: "The main source of equity jurisdiction herein—the backbone of equity jurisdiction—is that land-officers are of a special *quasi* judicial character." The bill shows the action of the land department to be against the complainant in refusing to issue the usual patents to the state of Louisiana, and in favor of the defendants by deciding that the grant under which they claim is valid. The bill does not ask that these rulings shall be reversed or annulled, but does ask that they shall be disregarded, and held for naught. These rulings take nothing away from the complainant's title, and add nothing to the defendants', if, as charged, the government officials in the land department have no jurisdiction, and such rulings may be disregarded at law as well as in equity. And the rule is the same whether the land-officers are of *quasi*, special, general, or particular judicial character, or even were fully recognized courts. In the case of *Wright v. Roseberry*, *supra*, the land department had gone so far as to issue to the defendants regular patents from the United States, and yet the supreme court of the United States saw in those void patents no hinderance to the plaintiffs fully recovering the land in an action at law. And see *Smelling Co. v. Kemp*, 104 U. S. 640, 641. We have examined many cited authorities in this case, and have made some investigation of text-books and cases not cited, and we can reach no other conclusion than that for all the matters charged in the bill the complainant has a plain, complete, and adequate remedy at law, and has no right to invoke the aid of equity.

MARSHALL v. TURNBULL *et al.*¹

(*Circuit Court, E. D. New York.* April 16, 1888.)

1. INJUNCTION — JURISDICTION — PROPERTY CLAIMED THROUGH ACTS OF A FOREIGN GOVERNMENT.

While this court, having jurisdiction of the person of a defendant, may no doubt enjoin him from wasting or interfering with property, or asserting title thereto, though the property be situated in a foreign country, it will not grant such injunction, asked for on the sole ground that certain acts of the officials of a foreign government, creating defendant's title to the property, are alleged to be void. A bill asking such relief on such ground is properly demurrable.

2. EQUITY—PLEADING—BILL.

A bill of complaint which does not set forth a copy of an instrument vital to complainant's claim, or contain any averment setting forth the terms thereof, is demurrable.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

In Equity. On demurrer.

William M. Safford, for complainant.

Silas M. Stilwell, for defendant.

LACOMBE, J. The demurrer to the amended and supplemental complaint is filed only by the defendant Turnbull and the Pedernales Company. The sufficiency of the bill as against them only is to be determined. Upon the hearing of the motion for preliminary injunction herein, (32 Fed. Rep. 124,) the question of jurisdiction was considered solely in respect to the case made out, or sought to be made out, at that time, by the complainant. His claim, as shown by the bill and affidavits, then was that the relations of the defendant Turnbull to the Manoa Company (the mortgagor) were of a fiduciary character, and that any title which he might in his own name acquire to its property inured to the benefit of the company and its creditors. In the words of complainant's brief on that motion, his "suit was one to enforce a trust, * * * [in which] the trustee can be decreed to convey the title." Jurisdiction of the court to compel a faithless trustee to disgorge property obtained contrary to the obligations of his trust, to require from him an account of all profits derived therefrom, and to exact the execution of such instruments of conveyance as might be necessary to the protection of his *cestui que trust*, no doubt exists, although the land concerned is situated in a foreign country, when the court obtains jurisdiction of the person and conscience of the defendant. The court may also, in a proper case, and as ancillary to such relief, enjoin the trustee from wasting or interfering with the property, or from asserting title to it. Such, however, as the case is now presented, is not the theory of this bill. It contains some averments as to a lease of the property to defendant Stone, in which lease it is claimed that Turnbull was interested. It also alleges that Turnbull subsequently took (or pretended to take) title to the property, but it does not seek to secure a transfer of his title, or a decree that whatever he took inured to the benefit of the Manoa Company. A naked injunction is asked for against him on the ground that his title is void because Venezuelan officials acted improperly in creating it. In other words, he, it is claimed, holds nothing, not because what he took passed (equitably) through him to the Manoa Company, but because the Venezuelan government could give nothing. Turnbull's position under this bill is no different from that of some stranger to whom the Venezuelan government might have conveyed the rights originally conceded to Fitzgerald; and the court is asked to enjoin waste upon, or interference with, property in a foreign country, because, as it is alleged, certain official acts of the government of that country (annulling one concession and making a new one) are void. Such relief cannot be administered on such ground. The bill is also demurrable for the reason that it neither sets forth copies of the instruments by which the mortgage under which complainant claims was created, nor contains any averment setting forth the terms thereof. The demurrer is sustained, with leave to amend.

BARRY v. MISSOURI, K. & T. RY. CO. *et al.*¹

(Circuit Court, S. D. New York. May 12, 1888.)

1. RAILROAD COMPANIES—BONDS AND MORTGAGES—EXCHANGE OF BONDS.

Where provision is made for retiring a series of secured income bonds of a railroad, and issuing new bonds in exchange, the bonds surrendered to be held by a trust company uncanceled until all are retired, a bondholder who does not consent to render his bonds is not entitled, in an accounting under the mortgage, to claim for interest due him more of the income than his share would have been had no bonds been surrendered.

2. SAME—ACCOUNTING.

In an accounting in favor of income bondholders of a railroad, if the company has seen fit to pay a higher rate of interest than needful upon prior incumbrances, it cannot charge the difference against the income to the injury of the bondholders in direct contravention of the provisions of the mortgage securing the income bonds.

3. SAME.

Held that, under the particular facts of this case, an allowance made by the mortgagor to a connecting road for a diversion of earnings should be rejected from the expense account in ascertaining income applicable to the payment of interest.

In Equity.

J. A. Davenport, for complainant.

Winslow S. Pierce, Jr., for defendants.

WALLACE, J. This cause is here upon exceptions filed by the railway company and the Mercantile Trust Company to the master's report. By the interlocutory decree of April 26, 1886, it was adjudged that the complainant and the other owners of income mortgage bonds created by the railway company were entitled to an account of the net earnings of the company for each six months from April 1, 1876, the date of the mortgage; and the railway company was accordingly directed to account before the master, in order to ascertain how much the complainant and others similarly situated should receive from the company as owing for interest earned upon the bonds. The decree directed the master to charge the company with its gross earnings and income derived from all the property covered by the mortgage since the execution of the mortgage, and to credit the company with its operating expenses, its expenses for keeping the property in repair, and the sums paid, or which it was liable to pay, for interest upon prior incumbrances, and for taxes and assessments. Upon the accounting thus directed, the master found and reported that the net earnings of the company which should have been applied to the payment of interest upon the bonds, after rejecting the items which the company had sought without right to charge against income, amounted October 1, 1886, to \$3,547,012. By the exceptions filed the railway company complains that the master improperly disallowed two items charged against earnings in the income account,—one for interest upon prior incumbrances actually paid by the company, and

¹See 27 Fed. Rep. 1.

the other for operating expenses in the form of an allowance to the International & Great Northern Railway Company for earnings diverted from that company.

Without repeating the opinion expressed at the hearing of the exceptions why the first item was properly disallowed by the master, it is sufficient for present purposes to state that, if the railway company has seen fit to pay a higher rate of interest upon prior incumbrances than it was liable to pay by its agreement with the owners of these incumbrances, it cannot charge the difference against the income, to the detriment of the income bondholders, in direct contravention of the agreement between the company and the income bondholders recited in the income mortgage.

The second item was, in effect, disallowed by the master, although his ruling was in form only a refusal to permit the railway company to delay the accounting by the issuing of a commission to produce testimony to show the particulars and details of the item. The refusal was put upon the ground, by the master, that the item ought not to be allowed as a charge against net earnings under the terms of the mortgage, if all the particulars and details sought to be proved were proved. It appears that June 1, 1881, five years after the execution of the income mortgage, the railway company leased the railway of the International & Great Northern Railway Company for the term of 99 years, and soon after acquired all the stock of that company, except 300 of the 10,000 shares, and since that time has operated the leased railway. After the interlocutory decree in this cause, compelling the railway company to render an account of its income, and apparently several months after the accounting before the master had commenced, Mr. Gould, who was then president of both railway companies, directed a credit to be made on the books of the Missouri, Kansas & Texas Railway Company in favor of the International & Great Northern Railway Company, as follows: "Allowance to International & Great Northern Railway Company on adjustments of earnings diverted from their company's line to the Missouri, Kansas & Texas Railway, \$743,899;" and the same item was charged against income in the income account. This allowance seems to have been the result of a conference between Mr. Gould and the treasurer of the Missouri, Kansas & Texas Railway Company. According to the testimony of the treasurer, the allowance was made on his suggestion, and concurred in by Mr. Gould, upon the theory that the earnings of the International & Great Northern Railway Company were only equal to its fixed charges, and would have been more than its fixed charges had it been allowed to control its business in its own interest exclusive of connections with any other road; and the amount allowed was the difference between fixed charges and operating expenses, which had been advanced to it by the Missouri, Kansas & Texas Railway Company. There was enough, probably, in the origin and history of this item, to justify the master in treating it as a mere matter of book-keeping, or as one manufactured for the purpose of the accounting, and destitute of any real foundation; but he placed his ruling upon the ground that by the terms

of the income mortgage such a disbursement would not fall within the category of expenses incurred in operating and keeping in repair the 786 miles of road covered by the mortgage, and therefore was not a proper charge against income. In this he was clearly correct, and the ruling is fully approved.

The master excluded the Mercantile Trust Company, the holder of coupons and scrip certificates representing \$2,028,007 of unpaid interest, from proving its claim against the fund, and ruled that the fund should be distributed wholly to other holders of coupons and scrip. The correctness of this ruling is questioned by exceptions filed in behalf of that corporation, and also by the railway company. It appears that in November, 1883, the railway company resolved upon a plan for exchanging the income mortgage bonds for the bonds of a general consolidated mortgage created December 1, 1880. By the terms of the resolutions of the board of directors embodying this plan, it was provided that all income bonds offered for exchange should be deposited with the Mercantile Trust Company as trustee, and held uncanceled as security for the new bonds until all the income bonds should be retired; and that the coupons and scrip certificates for unpaid interest upon the bonds offered for exchange should be retired at 60 per cent. of their face value, flat, payable in the new bonds. At the time of the hearing before the master the greater part of the income bonds, with coupons attached representing \$1,307,205 unpaid interest, had been exchanged with the company for the new bonds, pursuant to this plan, and were deposited with the Mercantile Trust Company, and held by it uncanceled; and scrip certificates to the amount of \$715,630 had also been exchanged for the new bonds, and were deposited with the Mercantile Trust Company, and held by it uncanceled. The scrip certificates represent overdue interest coupons, which were detached from the bonds at the time of the exchange; and the coupons are those which were attached to the bonds at the time of the exchange, and have matured subsequently. The theory upon which the master ruled that these coupons and scrip certificates should not be allowed to share in the interest fund earned by the railway company was that they had been paid and satisfied by the railway company, the exchange being in legal effect a payment and satisfaction. According to his view, the holders of coupons and certificates who did not exchange them for new bonds are entitled to the whole interest fund until they have received their 6 per cent. annual payments. It is quite immaterial whether the securities excluded from sharing in the interest fund are to be regarded as belonging to the Mercantile Trust Company, and treated as held in trust by that corporation for the benefit of the income bondholders who have consented to exchange their bonds for the new bonds, or whether they are regarded as really belonging to the railway company, and treated as held for its benefit by the trust company. The essential question is whether the railway company must pay over to the holders of outstanding coupons and certificates the whole interest fund, or enough of it to render them 6 per cent. interest, with interest upon interest, by way of damages, or whether it must pay to them only

such proportion as the amount of their respective coupons and certificates bears to all the interest payable by the terms of the income mortgage. It seems plain that the holders of income bonds, or of coupons or certificates representing unpaid interest on the bonds, who did not consent to surrender them in exchange for new bonds, are not entitled to any larger share of the interest fund than they would be if none of the original issue of bonds, or no coupons or scrip certificates, had ever been surrendered. It was competent for the railway company, in carrying out its scheme of refunding, to agree with the holders of income bonds, coupons, or certificates that, upon their exchange of their securities for new bonds, those surrendered should not be deemed paid, but should be kept alive to protect them against any enlarged claims of non-assenting holders; and, if such an agreement was made, the surrendered securities are to be regarded as held in trust by the trust company for the benefit of those who surrendered them. Ordinarily such an agreement, or some other arrangement for the protection of those who surrender securities, having a prior lien for securities secured by a junior mortgage, is one of the features of the refunding schemes of corporations. The rights of non-assenting bondholders cannot be prejudiced by any action on the part of the corporation and assenting bondholders in substituting new bonds for old; but it has sometimes been supposed that, if the refunding plan should assume the form of a payment of the old bonds, and an exchange of new bonds in satisfaction, the non-assenting holders of old bonds might acquire a priority which they did not have originally. Thus, in the case of *Ames v. Railroad Co.*, 2 Woods, 206, the railway company had executed a mortgage to secure a limited number of bonds, and afterwards executed another mortgage on the same property to secure a larger number of bonds, which recited that the holders of the bonds secured by the first mortgage had agreed to surrender the same, and receive in substitution therefor new bonds to be secured by the first mortgage, as modified by the second mortgage; and all the bonds secured by the first mortgage except 20 were exchanged for bonds secured by the second. Upon foreclosure the holders of the 20 bonds claimed that they were entitled to be paid out of the proceeds of the mortgaged property in preference to the holders of the new bonds, who had surrendered their old bonds in exchange, so that the proceeds which would have been divided among 2,825 bonds, the number originally secured by the first mortgage, should be first appropriated to pay the 20 bonds which had not been surrendered. But the court held that, while those holders who had not surrendered their bonds were entitled to have their rights preserved unaffected by what had taken place, equity would be done by giving them such part of the proceeds of the sale as they would have been entitled to if the new bonds and mortgage had never been executed; in other words, that they were entitled to 20.2825 of the proceeds of the sale, and no more. In that case, however, the court placed some emphasis upon the circumstance that there was an express understanding between the corporation and those bondholders who consented to the exchange that the first mortgage should stand for the benefit of the new

- bonds. But suppose there is no express understanding between the corporation and assenting bondholders that the original security is to be kept alive for their protection, how are the rights of non-assenting bondholders enlarged by the surrender or payment of part of the bonds originally covered by the mortgage? No new contract is made with them by which their rights or their original liens are amplified. If it becomes necessary to enforce their mortgage, complete equity is done them if they are awarded the same share of the proceeds of the property which they would have received if no bonds had been surrendered. If, by the terms of the contract, the whole property covered by a mortgage created to secure an issue of bonds is pledged to each bondholder, then, indeed, he may rightfully insist that he shall not be deprived of the fruits of his pledge by any subsequent dealings between the mortgagor and other bondholders to which he has not assented; and consequently he could reasonably claim that, if part of the debt to the payment of which the property was originally pledged has been extinguished, the proceeds of the property in case of a foreclosure must be applied to pay the balance before any other appropriation can be made of them. But such is not the contract implied between a bondholder and a mortgagor when the mortgage purports to secure a series of which his bond is one. The contract is that he shall receive the *pro rata* share of the whole security which his bond bears to the whole series. In *Clafin v. Railroad Co.*, 4 Hughes, 12, 8 Fed. Rep. 118, certain mortgage bonds had been acquired by the corporation in refunding operations, and the question arose whether the company, after having acquired them, could keep them alive, and re-issue them, so that they would carry with them their original mortgage lien. Chief Justice WARRE, in deciding the case, said:

"As against other bondholders secured by the same mortgage, I cannot believe there is a doubt of the power of the company to put out and keep out the entire issue up to the time the bonds became due. The contract with the individual bondholder was no more than that he shall have his due proportion of the security the mortgage on its face implies."

Where a mortgage is security for the whole number of a series of bonds, in a distribution of the proceeds of the sale of the mortgaged property each bond carries only a fractional interest in the proceeds of the property, to be ascertained by the proportion which its amount bears to the whole amount secured; and the holder of such a bond has no interest in the question whether holders of other bonds have title or not. *Hodges' Appeal*, 84 Pa. St. 359. There is no principle in the law of corporations or of mortgages which forbids a corporation that has issued a series of mortgage bonds from purchasing part of them back, and reissuing them again before their maturity, when the financial interests of the corporation will be thereby promoted, unless the organic law of the corporation prohibits the exercise of such a power. If it is lawful for the corporation to do this, it is wholly immaterial whether it pays money upon such a purchase, or exchanges other bonds instead. And if it should destroy the bonds purchased, and issue duplicates, not intending to extinguish the debt evidenced by the bonds, the lien of the mortgage would

not be affected by the substitution of the new bonds. *Watkins v. Hill*, 8 Pick. 522; *Pomroy v. Rice*, 16 Pick. 22; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65; *Dana v. Binney*, 7 Vt. 501. Of course, payment with intent to extinguish the debt would extinguish the lien.

In the present case the railway company intended that the income bonds exchanged for new bonds should remain with the trust company uncanceled until all the income bonds should be retired, and the resolutions embodying the refunding scheme distinctly provides for this; and although the language of the resolution, with reference to the coupons and scrip certificates representing the interest on the bonds, stated that they were to be "retired at sixty per cent. of their face value" in new bonds, it cannot be doubted that the company did not intend them to be canceled. They were not canceled, but were deposited with the trustee, as were the bonds. It is conceded that the bonds were kept alive upon the exchange, and it is difficult to see how the slight difference of phraseology employed to describe the mode of retiring the coupons and scrip certificates can work any substantial difference in the effect of the transaction as to them. The coupons and certificates are nothing more than evidence of the promise contained in the bonds for the payment of interest. The lien of the income bondholders upon the income of the company for the payment of their interest cannot extend beyond the contract of hypothecation as evidenced by the bonds and the mortgage when read together. The lien of coupon or certificate holders is but the lien the bondholders have for interest. The income mortgage was created to secure a series of bonds for the sum of \$1,000 each, amounting in the aggregate to \$10,000,000. Each bond contains a promise to pay the bearer from the net or surplus earnings of the railway company interest semi-annually at the rate of 6 per cent. per annum; and recites that the whole series of bonds are secured by the mortgage, and that the income of the property covered by the mortgage is pledged to the payment of the interest thereon. Manifestly the contract between each bondholder and the railway company authorized the latter to issue 10,000 bonds. It is also manifest that the railway company only bound itself to pay interest to each bondholder to the extent of his proportion of its semi-annual income. Consequently the railway company would satisfy its obligation to each holder of a \$1,000 bond by paying him one ten-thousandth part of its annual net income as interest on his bond. If this is a correct view of the contract between the company and the bondholder, it is obvious that neither the rights of the bondholder would be enlarged, nor the obligation of the railway company changed, by any increase or decrease in the amount of bonds issued. If the company had issued but 5,000 of the 10,000 bonds, or if it had issued the whole number, and had then called in and purchased some of them, and then put them out again, it would have made no difference in the rights of an individual bondholder. So, if the exchange of bonds is deemed equivalent to a payment of those surrendered, as well as of the coupons and certificates, the bondholders of outstanding bonds, coupons, or certificates occupy no different relation to the interest fund, and have no larger

lien upon it, than before. The fallacy of the position of the complainant, and the other holders of coupons and scrip not surrendered, is in the notion that by the contract of hypothecation the whole income of the railway company, to the extent of 6 per cent. annually, was pledged to the payment of the interest upon each bond. If this were true, and the claims of some of those who were originally entitled to share in the income fund had been extinguished by payment, the residue of the fund would inure to those whose claims remain unsatisfied. But the contract was that the company should distribute the income ratably among 10,000 bonds for \$1,000 each, so as to pay each bondholder his share. This share constitutes the whole interest of the holders of outstanding coupons or certificates in the income fund.

The report is recommended to the master to ascertain the rights of the parties to the fund in accordance with these views.

SIoux CITY & ST. P. R. CO. v. UNITED STATES.

(*Circuit Court, N. D. Iowa, W. D. May Term, 1888.*)

1. PUBLIC LANDS—JURISDICTION OF COURTS TO DETERMINE TITLES.

The question of determining whether certain land is open for settlement or whether it has passed under a railroad grant, is one which requires the exercise of judicial power and discretion on part of the officers of the land department, with which the courts of the United States cannot interfere by injunction or otherwise.

2. SAME—INJUNCTION—AGAINST DEPARTMENT OF LAND OFFICE.

Act Cong. March 8, 1887, providing that in certain cases suit may be brought against the United States, does not give the courts the right to interfere by injunction or otherwise with the action of the departments in matters requiring the exercise of judicial, as distinguished from ministerial, duties.

3. SAME—BILL FOR INJUNCTION—PARTIES.

The persons named as seeking to pre-empt the land claimed by complainants under a railroad grant are necessary parties to a bill to enjoin the United States land-officers from allowing the proof to be made or acted upon requisite to the completion of the entries made by such persons.

In Equity. Bill to settle title to land. Motion for preliminary injunction.

J. H. & C. M. Swan, for complainant.

T. P. Murphy, U. S. Dist. Atty., for defendant.

SHIRAS, J. The bill filed in this case avers that by the act of congress of May 12, 1864, there was granted to the state of Iowa every alternate section of land designated by odd numbers for 10 sections in width on each side of a projected line of railroad to be built from Sioux City to the Minnesota state line, with a provision that all lands already sold or granted by the United States within such sections should be made good by sections to be taken from the lands of the United States nearest to the designated sections; that by an act of the general assembly of the

state of Iowa, approved April 3, 1865, the lands granted to the state for the purpose named were in turn granted to the complainant company, which had undertaken the construction and operation of the line of railway designated in the act of congress; that the company proceeded with the construction of the named line of railway, and have built and maintained the same from the Minnesota state line to Le Mars, Iowa, from which point the trains all pass over the line operated by the Illinois Central Railroad Company to Sioux City. The bill further recites at length the various proceedings taken by the company, whereby it is averred it became entitled to demand and receive under the act of congress a total of 320,000 acres of land. It is also averred that there was not found within the 10-mile limit sufficient lands to make up the total quantity to which the company was entitled, so that the company became entitled to demand 133,202.20 acres as indemnity land, the same to be selected from those lying nearest to the 10-mile limit. The bill further describes specifically 720 acres of land, which it is averred are worth over \$2,000 and less than \$10,000, and are charged to be part of the lands of which the company has become the owner by reason of the grants already named, it being charged, however, that on the 24th day of March, 1884, the state of Iowa, disregarding the rights of complainant, illegally and wrongfully relinquished to the United States the lands in question, and that the United States, through its officers, the secretary of the interior, the commissioner of the general land-office, and the officers of the local land-office at Des Moines, Iowa, in disregard of the rights of complainant, have opened said lands to settlement and entry under the homestead, timber culture, and pre-emption laws of the United States, and have permitted certain named individuals to file pre-emption claims upon specified portions of said 720 acres of lands, and are permitting said parties to complete and perfect their proofs under said pre-emption laws, and that unless restrained, the said officers will issue receipts, patents, and other evidence of title to said parties, thereby casting a cloud upon complainant's title, and compelling complainant to bring a multiplicity of suits for the protection of its rights. Based upon this bill, a motion is now made asking the issuance of a temporary injunction restraining the commissioner of the general land-office, and the officers of the land-office at Des Moines, from allowing the proof to be made or acted upon necessary for the completion of the entries made by the parties named in the bill.

Jurisdiction in the court to entertain the bill is predicated upon the act of congress approved March 3, 1887. Whether this is one of the class of cases which come within the provisions of the act, and of which the circuit court can entertain jurisdiction, is a question which has not been discussed, and which will not be considered or determined at the present time. Assuming, however, for the purposes of the present application, that jurisdiction exists, should the motion for the temporary injunction be granted? It will be noticed that the only defendant to the bill is the United States. The individual pre-emptors, although named in the bill, are not made parties thereto, nor are the officers of the general

and local land-offices. The ultimate question presented for determination by the averments of the bill is whether the lands in question passed, under the act of congress and of the general assembly of Iowa, to the complainant, or whether they still remain part of the unappropriated lands of the United States, and therefore open to entry by pre-emption and homesteaders. This is a question which requires for its determination the examination and construction of the act of congress, of the acts of the general assembly of the state of Iowa touching these lands, and of the acts done, and work of construction performed by complainant, and the examination of the question calls for the exercise of judicial power on part of the officers of the land department. Unless the act of congress of March 3, 1887, confers the right upon the court to control in advance and direct the action of the land department, when called upon to act judicially, it is well settled that the power so to do, either by *mandamus* or injunction, does not exist. In the case of *Gaines v. Thompson*, 7 Wall. 347, this question was exhaustively considered, the authorities bearing thereon being fully cited. The distinction between purely ministerial acts, in regard to which the officers of the department have no discretion, and those which require the exercise of judgment and discretion, is clearly defined, and, touching the latter class of duties, it is declared that "certain powers and duties are confided to those officers, and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of *mandamus*." See, also, *Litchfield v. Register*, 9 Wall. 575. On the question of the extent and character of the functions exercised by the officers of the land department in determining whether certain lands are open to entry, and whether given parties are entitled to patents therefor, see *Johnson v. Towsley*, 13 Wall. 72; *Shepley v. Cowan*, 91 U. S. 330; *Moore v. Robbins*, 96 U. S. 530; *Craig v. Leitensdorfer*, 123 U. S. 189, 8 Sup. Ct. Rep. 85. Do the provisions of the act of March 3, 1887, change the rule recognized and announced in these cases, and confer upon the courts of the United States the power to control the officers of the department in the exercise of their judgment in determining whether certain lands are or are not open to settlement, and whether certain individuals have met the requirements of the several laws providing for the entry of lands? It seems to me that the matter is too plain for argument or elaboration. So radical a change in the relations between the courts and departmental branches of the government cannot be predicated on anything less than an express declaration by the legislative power, and certainly none such is found in the act of congress in question. The mere fact that the act provides that in certain cases suits may be brought against the United States does not tend to show that it was the

purpose of congress to bestow upon the courts the right to interfere by injunction or otherwise with the action of the departments in matters requiring the exercise of judicial, as distinguished from ministerial, duties. The fact that great injury may be caused, not only to the complainant, but to the settlers upon these lands, and to the region in which the lands are situated; by throwing them open to settlement while the title thereto is in dispute, cannot be considered in determining the question presented by this motion. It might not be difficult to convince any one who has any knowledge of the lamentable evils entailed upon the community and the settlers themselves by the action of the land department in throwing open the lands upon the Des Moines river to settlement when the title was in dispute, of the unwisdom of inviting settlers to occupy lands which are claimed under specific grants from the government without first having the question of title determined by the supreme court; but the certainty of the evils resulting from such action on the part of the department cannot be urged as a reason why the court should usurp a jurisdiction not conferred upon it. In the case of *Litchfield v. Register, supra*, it was held to be a fatal objection to the bill that the persons asserting their rights as legal pre-emptors were not made parties thereto. Any objection, good upon the final hearing, may be urged against the granting of a temporary injunction; and, as already stated, the individuals seeking to pre-empt the lands in the bill described are named in the bill, but are not made parties thereto, and, as is held in the case just cited, they are in fact the real parties to the controversy. Motion for injunction is therefore refused.

DENVER & R. G. R. Co. v. UNITED STATES, (two cases.)

(Circuit Court, D. Colorado. May 10, 1888.)

1. PUBLIC LANDS—LICENSE TO RAILROADS TO CUT TIMBER.

Act Cong. June 8, 1872, (17 U. S. St. at Large, 389,) granted to the D. & R. G. R. Co. the right to take stone, timber, etc., from public lands for the construction and repair of its railway, provided it was completed within five years from its passage; and in case of default the act was to be null and void as to the unfinished portion of the road. This act was amended to change the five years to ten. By act Cong. March 3, 1875, a general grant to railroads was made, similar to the special grant of the act of 1872, except that it limited the right to material to that necessary for the construction alone. *Held*, that the D. & R. G. R. Co. was entitled to the privileges of both acts.

2. SAME—PLACE OF USE.

Where a railroad has the right to take timber from the public lands adjacent to its right of way, to use for purposes of construction, it can take timber so obtained to any point of the line, however distant from the place of cutting.

3. SAME.

For the rights granted under the general act of 1875, the portions of the D. & R. G. R. R. built before and after June 8, 1882, are to be treated as one road, and timber can be taken from the entire line for the construction of any portion of the line provided for in the original organization.

4. SAME—PURPOSES OF USE.

Under these acts, section and depot houses, snow-sheds, and fences are a part of the railroad.

5. SAME—REPAIRS.

Under these acts, no timber can be taken from the public lands for the repair of any portion of the D. & R. G. R. Co.'s track not completed before June 8, 1882, and for that portion only from the lands adjacent thereto.

6. SAME—ADDITIONS.

After a railroad line is once completed it has no right under act Cong. March 3, 1875, to take timber from the public lands to build new switches and side tracks.

Error from district court, district of Colorado; HALLETT, Judge.

The United States, plaintiff, sued the Denver & Rio Grand Railroad Company and others, defendants, in two suits, for cutting timber illegally on the public lands. Judgments for plaintiff, and defendants bring error. Both suits were consolidated.

Wolcott & Vaile, for plaintiff in error.

H. W. Hobson, U. S. Atty., for defendant.

BREWER, C. J. These two cases come here on error from the district court, judgments having been rendered there in favor of the United States and against the plaintiff in error, for the full amounts claimed. Each case was tried on an agreed statement of facts. On June 8, 1872, congress passed an act making a grant to the Denver & Rio Grande Railway Company. 17 U. S. St. at Large, 339. The material portion of that grant is as follows:

"That the right of way over the public domain, one hundred feet in width on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops, and other buildings for railroad purposes, and for yard-room and side tracks, not exceeding twenty acres at any one station, and not more than one station in every ten miles, and the right to take from the public lands adjacent thereto stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line, be, and the same are hereby, granted and confirmed unto the Denver & Rio Grande Railway Company, a corporation created under the incorporation laws of the territory of Colorado, its successors and assigns: * * * provided, that said company shall complete its railway to a point on the Rio Grande as far south as Santa Fe within five years of the passage of this act, and shall complete fifty miles additional south of said point in each year thereafter; and in default thereof the rights and privileges herein granted shall be rendered null and void so far as respects the unfinished portion of said road."

Subsequently this proviso was changed so as to give ten years instead of five. 19 U. S. St. at Large, 405. On March 3, 1875, congress passed an act, making a general grant "to any railroad company duly organized under the laws of any state or territory," etc., which grant, for all questions that arise in this case, is similar to the special grant to the Denver & Rio Grande, except that in the general grant the right to take material, earth, stone, and timber is limited to what may be necessary for the construction, and not, as in the special grant, for construction and repairs.

The agreed statement of facts in the first case is as follows: That it is agreed—*First*. That the timber sued for in said action was cut by

William A. Eckerly & Co., as agents for the Denver & Rio Grande Railway Company, and delivered to said railway company. *Second.* That the attached statement correctly shows the kind and amounts of timber so cut and delivered, and also shows the time of cutting, the purposes for which it was cut and used, and the prices paid for cutting and delivering the same. *Third.* That said timber was cut in Montrose county, Colo., and near the town of Montrose, and upon public, unoccupied, and unentered lands of the United States. *Fourth.* That the lands from which the timber was cut were along and near and adjacent to the line of railway of said company. *Fifth.* That the portion of the line of railway through said county of Montrose, and in the vicinity of said town of Montrose, was not constructed or completed until after June 8, 1882, and that on June 8, 1882, said line of railway was only constructed and completed as far westward of Cebolla, in Gunnison county, Colo. *Sixth.* That said company had not completed its line of railway to Santa Fe on June 8, 1882, nor has it ever so completed it. *Seventh.* That of the timber cut as aforesaid a part was used on portions of the line of railway out to Grand Junction constructed and completed after June 8, 1882, and for the purpose of construction of railway, erection of section and depot houses, snow-sheds, fences, etc.; and a part was shipped by the Denver & Rio Grande Railway for similar purposes to the Denver & Rio Grande Western Railway, to be used in the territory of Utah, as shown in attached statement; and \$1,000 worth was used for repairs on portions of road completed prior to June 8, 1882. *Eighth.* That as to all of its line of railway constructed after June 8, 1882, the said company strictly complied with all the requirements of the act of congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States." *Ninth.* That upon the foregoing agreed statement of facts the following questions are to be submitted to the court for decision: (a) Whether under the act of June 8, 1872, and an act of March 3, 1877, amendatory thereof, the Denver & Rio Grande Railway Company had a right to cut timber for any purposes on public land of the United States adjacent to portions of its line of railway constructed and completed after June 8, 1882. (b) What are "adjacent" lands within the meaning of the act of congress, approved June 8, 1872, entitled "An act granting the right of way through the public lands to the Denver & Rio Grande Railway Company," and the act of congress of March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States?" (c) Whether under said acts said company could cut timber on public lands of the United States adjacent to the portions of the line of railway completed subsequently to June 8, 1882, to be used for purposes of repair, and for station and section houses, and for fences and snow-sheds on those portions of said railway line constructed and completed prior to June 8, 1882. (d) Whether under such statutes said railway company could cut timber from public lands adjacent to portions of the line of railway completed after June 8, 1882, to be used for any purposes on portions of the line of railway constructed and completed after June 8, 1882, and, if so, for

what purposes. (e) Whether the terms of the statute giving said railway company the right to take timber "for the construction and repair of its railway lines" would in anywise comprise and comprehend the erection, building, and repair of section and depot houses, snow-sheds, fences, and rolling stock. (f) Had the said railway company the right, under the act of March 3, 1875, to take from adjacent public lands material, earth, stone, and timber necessary for the construction of its railroad? (g) To what extent, and for what amount, the Denver & Rio Grande Railway Company is responsible for timber cut as aforesaid, and shipped to Utah for use on the Denver & Rio Grande Western Railway. (h) To what extent, and for what amount, said railway company is liable, if at all, upon the above agreed statement of facts, and upon the law as it shall be decided by the court. *Tenth.* That this case is a test case to obtain a definite and positive adjudication by a court of competent jurisdiction of the various points set out above, and of the rights of said railway company with regard to cutting timber from public lands under the act of June 8, 1872, under the amendatory act of March 3, 1877, and under the act of March 3, 1875. *Eleventh.* That judgment shall be entered by the court upon the foregoing statement of facts, and upon the law as it shall decide it, and at a valuation for said timber as set out in the annexed statement. *Twelfth.* That the admissions made in this statement of facts shall bind the parties hereto only for this suit, and shall not bind them as to any other matter or case.

There is some dispute between counsel as to the questions that are involved in and presented by these facts. I shall not attempt to consider any that I do not think are fairly and clearly presented by the facts. The fourth paragraph stipulates that the lands from which the timber was cut were adjacent to the line of railway; hence I shall not stop to consider how near land must be to be adjacent,—whether half a mile or ten miles. I certainly do not agree with the idea, which seems to be expressed elsewhere, that the proximity of the lands is immaterial, or that congress intended to grant anything like a general right to take timber from public land where it was most convenient. The grant was limited to adjacent lands, and I do not appreciate the logic which concludes that, if there be no timber on adjacent lands, the grant reaches out and justifies the taking of timber from distant lands,—lands fifty or a hundred miles away; nor do I understand that the rule controlling the construction of ordinary public grants, to the effect that they are construed strictly against the grantee, does not apply to these grants.

The first question is whether the railroad company can avail itself of both the special act of 1872 and the general grant of 1875. It was held by the district judge that it could, and I agree with him in that conclusion. It is unnecessary to do more than refer to the opinion filed by my Brother HALLETT for sufficient reasons for his conclusion. The principal question, however, is this: My Brother HALLETT was of the opinion that the place of use of the timber on the line of the railway was to be considered as well as the place of cutting, in determining the rightfulness of the appropriation by the company. He thought that the right

to cut timber extended to only so much timber as should be used in the construction of the road opposite, or nearly so, to the place of cutting; that if timber should be cut within a half mile of the road, and then carried on the cars of the company a hundred miles, and there used in the construction of the road, it could not be said to be taken, within the purview of the act, from adjacent lands. So he concluded that the right to take timber was limited by the place of use, and that, as each section of the road of reasonable length was completed, the right to take timber on lands adjoining such section was gone. In other words, the grant of timber was exhausted *pari passu* with the construction of the road. In this view, with all deference to the learned judge, I think he was mistaken. While grants of this nature are to be strictly construed, they are to be fairly construed, and so as to carry into effect the intent of the grantor. In determining what is granted, we of course look first to the language used. Now, in these grants the place of cutting, as well as the use to which the timber cut may be put, are both expressed. The place is the public lands adjacent to the line of the road. The use is the construction of the railroad, not a part of the railroad, but of the railroad as a whole, and of course including therein every part of it. It does not purport to grant the right to take timber from adjacent public lands for use in the construction of the railroad opposite the place of cutting, and these last words will have to be implied in order to place the limit on the grant given to it by the district judge. It would have been so easy to use such words of limitation that their omission makes strongly against an intent of such limitation. Let me make an illustration. Suppose the owner of a section of land made a grant to a railroad company of a strip 50 feet in width through his land for a right of way, and by the same instrument granted to the company the right to take stone and earth from land near this right of way for the purpose of constructing its road. This would be precisely parallel to the case at bar, the difference being only one of size. Now, would it be contended that under such a grant the company was limited for each rod of distance to the stone and earth which might happen to be opposite such rod? Would not a fair and reasonable construction, one expressing the intent of the grantor, be that the company could take stone and earth from any place which was near to the right of way for use in the construction of any part of the road through the section? If that would be true in the lesser illustration, would it not also be true in the larger case before us? Can it be that congress intended to aid in the construction of only a part of the railroad? It must have known that there were large extents of territory in this western country treeless, and without suitable stone for culverts and bridges. Did it mean to aid in the construction of such parts of the road as ran through a timber country, or where there was suitable stone, and leave the company unaided in the construction of other parts? It seems to me, both the language of the statute and the intent of the grantor are against the views entertained by my Brother HALLETT.

But, beyond this, the decision of the supreme court in the case of *U. S. v. Railroad Co.*, 98 U. S. 334, seems to me decisively against those

views. In that case the facts were these: By the nineteenth section of the act of July 2, 1864, there was granted to the railroad company, for the purpose of aiding in the construction of its road, every alternate section of public land (except mineral land) designated by odd numbers, to the amount of 10 alternate sections per mile on each side of the road on the line thereof not reserved, etc. By the twentieth section, whenever 20 consecutive miles were completed and accepted, patents were to be issued to the company for land on each side of the road to the amount designated. It was contended that this grant was to be measured by the separate sections of 20 miles of road, and that, to fill out the grant, land must be taken opposite each section, respectively. But the court ruled otherwise, and held that the grant was in aid of the construction of the road as a whole, and might be filled out by lands anywhere along the line. I quote the language of the opinion:

"The position that the grant was in aid of the construction of each section of twenty miles, taken separately, and must be limited to land directly opposite to the section, is equally untenable. The grant was to aid in the construction of the entire road, and not merely a portion of it, though the company was not to receive patents for any land except as each twenty miles were completed. The provision allowing it to obtain a patent then was intended for its aid. It was not required to take it; it was optional for it then, or to wait until the completion of other sections or of the entire road. The grant was of a quantity of land on each side of the road, the amount being designated at so many sections per mile, with a privilege to receive a patent for land opposite that portion constructed, as often as each section of twenty miles was completed. If this privilege were not claimed, the land could be selected along the whole line of the road without reference to any particular section of twenty miles. When lateral limits are assigned to a grant, the land within them must, of course, be exhausted before land for any deficiency can be taken elsewhere; and, when no lateral limits are assigned, the land department of the government, in supervising the execution of the act of congress, should undoubtedly as a general rule, require the land to be taken opposite to each section; but in some instances good reasons may exist why a selection elsewhere ought to be permitted. If, as in the present case, by its neglect for years to withdraw from sale land beyond twenty miles from the road, the land opposite to any section of the road has been taken up by others, and patented to them, there can be no just objection to allowing the grant to the company to be satisfied by land situated elsewhere along the general line of the road."

This sustains me in the construction I place upon these grants, that only two things are necessary in determining the rightfulness of the appropriation of timber—*First*, that it be taken from public lands adjacent to the line of road; and, *second*, that it be used in the construction of the road. This disposes of substantially all the questions in the case. One or two minor matters remain for notice.

As appears from the agreed statement of facts, a part of the road was completed before June 8, 1882, the time limited by the special act and its amendment; and a portion has been constructed since. For convenience I shall call the first part the old line, and the latter part the new line. Now, the special right given by the special act—that is, the right to take timber for repairs—is by the proviso specifically limited

to the old line, so that no timber can be taken from lands adjacent to it for repairs on the new line, and, conversely, none from land adjacent to the new line for repairs on the old. Again, for the rights granted under the general act both the old and the new lines are to be taken as parts of one road, so that timber can be taken from any part of the entire line for the construction of any part of the road provided for in the original organization. Again, I think there can be no doubt that section and depot houses, snow-sheds, and fences are properly to be considered, in the purview of the act, a part of the railroad.

I have not hitherto noticed the agreed statement of facts in the second case, for the matters that I have been considering dispose of every question in that case except that which arises upon the eighth paragraph, which is "that one-fourth of said timber has been used in the construction of new switches and side tracks along the line of road completed subsequent to June 8, 1882;" and that presents the question whether this timber was used in the construction of the railway. On the one side it is claimed that this refers to repairs, new switches, etc., being in lieu of old switches, etc. On the other hand it is claimed that this means absolutely new switches, etc.; that is, switches, etc., where there were none before. I think it immaterial which is the meaning. Of course, if repairs, it was unlawful, because upon the new line; and if, on the other hand, absolutely new switches and side tracks, they were upon a line of road already completed, so that they were merely additions, extensions, and improvements. The grant does not extend to these matters, but is exhausted when the line is once completed. Of course we all know that the developments of the country and increase of business will require constant additions; new depots, section-houses, switches, and side tracks. The demand for these will never be exhausted, but will continue as long as the surrounding country increases in population and business. Now, the grant was not intended to aid in supplying these successive demands. It was to aid in the first construction, and when that was completed the grant was exhausted. So, in either event, this appropriation of timber was unlawful.

Of course the supply of timber for other roads was not within the contemplation of the act.

This disposes of all questions in the case. From the views above expressed, it follows that the judgment of the district court in each case must be modified. In the first case judgment will be entered in favor of the government for the amount of timber shipped to the Utah lines, and for the \$1,000 worth of timber cut on land adjacent to the new lines for repairs on the old; and in the second place judgment will be for the one-fourth which was used in the construction of new switches and side tracks.

ROLLINS v. LAKE COUNTY.

(Circuit Court, D. Colorado. May 7, 1888.)

1. COUNTIES—LIMITATION OF INDEBTEDNESS.

The provision of Const. Colo. art. 11, § 6, to the effect that "the aggregate amount of indebtedness of any county, for all purposes," exclusive of debts contracted before its adoption, "shall not exceed at any time" a certain limit therein named, is not confined to debts by loan. Following *People v. May*, 9 Colo. 80, 10 Pac. Rep. 641.

2. SAME—COMPULSORY OBLIGATIONS.

Warrants issued by a county in payment of compulsory obligations, viz., fees of witnesses, jurors, constables, sheriffs, and the like, are not within the prohibition; and it is no defense to an action upon such warrants that at the time they were issued the general limit of county indebtedness fixed by the constitution had been reached. Overruling *People v. May*, 9 Colo. 404, 12 Pac. Rep. 888.

At Law. Action by Frank Rollins upon certain county warrants issued by the board of county commissioners of Lake county. The case was tried to the court.

Teller & Orahod, for plaintiff.

A. E. Parks and *H. B. Johnson*, for defendants.

BREWER, J. This action is upon county warrants. The circumstances which surround it make it one of peculiar importance. For 10 years, and from the admission of the state in 1876, many counties, whose tax levy was insufficient to meet current expenses, had been issuing warrants, which had accumulated to, as counsel says, at least \$1,000,000. No question seems to have been made during these years as to the validity of such action; but the question being thereafter presented to the supreme court of the state, it construed section 6, art. 11, of the constitution of the state in such a manner as to invalidate the bulk of these warrants. The plaintiff, being a non-resident, comes into the federal court, and invokes its judgment as an independent tribunal on the question thus determined by the state supreme court.

No more delicate or responsible duty is ever cast upon the federal court than when it is asked to determine, not what the state supreme court has decided, but whether its decision shall be followed. While the federal courts are in a certain sense independent tribunals, yet they sit within the state to construe and enforce its laws. Whenever a construction has been placed upon a state statute or constitution by her supreme court, that determines for both state and federal courts all questions and rights arising after such construction; but, when the rights or claims of right arose prior to such construction, then the duty rests upon the federal courts of independent examination and determination. The rule controlling in such cases is fully and clearly stated in the recent case of *Burgess v. Seligman*, 107 U. S. 33, 2 Sup. Ct. Rep. 10, as follows:

"Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and

have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrine of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony, and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

See, also, *Paria v. Bowler*, 107 U. S. 540, 2 Sup. Ct. Rep. 704; *Green Co. v. Conners*, 109 U. S. 104, 3 Sup. Ct. Rep. 69; *Carroll Co. v. Smith*, 111 U. S. 556, 4 Sup. Ct. Rep. 539; *Anderson v. Santa Anna*, 116 U. S. 362, 6 Sup. Ct. Rep. 413; *Bolles v. Brinfield*, 120 U. S. 759, 7 Sup. Ct. Rep. 736. Accepting that as the rule to control this court, I pass to a statement and consideration of the immediate question. The section of the constitution referred to is as follows:

"No county shall contract any debt by loan in any form except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to-wit: Counties in which the assessed valuation of taxable property shall exceed \$5,000,000, \$1.50 on each \$1,000 thereof; counties in which such valuation shall be less than \$5,000,000, \$3 on each \$1,000 thereof. And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debts so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned: provided, that this section shall not apply to counties having a valuation of less than \$1,000,000."

The decisions of the supreme court of Colorado referred to are *People v. May*, 9 Colo. 80, 404, 414, 10 Pac. Rep. 641, 12 Pac. Rep. 838, and

15 Pac. Rep. 36.¹ In the first of these cases the question was whether this section in all its sentences referred exclusively to debts contracted by loan, and it was held that it did not; that there were two independent declarations in it; and that the third sentence, commencing, "And the aggregate amount of indebtedness of any county for all purposes," was not limited to debts by loan, but applied generally to all. In the second case the question was whether the limitation upon county indebtedness imposed by this section included debts incurred by operation of law as well as those arising from express contracts, and it was held that it did.

Returning now to the first question, it was and is earnestly insisted by the learned counsel for plaintiff that the scope and intent of the entire section is indicated by its opening lines, which expressly name debts by loan; that, as a general rule, each separate section is to be construed as carrying one idea through all its sentences, and that, even without special words of reference in the later sentences, they are to be construed as based upon the first idea or controlling fact; that not only is such the ordinary rule of construction, but also to establish a different one for this section would result in glaring absurdities, hindering the administration of county affairs in such a manner and to such an extent as shows that such was not the intent of the framers of the constitution or the people who adopted it.

Again, it is insisted that although, prior to the framing of this constitution, seven states had incorporated into their constitutions limitations upon county indebtedness, a comparison of the condition of those states with this, in territory, population, and county organization, shows the absurdity of the meager powers given to counties in this state under such a construction of this section. And, again, great reliance is placed upon contemporary construction, inasmuch as for 10 years many counties have transacted business and issued warrants as though no such limitation as is now claimed existed; inasmuch as several suits were brought in different courts, both state and federal, upon county indebtedness, in which the defense of this limitation existed, but was not presented; inasmuch, also, as several acts of the legislature applied to facts as they existed, and as it must be presumed were known to exist, conflict with the limitation imposed by this construction.

It will be observed that the language of the third sentence is general. It says: "That the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed," etc. Now, in order to make it mean what counsel claim it means, the word "such," or some word of similar meaning, must be implied prior to the word "indebtedness" or "purposes;" and counsel insist that such word should be implied, and that the meaning is correctly expressed, when the language is "the aggregate amount of such indebtedness," or "for all such purposes." That a word may be supplied or implied when necessary to carry out the ob-

¹ See, also, 9 Pac. Rep. 34.

vious intent of the sentence is, of course, conceded; but can the intent be presumed to justify the supply of the omission? It is, of course, always a question of construction, and the thought and intent of the framer is the thing to be determined. I have read the opinion of the supreme court on this matter, and studied it with care. The solid tread of the argument of the learned judge who wrote that opinion is to my mind irresistible. It compels conviction. Starting with the conceded and elementary proposition that, in determining the meaning of any instrument, whether agreement, statute, or constitution, we look first to the words used, and seek their natural signification in the order of grammatical arrangement in which they are found, he shows that the sentences are separate and complete, the propositions in them independent declarations, and that there is no grammatical necessity of implying or supplying any word to perfect either. Hence the supplying or implying of a word must find some other reason than the mere grammatical arrangement for its justification.

Again, he calls attention to what, in my judgment, is most significant,—the proceedings of the convention that framed this constitution. If, in construing any sentence, it becomes a question whether any word should be implied which is not found, in order to fully express the true meaning, and we can know that when the sentence was being prepared the question of whether that very word should be inserted was presented, discussed, and it was finally determined to reject it, we should be driven almost irresistibly to the conviction that the meaning which that omitted word would disclose was not the meaning intended by the makers. Now, it appears from the debates in the convention that the question of introducing this word “such” into the sentence was presented and discussed; that two or three times it was voted to introduce it, and as often voted to strike it out; and that finally it was left out, and the proviso at the close of the section added. I do not see how demonstration could be made more perfect as to the intent of the framers of this section. Cooley, Const. Lim. 66. That which was their intent as shown by the grammatical arrangement of the language, and by their discussion, must, in a matter of this kind, be presumed to have been the intent of the people in adopting this constitution. The learned judge also notices other matters, such as the language of an address prepared by the convention, and submitted with the constitution to the people; but I do not care to pursue this matter further, or notice the various reasons urged by him in support of the conclusion. It is enough to say that I think his reasoning unanswerable.

I pass now to the second question: Does the limitation upon county indebtedness imposed by this section include debts incurred by operation of law as well as those arising from express contracts? This question may be really separated into two: *First*, in determining when the limit is reached, what is to be included; and, *second*, what effect has the limit when reached upon the powers and liabilities of the county?

In regard to the *first*, it will be noticed that county indebtedness may arise in one of three ways: It may spring from the voluntary contracts

of the county authorities. Second, it may be cast upon the county by the action of the legislature in requiring the payment by it of certain fees and salaries; and in respect to debts of this class the county as such exercises no choice, has no volition. They are compulsory, as distinguished from contractual, obligations. Further, it may arise from some tortious act of the county authorities. Such a tort creates a liability against the county, which, ripening into a judgment, becomes a debt. Now, in determining when the limit of county indebtedness has been reached, it is obviously immaterial under said section how any particular portion of the indebtedness arose or whence it sprang. It is enough that it is a debt. The language of the section is, "the aggregate amount of the indebtedness of any county for all purposes shall not exceed," etc. Every dollar of the indebtedness might have sprung from tortious acts of county officials which, prosecuted by the injured parties in actions *ex delicto*, have ripened into judgments, and thus become debts, and still the limit be reached. Indeed, the process of determination is a mere matter of mathematical calculation,—the adding up of the valid debts of the county.

Secondly. Supposing the limit has been reached. What effect has that on the powers and liabilities of the county? That it puts an end to its contractual powers is clear. So the supreme court held. Such was the obvious purpose of the framers of the section. They were familiar with the experiences of other states, the territorial laws in force, and the ordinary ways of county business everywhere. They knew that a large discretion was given to county commissioners in the matter of creating obligations against the county. They knew that it was usual to give to them power to build and keep in repair county buildings, to lay out, open, and improve county roads, build bridges, and otherwise subject the county to large expenditures. With this in view, the obvious purpose of the statute was to limit their powers in this direction, and to say that beyond a certain sum no county official should be authorized to contract a debt binding against the county. On the other hand, it is equally clear that this section does not enable a county to defeat its liability for a tort, or prevent such liability from being merged into a judgment, and thus becoming a debt. It is no defense to an action for a wrong that, if judgment be recovered therefor, it will carry the county indebtedness beyond the constitutional limit. This is conceded by the supreme court in this opinion. It says: "Involuntary liability arising *ex delicto* is a subject that is not contemplated by the provision." In this the court only follows prior decisions in other states. In *Bartle v. City of Des Moines*, 38 Iowa, 414, the same doctrine was affirmed. So, also, in the case of *Bloomington v. Perdue*, 99 Ill. 329, the court in that case in a single sentence disposing of the question, as though a contrary doctrine were too absurd to require discussion. See, also, *Chicago v. Sexton*, 115 Ill. 230, 2 N. E. Rep. 263, in which the court uses this language:

"There is nothing new in thus holding a municipality responsible for the want of fidelity of those who act for it. Suits of that kind are of daily occurrence. The liability thus imposed is not within the constitutional and statutory limitations in regard to the creation of indebtedness."

So it has been held in Iowa that where warrants were issued in excess of the constitutional limit, and judgments rendered thereon, the defense of invalidity not having been pleaded, and that through the fraud of the supervisors of the county, and thereafter bonds issued in payment of such judgments, the bonds were valid in the hands of a *bona fide* holder. *Railroad Co. v. Osceola Co.*, 45 Iowa, 168, 52 Iowa, 26, and 2 N. W. Rep. 593.

The other class of debts springs from neither the voluntary nor the tortious acts of county officials. The county has neither voice nor opportunity in the matter. They are imposed by the legislature, and are generally such as affect the state at large as well as the county.

It is well here to stop a moment, and consider what a county is. In one aspect, it is an independent corporation, having peculiar private interests and concerns. The management of those interests and concerns is, as a general rule, confided to the county officials; and the debts incurred in the management of those private affairs are created by the voluntary contracts of those officials. In another aspect, the county is but a mere subdivision of the state, and only determines locally the administration of those affairs which affect the people of the state as a whole. Take the administration of justice in the courts, the matter of elections, the preservation of the public peace, and matters of a kindred nature. They are not the purely private concerns of the county. They affect vitally and largely the interests of the state as a whole. It is common elsewhere, it was and is the case here, that the cost of these public services is cast largely upon the county. Not upon the county as an independent corporation, and solely interested in and benefited by such services, but as a portion of the state, and as such portion thus contributing to the general welfare. In the creation of debts for these services the county is not consulted. It has no voice in saying when they shall be incurred, or to what extent. I know the line of demarcation is not preserved with absolute uniformity, but the general character of the difference between contractual and compulsory obligations is as I have stated. This is a matter of common knowledge, and must have been within the contemplation of the framers of the constitution. Was it their intent to relieve the county of liability for these compulsory obligations when in any manner the general limit of indebtedness had been reached? See what that would imply: The possibility that county commissioners, by extravagance, might largely impair, if not practically defeat, the administration of justice, the preservation of the peace, and even the holding of elections. For public service, without expectation of pay, is seldom done, or, if done, only poorly. Will a constable serve process; will a sheriff, at personal risk, preserve the public peace; will a county attorney prosecute with vigor and interest; will juror or witness attend, giving up private interests for public good,—with the knowledge that these, their services, are gratuitous, and will receive no compensation?

Will it be said the legislator can guard against these dangers by an increase of the tax levy? Who shall say how great will be the extravagance of the county officials? or, even if that could be restricted by law,

who can foretell how much of crime will happen during any coming year? I am advised by counsel that the suppression of a single riot in Leadville cost the county more than the entire proceeds of that year's levy. These things cannot be foreseen. Can it be that the framers of the constitution intended that compensation for such services should depend upon the question whether a limit of county indebtedness had been reached? It must be borne in mind that the amount of such expenditures can never be foreseen. In one year they may aggregate a great amount, and in the next be comparatively trifling.

These considerations of a general nature impress me forcibly with the conviction that it was not the intent of the framers of this section to permit a county to escape from liability on account of such compulsory obligations by the fact that its general limit of indebtedness has been reached. This conviction is strengthened by this provision in the section: that the indebtedness "shall not at any time exceed twice the amount above herein limited, unless when in manner provided by law the question of incurring such debt shall at a general election be submitted," etc. Now, what a county proposes voluntarily to do, what amount of debt it intends voluntarily to create, may be known and submitted to a vote; but who can foresee what amount of crime may be committed, what criminal cases may have to be prosecuted, what expenses must be incurred in such prosecution, or in preserving the public peace, not yet apparently threatened? These are matters which, as they cannot be foreseen, cannot well be provided for by submission to popular vote. "Such debt," is the language; obviously a debt that is contemplated, and not one that may be imagined. This question did not arise in this state for the first time. In 1885 the supreme court of Missouri considered and decided it. In *Book v. Earl*, 87 Mo. 246, that court held that a county could not contract a debt for any purpose in excess of its revenue for the current year without the special assent of the voters, and that, when it was desired to create a debt in excess of such revenue for the improvement of the court-house, the question must first be submitted to the qualified voters. But at the same term, in *Potter v. Douglas Co.*, Id. 239, the same court held that the constitutional limitation as to indebtedness had no application to a debt incurred by a county for the keeping and transporting of its prisoners by the sheriff or jailor of another county. The judge who wrote the opinion in that case thus states the reasons therefor:

"After carefully considering the subject, I am not of opinion that the constitutional prohibition should be ruled to apply in instances like the present. For this conclusion these are my reasons: I do not regard section 12, *supra*, as applying here, because the effect of such construction would be destructive of the peace and good order in every county embraced within the provisions of section 6090, aforesaid; for it would be an impossibility to submit to a vote of the people of the county concerned, the question of an unascertained and unascertainable indebtedness to be incurred in the future, as the exigencies of the case might demand. Who could foretell how many criminals would be arrested in the course of the ensuing year? If this could not be done, is it not glaringly obvious that no question as to the amount of the indebtedness could possibly be submitted to the people for the sanction of their suffrages?

The maxim, *lex non cogit ad impossibilia*, may appositely be invoked in the present case; a maxim equally invocable whether the law be statutory or organic. But another reason occurs why that section cannot apply in the case at bar. The inhibition of the constitution, it will be observed, is leveled against a county becoming indebted, *i. e.*, through the ordinary channel, the action of the county court, the financial agent of the county. But here the indebtedness was not so incurred. It was created entirely independent of any action of the county court; created by the sheriff of the county pursuant to the command of section 6090, *supra*. The law itself gave license to the incurring of such debt. It was incurred by operation of law, and the fact that the county would ultimately have the debt to pay cuts no figure in this discussion."

It is true, by the constitution of Missouri there is a limit on the amount of taxation, as well as in the matter of indebtedness, but that does not militate against the force of the argument presented by that court. My conclusion, therefore, is that it is no defense to an action upon county warrants issued in payment of these compulsory obligations that the general limit of county indebtedness has been reached. I believe that it is agreed between counsel that the warrants sued on in this action are of this nature, and the judgment must be entered, therefore, in favor of the plaintiff.

I regret that in the conclusions that have been reached I am not fully in accord with the supreme court of the state. I regret this, not alone because I regard it generally the duty of the federal court to follow the supreme court of the state in its interpretation of the state statutes and constitution, but also because of the high respect I entertain for the individual members of that court, who honor the office which they occupy, and whose duties they so admirably discharge; but over against that is the strong voice of appeal rising from the equities of these various warrant holders. This is not the case of a series of bonds issued to a railroad corporation whose existence and work are, notwithstanding it is called a *quasi* public servant, we all know, prompted by personal and selfish interests, but it is the case of warrants issued to many individuals, witnesses, jurors, constables, sheriffs, and the like, called upon by the laws of the state to render some public service in the administration of justice, the punishment of crime, the preservation of the public peace, the conduct of elections,—matters in which the state as a whole is interested and which conduce to the general welfare,—and who have obeyed the mandates of their state in the undoubting faith that the promised compensation for those services would be paid. Honesty, justice, and all the potential obligations of a solemn promise demand that they be paid; and if I have lent a too-willing ear to the voice of such appeal, and have permitted such equities to blind my eye to a clear vision of the literal mandate of the constitution, it is consolation to know that the amount in controversy is so great that a review of these proceedings can be had in the supreme court of the United States, by which high and ultimate tribunal any errors and mistakes can be corrected.

SCHNELLE & QUERL LUMBER CO. v. BARLOW.

(Circuit Court, S. D. New York. May 8, 1888.)

1. DEEDS—STATUTORY CONSTRUCTION—"GRANT, BARGAIN, AND SELL."

Under 1 Rev. St. Mo. 1879, c. 20, § 675, p. 110, as construed by the supreme court of that state, the words "grant, bargain, and sell," used in a conveyance in which an "estate of inheritance in fee-simple is limited," amount to a covenant of seizin of the estate so limited, and the covenant runs with the land.

2. COVENANTS—SEIZIN—TITLE BY JUDGMENT IN EJECTMENT.

In Missouri ejectment is a mere possessory action and a judgment therein confers no title upon the party in whose favor it is given. It is no defense, therefore, to an action in the United States circuit court in New York, by the grantees of land in Missouri, to recover damages for breach of covenant of seizin, that the covenantor has succeeded to the rights of the prevailing party in ejectment, and has duly conveyed them to the plaintiff, in the absence of other proof of title in such prevailing party.

3. SAME—PURCHASE OF PARAMOUNT TITLE.

A covenantee, in Missouri, under a covenant of seizin is not bound to wait for actual dispossession, but may at once, upon the hostile assertion of a paramount right or title, pay off or extinguish the right by purchase; and his measure of damages is the reasonable sum paid for such title.

4. SAME.

The life-tenant of land in Missouri compromised litigation with B., who claimed an interest in it, by taking from him a deed of nineteen-thirtieths, and giving him in turn a conveyance of the remaining eleven-thirtieths. Upon her death intestate, the remainder-men in fee, who were also her children, set up title to the land conveyed to B., and he filed bill to remove cloud. The bill was dismissed, and the dismissal was affirmed by two appellate courts, on the ground that the children were not estopped from asserting title to the land B. had got by reason of the fact that they had succeeded as heirs to the land he had given their mother in exchange. S., who had bought B.'s land, and been compelled to purchase the interest of the heirs, then sued B. on his covenant of seizin in the United States circuit court in New York. *Held*, that neither the plaintiff nor the defendant would have had a valid defense in an action of ejectment, in Missouri, at the suit of the remainder-men.

At Law.

Charles C. Burlingham and Joseph A. Shoudy, for plaintiff.

Wm. D. Shipman, for defendant.

SHIPMAN, J. This is an action at law, in which a jury trial was waived, by written stipulation duly signed by the parties, and the case was tried by the court. The action was brought to recover the damages which were alleged to have been sustained by the plaintiff by reason of the breach of the covenant of seizin in the deed of the defendant and his wife of a lot of land in St. Louis, Mo., to Lesley Garnett. The facts which, upon such trial, were proved and are found by the court to be true, are as follows: The land in question is property described in the complaint, and is situated on the south-east corner of Eighth and Mullanphy streets in said St. Louis, having a front of 36 feet 3 inches on Eighth street, and a depth of 125 feet on Mullanphy street. In the partition of the estate of John Mullanphy, in April, 1842, the partition proceedings having been instituted in the month of August, 1841, said lot was set off and aperted to his daughter, Mrs. Ann Biddle, who died in January, 1846,

having devised an undivided one-fifth interest in a tract of land, including said lot, to the use of her sister, Octavia Delaney, then wife of Dennis Delaney, "for and during her life, and from and after her death to the use of the heirs of her body living at the time of her death, and for default of such issue then to the use of my own right heirs, forever." Mrs. Delaney, after the death of her said husband, married Henry Boyce, and upon the partition of Mrs. Biddle's estate, in 1854, the said lot was allotted to two trustees, appointed under an antenuptial settlement of the said Henry Boyce and wife, "to the use of Octavia Boyce (wife of Henry Boyce) for and during her life, and from and after her death to the use of the heirs of her body living at the time of her death, and for default of such issue then to the use of the right heirs of Ann Biddle deceased, forever." Mrs. Boyce died on November 12, 1876, leaving three children, John O. F. Delaney, Jane Lindsay, wife of Andrew J. Lindsay, and Mary E. Boyce. On April 15, 1867, Mrs. Boyce and one of her trustees, her said husband being in life, but not joining in said conveyance, executed a deed of said lot in fee, with general and special covenants, to the defendant, said deed purporting to be an absolute conveyance thereof. On March 18, 1872, the defendant and his wife conveyed said lot in fee-simple to Lesley Garnett. The words of conveyance which were used in said deed were "grant, bargain, and sell."

The statute of Missouri, in existence at the date and execution of said deed, and ever since the existing statute in said state, is as follows:

"The words 'grant, bargain, and sell' in all conveyances in which any estate of inheritance in fee-simple is limited, shall, unless restrained by expressed terms contained in such conveyances, be construed to be the following expressed covenants on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns: *First*, that the grantor was, at the time of the execution of such conveyance, seized of an indefeasible estate in fee-simple, in the real estate thereby granted; *second*, that such real estate was, at the time of the execution of such conveyance, free from all incumbrances done or suffered by the grantor or any person under whom he claims; *third*, for further assurances for such real estate to be made by the grantor and his heirs and to the grantee and his heirs and assigns; and may be sued upon in the same manner as if such covenants were expressly inserted in the conveyance." 1 Rev. St. Mo. 1879, p. 110.

The settled construction of this statutory covenant by the highest court of Missouri, as first declared in *Dickson v. Desire*, 23 Mo. 151, and substantially affirmed in *Maguire v. Riggin*, 44 Mo. 512; *Jones v. Whitsett*, 79 Mo. 191, and *Allen v. Kennedy*, 91 Mo. 324, 2 S. W. Rep. 142, is, as stated in *Maguire v. Riggin*, that the words "grant, bargain, and sell" are a covenant that runs with the land, of indemnity, continuing to successive grantees, and inuring to the one upon whom the loss falls." A contrary construction had been originally announced by the same court in *Collier v. Gamble*, 10 Mo. 467.

Said Garnett and wife conveyed the said lot in fee-simple to Charles F. Querl, as trustee, and subsequently, on August 8, 1884, the title of said Garnett and wife became vested in the plaintiff, which immediately entered into and still continues in possession of said land. On March 12,

1886, and after the termination of the suit of *Barlow v. Delaney*, herein-after mentioned, the said heirs of the body of Mrs. Boyce caused to be served upon the tenant of the plaintiff a notice demanding the surrender of said lot, and notifying the tenant to pay no rent but to them. The plaintiff having examined its title to the said premises, became satisfied that it had none, and, being threatened by the said heirs with a suit in ejectment, paid to them, on April 15, 1886, the sum of \$2,537.50 for said land, which was a reasonable and moderate price therefor, and thereupon received a deed from said heirs, which conveyed to it all their right, title, and interest in said land. On August 8, 1846, Norman Cutter commenced in the proper court in St. Louis an action of trespass and ejectment against William Waddingham, demanding the possession of a large tract of land claimed by the heirs of John Mullanphy as a part of his estate, of which tract the lot in question was a part, and damages for the ejection of the plaintiff therefrom. Waddingham was the tenant in possession. The living heirs and representatives of John Mullanphy were made party defendants. Mrs. Biddle, who had theretofore died, was not a party. Mrs. Boyce was a party; her children were not parties. The litigation¹ continued till February 4, 1865, when a verdict was rendered in favor of the plaintiff for the possession of eleven undivided thirtieths of the whole tract, and damages of \$27,500 for the trespass and ejectment and withholding possession and a monthly value of \$192.50 for any subsequent possession. An appeal was taken to the supreme court of Missouri, but was not prosecuted, and was dismissed by the appellants in December, 1868. On June 5, 1852, the said Cutter sold his interest in nine twenty-fourths of the land described in the declaration in said suit to Henry D. Bacon, and on February 15, 1854, conveyed the remainder of said tract to said Bacon and Daniel D. Page; and said Page and Bacon, by deed dated September 23, 1857, conveyed the whole tract to the defendant for \$125,000. In 1866, said Octavia Boyce, and the defendant entered into an agreement by which they agreed for the purposes of settling said litigation, that the defendant was entitled to twelve-thirtieths of all parts of said tract of land to which the said Boyce derived title under John or Bryan Mullanphy or Ann Biddle, or which had been theretofore set off to her in partition, and that she was entitled to eighteen-thirtieths thereof, and that partition should be made of said interest. The result was a partition and conveyances between Mrs. Boyce and the defendant of the portion of this tract of land which had been allotted to her. Certain of the lots which he conveyed to her have descended to her said children which they still hold. He also indemnified Mrs. Boyce against any liability under said Cutter judgment. In part fulfillment of this agreement, she made the conveyance of the lot in question which has been heretofore mentioned. The twelve-thirtieths was inserted by mistake instead of eleven-thirtieths.

In the latter part of 1881, it came to the knowledge of the defendant that the children of Mrs. Boyce were claiming title to the two lots con-

¹See, 23 Mo. 206, 33 Mo. 263.

veyed to him by their mother, of which she had only a life-estate under the will of Mrs. Biddle. He thereupon instituted a suit in equity before the circuit court for the city of St. Louis against said children, in which he averred that he had recently learned and believed it to be true, and so stated, that the said Boyce had only a life-estate in said two pieces of land, and that upon her death, the same went in fee-simple absolute to her children, and that they still owned and possessed all the property which he had conveyed to their mother in exchange for said land, and had inherited from her other realty to the value of \$300,000, and that their claim was a cloud upon the title of said two pieces, and praying that they be enjoined from claiming any interest therein, and that the title to the same be diverted from them and vested in him, and for other proper relief. Said circuit court sustained a demurrer to said bill, and entered judgment for the defendants. The St. Louis court of appeals affirmed the judgment upon the following grounds: "(1) A married woman cannot convey real estate without the joinder of her husband; (2) a married woman who owns a life-estate in land, cannot (under the statute of Missouri) execute a valid general warranty deed of the fee; (3) a bill to enforce a deed of the fee of the land conveyed by the owner of the life-estate is without equity as against the remainder-men who are also the heirs of the owner of the life-estate." *Barlow v. Delaney*, 13 Mo. App. 591. Upon appeal to the supreme court of Missouri, the judgment of the court of appeals was affirmed, upon the ground that, conceding that Mrs. Boyce had a right to convey, and that her covenants were obligatory upon her, they do not estop her children from asserting their title to the lots in controversy. The court said:

"It is urged, that it would be inequitable to permit defendants to hold the lots of land conveyed by plaintiff, and also recover the lots in controversy, but if they should recover those lots, and the covenants in Mrs. Boyce's deed are binding upon her children, then, to the extent of the estate they inherited from her, plaintiff will have his action on the covenants. If they were of no binding force, either upon her or her heirs, plaintiff certainly has no legal demand against them, which can be enforced against those lots. He may have an equitable right to have the lots conveyed by him charged with a lien for the unpaid purchase price, which would be the value of the lots conveyed by Mrs. Boyce, at the time of that conveyance; but, in no event, has he the right to have their title in the lots in question vested in him." 86 Mo. 587, 588.

The conclusions of law, upon the foregoing facts are as follows:

1. The covenant of seizin of an indefeasible estate in fee-simple, which was contained in the defendant's deed to Garnett, runs with the land.

"Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts no less than by the state courts themselves, as authoritative declarations of what the law is." *Burgess v. Seligman*, 107 U. S. 20.

2 Sup. Ct. Rep. 10; *Chicago City v. Robbins*, 2 Black, 418; *Townsend v. Todd*, 91 U. S. 452.

2. According to the evidence, the defendant was never seized of an indefeasible estate in fee-simple in the lot which he conveyed to Garnett. He does not claim that he had such a title, except as to eleven-thirtieths thereof. As to nineteen-thirtieths which he supposed he obtained by the deed of Mrs. Boyce, it is conceded, especially by the suit of *Barlow v. Delaney*, that the legal fee of that portion was never conveyed to the defendant. It is manifest that Mrs. Boyce, who derived all her title from the will of Mrs. Biddle, had only a life-estate. As to the eleven-thirtieths, the defendant relies upon the judgment in the Cutter ejectment suit. The conveyances to Cutter, if any ever existed, are not in evidence. His suit was based upon his right of possession. The record does not show that any other right was in issue. No testimony was offered, outside of the record, to show that any other question was actually in issue; and the Missouri authorities are abundant to the effect that, under the statutes of that state, ejectment is a possessory action, and that a judgment therein confers no title upon the party in whose favor it is given, and is not a bar to a subsequent suit in regard to the same land between the same parties, while it may be evidence in such a suit. *Kimmel v. Benna*, 70 Mo. 65; *Ekey v. Inge*, 87 Mo. 493; *Ewing v. Vannewitz*, 8 Mo. App. 602; *Hogan v. Smith*, 11 Mo. App. 314. The statute in the revision of 1855, that a judgment in ejectment, except of nonsuit, should be a bar to any other action between the same parties, and upon which the supreme court in *Miles v. Caldwell*, 2 Wall. 35, favorably commented, was repealed in 1857. Furthermore, the Boyce heirs were not parties or privies to the Cutter ejectment. It is true that their mother, who had a life-estate in the land, was a party, but they derived their title to the lot in question from Mrs. Biddle, and it seems that a judgment to which the tenant for life is a party is not evidence for or against a reversioner, who was not a party, "because the reversioner does not claim through the tenant for life, but enjoys an independent title." 2 Tayl. Ev. 1856; 1 Greenl. Ev. § 536; Bull. N. P. 232.

3. Upon the testimony in this case, neither the plaintiff nor the defendant would have had a valid defense in an action of ejectment, in Missouri, at the suit of the Boyce heirs. The defendant truly says that, "when the grantee surrenders to the paramount title, he must show that it was a valid and subsisting one, capable of being enforced, and was actually asserted, or he can recover only nominal damages." *Morgan v. Railroad Co.*, 63 Mo. 129. And upon this point, the defendant insists—*First*, that there is no proof that the Boyce heirs had a paramount title from a party in peaceable possession; and, *second*, that, it being shown that he had paid the mother of the Boyce children for the fee in this lot by a deed of land which they inherited and still hold, an equity arose against the assertion of their title to this lot of which they were out of possession, or an equity existed against their taking possession, which a Missouri court would have enforced if they had brought an action of ejectment, the statutes of that state permitting both legal and equitable

defenses in ejectment. As to the first point, as has already been said, the legal title of the Boyce children to nineteen-thirtieths is undisputed, and the admissions in the complaint of Barlow against Delaney sufficiently establish, as against Mr. Barlow, their legal title to the eleven-thirtieths. The second is the defendant's strong point, and he earnestly insists, it being admitted that the Boyce heirs have inherited from their mother, and now own the land which was conveyed to her in consideration of her conveyance of the fee of the lot in question, that a Missouri court would in an action of ejectment by them, prevent their obtaining possession until the equities against the enforcement of their legal title were satisfied or removed. This was, in substance, the question which was before the Missouri courts in *Barlow v. Delaney*. The demurrer admitted the facts which were alleged in regard to the inequitable conduct of the Boyce heirs, and the bill, after its statement of the grounds of the estoppel, prayed, *inter alia*, for an injunction against them from claiming any interest, title, or estate to said lots, and for any further proper relief. Two appellate courts dismissed the bill; the last court upon the express ground that the children were not estopped from asserting their title to the land in controversy, but that the plaintiff would have his action upon the covenants if the children were bound thereby and recovered the lots, and if the covenants were not of binding force, that the plaintiff had no legal demand against the children which could be enforced upon these lots, but suggested that he might "have an equitable right to have the lots conveyed by him, charged with a lien for the unpaid purchase price." Any speculation upon what the Missouri court could do seems to be useless in view of what the highest court in the state has done by its refusal to prevent the Boyce heirs from making claim to the land in controversy. It has virtually decided that Mr. Barlow has no equities therein which it will recognize.

4. The plaintiff was justified in his purchase of the paramount title without waiting for actual dispossession, and the measure of his damage is the reasonable sum which he paid for a good title.

"The covenantee is not bound to wait for actual dispossession, but may, after such assertion," (the hostile assertion of a paramount right or title by suit or otherwise) "pay off or extinguish the right by purchase; and his measure of damages will be the reasonable value of the right so discharged or extinguished by him." *Ward v. Ashbrook*, 78 Mo. 517; *Hall v. Bray*, 51 Mo. 288.

The plaintiff is entitled to judgment in his favor for \$2,537.50, with interest from April 15, 1886, and costs.

LAFLIN v. CHICAGO, W. & N. RY. CO.¹*(Circuit Court, E. D. Wisconsin. December 10, 1887.)*

1. EMINENT DOMAIN—DAMAGES—EVIDENCE.

In proceedings to recover damages for the construction of a railroad across premises used as a summer resort, plaintiff having shown by keepers of similar resorts that the proximity of the road would in their opinion impair the business of the hotel, defendant offered to prove by witnesses who kept hotels near the tracks and depot grounds of other railroads that such hotels were not injuriously affected thereby. *Held*, that the testimony was irrelevant.

2. ABATEMENT AND REVIVAL—AGREEMENT TO ARBITRATE.

A mere executory agreement to arbitrate entered into by parties to a proceeding to recover damages to land resulting from the construction of a railroad, does not abate the suit, or work a discontinuance, where no submission has been actually made, and no arbitrators actually chosen; and this is especially so where the party setting up the agreement as a bar has gone to trial without objection upon the merits.

At Law.

This was a proceeding for ascertaining the damage to certain premises situated in Waukeshah, Wis., owned by the plaintiff, and alleged to have been injured by the construction of the defendant's road across the same. Connected with said premises was a hotel, kept by the plaintiff for the accommodation of summer guests, known as the "Fountain House," with its appurtenances; which included a mineral spring, and pleasure grounds, and drives for the use of guests. On the trial the plaintiff called witnesses engaged in the summer hotel business at other points and places, to testify whether, in their opinion, based upon their experience in such business, the construction and proximity of the defendant's railroad would have an injurious effect upon the business and patronage of the Fountain House. In reply to this testimony the defendant called witnesses who were engaged in the business of conducting and managing hotels situated near the tracks and depot grounds of other railroads; and it was sought to show by such witnesses that the proximity of their hotels to railroads had no injurious effect upon the business of such hotels. It was admitted by counsel for the defendant that it was not intended to call for the opinions of such witnesses in relation to the probable effect of the construction of the defendant's railroad upon the business of the Fountain House; the object of the defendant being simply to show that the hotels kept by the witnesses in other places were not injured by their proximity to railroads. This testimony was objected to by counsel for the plaintiff, as inadmissible, on the ground that the tendency and effect of it would be to introduce into the case collateral issues not pertinent to the issue here to be tried, which related solely to the effect upon the Fountain House of the construction of the defendant's railway. The defendant introduced in evidence an agreement entered into by the parties subsequent to the commencement of the suit,

¹ See 33 Fed. Rep. 415.

to arbitrate their differences; and it was contended by counsel for the defendant that this agreement of arbitration operated to discontinue or abate this suit.

D. H. Sumner and J. V. Quarles, for plaintiff.

J. G. Flanders, Hugh Ryan, D. S. Wegg, and Howard Morris, for defendant.

DYER, J., (*after stating the facts as above.*) When the plaintiff was making his case he offered the testimony of several witnesses to show what effect, in their judgment, the construction and proximity of the railroad would or might have upon the business and patronage of the Fountain House. The witnesses were shown to have been long acquainted and experienced in the business of keeping summer hotels, supported by a class of patrons similar to those which the testimony tends to show are received as guests at the Fountain House, and appeared to be qualified to speak upon the subject to which their examination related. The testimony referred to, was, of course, offered as bearing, in its ultimate effect, upon the question of the value of the property for summer hotel purposes after the railroad was built across the plaintiff's land. The admission of this testimony was contested with much force by counsel for the defendant, but the court was unable to see why, within the doctrine of the cases on the subject decided by the supreme court of this state, it was not admissible. The only doubt I had was whether the matter inquired about was the proper subject of expert testimony. There may be doubt upon that point, but so much has the law in relation to the competency of such testimony, as applied to various subjects, been extended, or its scope broadened, by modern authority, that it seemed to me when the question came up that the doubt ought to be resolved in favor of the admission of the testimony. I have given a good deal of thought to the question since, because, if satisfied that the testimony was improperly admitted, I would not hesitate to strike it out before submitting the case to the jury; this being held to be proper practice, and to cure the error of original admission of improper testimony, by the supreme court of the United States. But, after careful reflection, my conviction still is, the testimony was admissible.

Now, the defendant offers the testimony of witnesses,—gentlemen engaged in the summer hotel business, and understood to be experienced in that business,—by which it is sought to show that they have kept hotels in even nearer proximity to railroads than is the Fountain House to the defendant's road, and that the business of such hotels has not been injuriously affected by that fact. The question is, is this testimony admissible? It is not proposed to show this merely as establishing the experience of the witnesses in the summer hotel business, and then to follow it with an expression of opinion from the witnesses as to whether the business of the Fountain House is likely to be diminished by the construction of the defendant's railroad. This is frankly admitted. But the object of the proposed testimony is simply to show that the business of other summer hotels is not injured by their proximity to a railroad.

Clearly, this would be introducing into the case what might prove to be a new and independent issue, foreign to that we have to try, namely, an issue in relation to the business, situation, and surroundings of other hotels, and all the various circumstances under which business is transacted in them. There are exceptional instances where this is allowable, such as cases involving matters of science, art, or questions of professional skill. But the cases are rare which allow independent collateral facts to be drawn into the issue. The question is, is the fact sought to be proved, namely, the effect of the construction of a railroad upon other hotels, a fact relevant to the issue, which is one involving the Fountain House? I think it is not. If the evidence proposed to be introduced is admitted, it must be that the plaintiff would have the right to rebut it, and then the defendant might have the right to reply to the testimony in rebuttal, and thus we should be engaged in a trial of the question as to other hotels, an independent collateral fact not germane to the principal issue we are trying. It is the duty of the court to allow the defendant to do in support of its contention just what it has allowed the plaintiff to do in support of his theory of the case, that is, to call witnesses who may show themselves qualified to speak on the subject from experience in the summer hotel business; to give to the jury their opinion and judgment as to whether the construction of this railroad will injuriously affect the patronage and business of the Fountain House. This the defendant has the right to do, and such testimony will be admitted. But to testimony offered only to show the effect of the construction or proximity or operation of a railroad upon other hotels, the objection must be sustained.

I do not think there is any issue of fact arising upon the arbitration agreement for the court to submit to the jury. So far as the agreement cuts any figure in the case, the effect which it shall have is purely a question of law. There is no dispute that the parties entered into this agreement; nor can it be disputed that by mutual forbearance the time for the selection of arbitrators under the agreement was extended. There were, for a considerable time, continued negotiations between the parties, with reference to the contemplated arbitration and the selection of arbitrators; and it must be held that by mutual consent the time for making such selection and entering upon the arbitration was extended. There is no evidence in the case that either party, by express notice to the other, before this case was noticed for trial, revoked the arbitration agreement. Therefore, I think the whole question resolves itself into the point whether the court, as matter of law, should hold that the execution of the arbitration agreement operated to abate the present action, or as a bar to its further prosecution.

It is contended by counsel for the defendant that the execution of this agreement, which has been aptly characterized as a purely executory agreement, worked a discontinuance of this suit. The material provisions of the arbitration agreement are as follows:

"First. The first party hereto, [Lafin,] and D. S. Wegg, general solicitor of said second party, shall jointly on the 1st day of July after the execution

of this agreement, nominate three arbitrators. *Second.* All three of said arbitrators shall be competent, disinterested persons, residents of said county of Waukesha. *Third.* Said arbitrators shall meet at a time and place in said Waukesha county to be selected by themselves; ten days' notice in writing having been previously given to each of the parties hereto of the time and place of said meeting, said time, however, to be prior to July 1, 1887, and may adjourn from time to time until the hearing of the matter submitted to them is concluded. *Fourth.* It is hereby mutually agreed that the only question to be submitted to such arbitrators is as to the amount of money which said first party is entitled to receive, and said second party shall be bound to pay to said first party, for and as compensation for the taking by said second party of said strip, belt, or parcel of land described in said award, and for the damages occasioned by the taking thereof, and that such compensation and damages shall be estimated as of the date of the payment of said award into the hands of the clerk of the circuit court for Waukesha county; and that said first party shall be allowed interest upon such compensation and damages from said date. *Fifth.* Upon such hearing each of the parties hereto may be represented by counsel, and shall be allowed one day for the introduction of evidence; and at the conclusion of the evidence one day shall be allowed for arguments, to be apportioned in such manner as such arbitrators may deem proper; and at the conclusion of said arguments the said arbitrators shall make their decision as to the matter submitted to them, in writing, to be signed by at least two of said arbitrators, and shall notify each party thereof, and the decision of any two of said arbitrators so made shall be binding. *Sixth.* The parties hereto do hereby mutually bind themselves, their heirs, executors, administrators, successors, and assigns, to abide by the decision of the arbitrators made as herein provided, and within ten days after notice of such decision to make such payments or restitutions in the premises as shall be required thereunder, and to dismiss of record all appeals from the said award."

Now, while it may be conceded to be the law that an actual submission of a controversy to arbitration operates as a discontinuance of a pending suit between the parties involving the same controversy, I should certainly very much doubt, if the question were an original one, whether a mere agreement to arbitrate in the future would have that effect. Let us examine with some care the authorities that have been referred to in the very able argument of Mr. Flanders. All that need be said of the case of *Muckey v. Pierce*, 3 Wis. 307, is that it was there held that the submission of a case to arbitrators by the parties works a discontinuance of the suit. It appears from the statement of facts in the case that the arbitrators were actually chosen; that the matter in controversy was submitted to them, and that they met together to consider the matters in issue in pursuance of the submission. In the opinion of the court it was said that the reason why the submission of the cause to arbitrators had the effect to discontinue or discontinue the suit was that the parties had chosen another forum for the determination of the matters in controversy between them; and the court in which the suit was pending at the time of the submission would not proceed further with the case, but would leave the parties to the tribunal they had created for themselves. There, as it thus appears, the forum had been created, the tribunal had been organized, and proceedings had been actually taken by the parties in pursuance of the submission before that tribunal. In the case of *Bigelow v.*

Goss, 5 Wis. 421, the parties had agreed to submit the matters involved in the suit to the decision of a person who was named and agreed upon as arbitrator; and it was stipulated that one of the parties, who had obtained a judgment against the other, was not to prosecute his judgment, or in any manner make use of it. It was held by the court that the arbitration agreement as made, worked a discontinuance of all proceedings upon the judgment, for the reason that the parties had chosen a tribunal other than the court, in which to settle and adjust their controversies. There, as we see, the arbitrator was chosen and designated; the tribunal was created before which the parties were to come for the final disposition of their dispute. Such being the facts of that case, it does not seem to me that it is an authority which goes to the extent contended; namely, that such an agreement as we have in the case at bar, nothing having been done under the agreement, no arbitrator having been chosen, works a discontinuance of the suit. The case of *Thornton v. Woolen Mills*, 41 Wis. 265, was one where the parties agreed upon a settlement of the controversy between them. A settlement was made, and, of course, that worked a discontinuance of the pending suit between them involving the same controversy. In the opinion of the court, Mr. Justice LYON says

"Had this whole controversy been submitted to arbitrators, and had the arbitrators awarded that the parties should do precisely what they have done, there can be no doubt that the submission and award * * * would have worked a discontinuance of the action."

Dock Co. v. Assurance Co., 5 Pac. Rep. 232, cited by counsel for the defendant, was a suit upon a fire insurance policy, which contained a condition that in case of loss and a difference of opinion as to the amount of damage, the same should "be submitted to two disinterested and competent men, whose award shall be conclusive and binding on both parties." The court held this to be a condition precedent, and that therefore the party who had sustained a loss could not maintain a suit upon the policy, regardless of this condition. We all understand the distinction between a condition precedent and a mere collateral agreement, and the court, in its decision in the case cited, simply enforced that distinction, by holding that the condition precedent must first be complied with. The case of *State v. Chamber of Commerce*, 20 Wis. 63, only holds that actual submission of a matter in controversy between the parties to the arbitration of a committee of the chamber of commerce operated as a discontinuance of a suit at law pending between the parties involving the same controversy. *Hills v. Passage*, 21 Wis. 298, was a case of a reference of a cause for trial to the judge of the court, and it was held that such a reference, although not a valid statutory reference, had the effect of a consummated submission to arbitration, and therefore worked a discontinuance of the pending action between the parties. *Bank v. Trust Co.*, 22 Wis. 231, was like the case just noticed, where there was an actual reference of a cause by submission to the judge of the court in which it was pending, and in which such a reference was held to work a discontinuance of the suit. As will be readily observed, none of the cases referred to, hold that a mere agreement, like that in the case at bar,

to submit a controversy to an arbitrator at some future time,—the agreement being thus purely executory, no submission having been actually made, and no arbitrator having been actually chosen,—is sufficient to abate or to work a discontinuance of a pending suit between the parties to such agreement, involving the same controversy.

Now, there are some other cases to which the attention of the court has been called on the argument, which are to the effect that even if a mere agreement to arbitrate could have the effect upon a pending suit contended for by counsel for the defendant, if the party who wishes to insist upon the discontinuance does not in the outset do that, but proceeds without objection in the trial of the case on the merits, that is a waiver of the right to claim that a discontinuance has resulted from the arbitration agreement. In *People v. Common Pleas*, 1 Wend. 314, it was held that the submission of all suits and controversies to arbitration is a discontinuance of a suit pending in court. But a party may waive such discontinuance by appearing at the trial of the cause and defending the same. In the opinion, SUTHERLAND, J., says:

"The party who might have insisted on the discontinuance, was competent to waive it; and in this case it was waived by the defendant's counsel appearing on the trial, cross-examining the plaintiff's witnesses, and addressing the jury."

To the same effect are the cases of *Paulison v. Halsey*, 38 N. J. Law, 488, and *Smith v. Barse*, 2 Hill. 387. My conclusion is that the making of this arbitration agreement—nothing having been done by the parties under it—did not work a discontinuance of this suit. But if the court is wrong in that, I am inclined to think that the discontinuance has been waived by the acts and conduct of the defendant in proceeding to a trial of the case and contesting it upon the merits. There are other authorities to which reference should be made, which hold as matter of settled law that a mere agreement to refer a dispute to arbitration cannot be set up as a defense in a suit at law; in other words, that the jurisdiction of a court cannot be ousted by a mere agreement to refer to arbitration, and that such an agreement cannot be set up in bar of an action, after it has been entered into. In the case of *Tobey v. County of Bristol*, 3 Story, 800, one of the questions was whether the representatives of a county had actually made an agreement to submit a certain question to arbitration. Upon that question, Mr. Justice STORY was in doubt whether the commissioners of the county had taken such proceedings as legally bound the county. After considering the question he says:

"But suppose it to be otherwise, and here there was a real contract or agreement, not conditional, but absolute, on the part of the commissioners to refer the claims to arbitration, can such an agreement be enforced by a court of equity? No case can be found, as I believe, and, at all events, no case has been cited by counsel, or has fallen within the scope of my researches, in which an agreement to refer a claim to arbitration has ever been specifically enforced in equity. So far as the authorities go, they are altogether the other way. The cases are divided into two classes,—one where an agreement to refer to arbitration has been set up as a defense to a suit at law as well as in equity; the other, where the party as plaintiff has sought to enforce such an agreement

in a court of equity. Both classes have shared the same fate. The courts have refused to allow the former as a bar or defense against the suit, and have declined to enforce the latter as ill-founded in point of jurisdiction."

This is the statement of the law on the subject, as made by Mr. Justice STORY. And the same adjudication, substantially, was made by the court in the case of *Campbell v. Insurance Co.*, 1 MacArthur, 246, where it is said (page 257:)

"It is not to be denied that a mere agreement between the parties that any future differences growing out of their contract shall be decided by arbitrators or referees thereafter to be chosen, will not be allowed by the courts to oust their jurisdiction."

The court then proceeds further in the opinion to point out the distinction between a mere agreement to arbitrate, and an actual submission to arbitration. In *Thompson v. Charnock*, 8 Term R. 139, Lord KENYON said:

"It is not necessary now to say how this point ought to be determined if it were *res integra*, it having been decided again and again that an agreement to refer all matters in difference to arbitration is not sufficient to oust the courts of law or equity of their jurisdiction."

Again, in *Street v. Rigby*, 6 Ves. 821, Lord ELDON said:

"It is enough for me to say it is not a necessary consequence of a covenant to refer that the party thereby agreed to forbear to sue. I do not enter into the question of the effect at law of a covenant to forbear to sue. But, supposing it good in strict law, it cannot be maintained that, having covenanted to refer, a party has covenanted to forbear to sue; and, if not, he has only left himself open to an action for damages if he does not refer; which the suit does not prevent, if thought desirable."

Further, in *Mitchell v. Harris*, 2 Ves. Jr. 129, it was held that a covenant to refer to arbitration only entitles to damages, but is no bar to a suit or action. A mere agreement to refer to arbitration, where no reference has taken place, cannot take away the jurisdiction of any court. These authorities, I think it must be conceded, entirely dispose of the proposition here urged, that during the pendency of this arbitration agreement the plaintiff could not have brought a suit against the defendant to determine the controversy between them, and that neither of the parties could prosecute the appeal taken from the award of the commissioners in the first instance.

For the reasons stated, the court is of the opinion that this arbitration agreement cannot be used by the defendant as a defense, either in bar or in abatement of this suit.

v.34f.no.11—55

CORDELL *et al.* v. HALL *et al.*¹

(Circuit Court, N. D. Illinois. December 27, 1887.)

1. FACTORS AND BROKERS—FACTOR'S LIEN—AGREEMENT TO HONOR CONSIGNOR'S DRAFTS.

Farlow, a dealer in live-stock at Marshall, Mo., shipped live-stock to the defendants, live-stock brokers at Chicago, which were purchased by Farlow with money advanced him therefor by the plaintiffs, bankers at the place of shipment in Missouri. Farlow drew drafts on the defendants, payable to the plaintiffs, on each shipment, and all drafts so drawn were honored, excepting the last one, involved in this suit. This draft was dishonored, the defendants applying a large part of the proceeds of the last shipment on an old claim against Farlow, claiming a factor's lien. The plaintiffs in this suit claimed that the defendants had orally agreed with them to honor all Farlow's drafts drawn on shipments, and that on the faith of such agreement they advanced the money to Farlow to purchase the cattle, which agreement the defendants denied. The plaintiffs further claimed, regardless of such agreement, that the defendants knew that the cattle were purchased with money advanced by the plaintiffs to Farlow. *Held* that, if such agreement was made, the defendants were liable.

2. SAME—NOTICE OF ADVANCES ON SHIPMENTS.

If the cattle were purchased by Farlow with money obtained from the plaintiffs with the agreement that the plaintiffs were to be paid for their advances on such cattle out of the proceeds of the same when sold by the defendants as Farlow's brokers, and that the defendants knew of such agreement between Farlow and the plaintiffs, then the defendants, as Farlow's brokers, had no right to apply any part of the proceeds of said cattle to the payment of the debt of Farlow to themselves, until the draft was fully paid.

3. SAME.

And such is the law, whether such knowledge on the part of the defendants was actual or constructive, the question being whether the defendants knew that Farlow had obtained advances from the plaintiffs upon these cattle, and had appropriated the proceeds of the cattle to the payment of those advances by the draft. If they had such knowledge, they had no right to appropriate these proceeds to the payment of their own debt against Farlow. Such knowledge might be derived expressly, or from the course of business between the parties theretofore, or from the defendants' knowledge of Farlow's financial ability, or other pregnant facts.

At Law.

Flower, Remy & Holstein, for plaintiffs.

Frank P. Seebree, H. Musgrave, Jos. A. Sleeper, and Theo. G. Case, for defendants.

BLODGETT, J., (*charging jury*.) This suit is brought upon an alleged agreement by the defendant to pay a draft of \$11,274, drawn July 13, 1886, by one George Farlow, payable to the plaintiffs. The plaintiffs, at the time of the transaction in question, were bankers at Marshall, in the state of Missouri. The defendants were live-stock brokers at the stock-yards in the city of Chicago. The plaintiffs' position is substantially this, as plaintiffs' proof tends to show: that on or about the last of March or the first of April, 1886, the defendants, by William Hall, one of the copartners, agreed with the plaintiffs that if they (the plain-

¹Reported by Messrs. Flower, Remy & Holstein, of the Chicago bar.

tiffs) would cash the drafts drawn by George Farlow on them against shipments of live-stock made by Farlow to the defendants, they (the defendants) would pay such drafts. The first controversy you meet at the threshold of this case is as to whether such an agreement was made. The plaintiffs have called in support of their position one of the members of the firm as a witness, Mr. Cordell, who testifies in substance that this promise was made to him at his bank in the town of Marshall, in an interview between himself and Mr. Hall. William Farlow is also called as a witness by the plaintiffs, who testified that he was present at this conversation and heard it, or a great part of it; at least that he heard the defendant Hall say, "Go on and cash the drafts, and we will pay them, until further notice." The testimony of Mr. Cordell is to the same effect: that the defendant Hall said to him, "We will pay the drafts drawn for the cost of the cattle bought by Farlow and shipped to us, until further notice." There is a letter written by the defendants—not to the plaintiffs, but allowed to be put in evidence—in which they refer to the course of business; and there is the testimony of George Farlow tending to sustain the same proposition on the part of the plaintiffs. The plaintiffs insist that something is to be inferred from the course of business which immediately followed this alleged contract between themselves and the defendants, as the defendants went on and cashed the drafts as they were drawn. Although in many cases, as the proofs show, the proceeds of the cattle were not sufficient to pay the drafts, yet the defendants paid them without objection, and under such circumstances as make what they did in the way of paying this draft admissible proof in behalf of the plaintiffs, you being the judges of the weight and value of this circumstance as proof of plaintiffs' case. This business ran on in this way from the time the contract is claimed to have been made until the draft in question was drawn on the 13th of July, 1886. On the part of the defendants Mr. William Hall is called as a witness, and he testifies that he made no such contract as Mr. Cordell and Mr. William Farlow testify to; that he did not agree for his firm that they would pay the drafts drawn by Farlow for the cost of the cattle which he might buy to ship and consign to them; so that you have a conflict of testimony here, and it becomes your duty in this case, so far as you are able to reconcile this testimony if you can; if not, to say where the preponderance of the proof lies. You are the judges, under the law, of the credibility of these witnesses, and not only of the credibility of the witnesses, but to say which of them you will believe. It is for you to say, in the light of the testimony here, whether the defendants did agree, as is charged in this case, that they would pay these Farlow drafts that should be drawn, and you will say where the preponderance of the proof lies. You are the judges. You have heard the witnesses testify. You have seen them here in court, and are to say whether the plaintiffs' or defendants' position is sustained by the preponderance of proof. If you find from the proof that Mr. William Hall, one of the firm, agreed with the plaintiffs to pay these Farlow drafts drawn against the live-stock shipped by him to the defendants, that the draft in question was so

drawn, and that the defendants have refused to pay said draft, then the defendants are liable for the amount unpaid on this draft. You will remember that the proof shows without dispute that there was the sum of \$5,936.55 paid, about three days after these cattle were sold, to the credit of the plaintiffs in one of the banks in this city. So plaintiffs admit the receipt of that amount on account of this draft, which leaves a balance due of \$5,337.45 after applying this payment, with interest from 15th July, 1886, the time the draft was protested for non-payment, if you find this contract was made. You cannot find for the plaintiffs upon this aspect of the plaintiffs' case, unless you find from the proof that the defendants did agree to pay these drafts as they should be drawn upon the defendants by Farlow, and cashed by the plaintiffs. If you do find that this agreement was made, then the defendants are liable in this case for the unpaid portion of this draft, which is \$5,337.45, and interest on the amount from the 15th of July, 1886, to the present time. If you find the testimony does not establish this agreement to pay these drafts by the defendants, then the defendants are not liable to pay the amount of the draft; but in that event, if you do so find, there is still another aspect of this case to be considered in the light of the evidence. If you are satisfied from the proof that the nine car-loads of cattle and the one car-load of hogs mentioned in this draft,—for you will observe the draft itself upon its face shows that it is drawn against nine car-loads of cattle and one car-load of hogs,—and you are to construe, in the light of all the testimony, that it was drawn against the nine car-loads of cattle and the one car-load of hogs shipped, out of which proceeds the draft is to be paid—if you are satisfied from the proof that the nine car-loads of cattle and one car-load of hogs mentioned in this draft as shipped by George Farlow were bought by Farlow with money obtained from the plaintiffs with the agreement that the plaintiffs were to be paid for their advance on such cattle out of the proceeds of such cattle when sold by the defendants as Farlow's brokers, and that the defendants knew that such was the agreement between Farlow and plaintiffs at the time defendants received the consignment,—that is, that the defendants knew from the course of business between the plaintiffs and George Farlow and themselves, and from other sources, that Farlow had obtained the money to pay for said cattle and hogs from plaintiffs, and had appropriated the proceeds of said shipments to the payment of said draft,—then the defendants, as Farlow's brokers, had no right to apply any part of the proceeds of said cattle to the payment of the debt of Farlow to themselves until the draft was fully paid. You will remember the proof shows these cattle and hogs brought, net cash, \$10,102.27, out of which the defendants paid to themselves—that is, they kept for the purpose of canceling their claim against Farlow—the sum of \$4,165.72; and deposited the balance, \$5,936.55, to the credit of the plaintiffs with their correspondent here for the use of George Farlow. Now, if you are satisfied from the proof that the defendants knew that Farlow had obtained advances from the plaintiffs upon these cattle, and that he had appropriated the proceeds of these cattle to the payment of those advances by

this draft, then the defendants had no right to appropriate these proceeds to the payment of their own debt against Farlow. So that, in this aspect of the case, if you find from the proof that Farlow had appropriated, with the knowledge of the defendants, to the payment of this draft, the proceeds of these cattle and hogs, then the defendants are liable for this \$4,165.72, which they applied to the payment of their own debt against Farlow. You are to infer, or, rather, you are to say whether, from the evidence in this case as to the course of business and dealings between the defendants and Farlow, and between the plaintiffs and the defendants, the defendants knew of the dealings between Farlow and the plaintiffs,—whether they did or did not know Farlow had been advanced money from the plaintiffs upon these cattle. In considering this aspect of the case you are to say whether the evidence shows that Mr. William Hall, at the time he visited Marshall, Mo., in the spring, found Farlow to be a man of means, and enabled to make purchases of such a shipment of cattle as this was, or whether he knew from Farlow's financial condition that he must have obtained advances from some one to purchase this shipment, and therefore that the persons making the advances were interested in the shipment. When this draft came to the notice of defendants, you are to say from the proof whether the draft itself was not notice that plaintiffs' money had purchased these cattle and hogs, because the draft refers to the cattle and hogs. You will remember that the testimony tends to show, and is, and perhaps it may be said to be undisputed, that the defendants knew that Farlow was not a man of sufficient means to carry on such a volume of business as he had been carrying on with defendants from the time he began these shipments,—about the 1st of April, 1886. To recapitulate, if you find the contract which is set out in this declaration—that the defendants agreed to pay these drafts—is proven, then the defendants are liable for the full amount unpaid in the draft, with interest at 6 per cent. If you find that this branch of the case is not made out, but do find that the defendants knew that the plaintiffs had advanced their money on these cattle, and that Farlow had appropriated the proceeds of them to the repayment of those advances, then you will find the defendants liable for the amount of money which they then appropriated, \$4,165.72, and interest on that from the time they appropriated it, which would be the time they received it,—the 15th of July. For your convenience I have just noted with pencil on the draft and protest, which you will take with you, the amount of the draft and amount of payment, \$5,936.55, and struck balance, \$5,337.45, and have also noted the undisputed fact as to the amount of the proceeds of the cattle, and the amount which was paid to the plaintiffs out of the proceeds, leaving the balance of \$4,165.72, which, in the latter aspect of the case, would be the sum upon which you would compute the interest.

Verdict for plaintiffs for full amount claimed. Judgment on verdict. Defendants appeal to supreme court.

ADREVENO v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court, E. D. Missouri, E. D. April 23, 1888.)

WITNESS—COMPETENCY—PHYSICIAN—WAIVER—INSURANCE POLICY.

The provisions of Rev. St. Mo. § 4017, prohibiting a physician from testifying as to any information he may have acquired from any patient while visiting him professionally, may be waived by the patient, and, when waived by a clause in an application for life insurance, such waiver is binding on the beneficiary.

At Law. Action on life insurance policy.

This was an action by Giovanni B. Adreveno, plaintiff, on a certificate of insurance issued to the son of plaintiff by the Mutual Reserve Fund Life Association, defendant, for the sum of \$5,000. Plaintiff was the beneficiary named in the certificate. The defendant relied upon alleged false representations in the application for the certificate as to the previous health and habits of the deceased. To prove that these representations were false, the defendant offered to introduce the testimony of several physicians, who had attended deceased prior to the date of the application. The plaintiff objected, on the ground that the witnesses were precluded from testifying under section 4017 of the Revised Statutes of Missouri. The questions and objections thereto were as follows:

"*Question.* I will now ask you with what disease he was afflicted while he was there in the hospital? Counsel for the plaintiff objected, if the information of the witness was obtained from the patient while attending him. *Q.* From whom did you get your information as to what he was afflicted with,—from him by an examination of his person, or from talking with him? *A.* Yes, sir. *Q.* Was it necessary for you to get that information in order to treat him properly? *A.* Certainly it was. Plaintiff's counsel renewed his objection."

Collins & Jamison, for plaintiff.

W. C. & J. C. Jones, for defendant.

THAYER, J., (after stating the facts.) I see that the application for the policy contains the following clause:

"And the applicant hereby expressly waives any and all provisions of law now existing, or that may hereafter exist, preventing any physician from disclosing any information acquired in attending the applicant in a professional capacity or otherwise, or rendering him incompetent to testify as a witness in any way whatever."

Section 4017, Rev. St. Mo., declares that "the following persons shall be incompetent to testify: A physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." It has been held in this state in three cases, viz., the case of *Groll v. Tower*, 85 Mo. 253; *Carrington v. City of St. Louis*, 89 Mo. 208, 1 S. W. Rep. 240; and *Squires v. City of Chillicothe*, 89 Mo. 226, 1 S. W. Rep. 23,—that section 4017, which I have

just read, renders a physician incompetent to testify as to the physical condition of a patient in those cases only where the patient or his legal representatives insist that he shall not testify. In other words, the statute is construed in this state as conferring a privilege merely, that may be waived; it is not declaratory of any public policy. The public is not concerned in excluding the testimony of a physician as to the condition of a patient, if the patient himself does not object to such disclosures. In this respect the courts of this state follow the rulings in New York and Michigan, under a similar statute, as appears by the cases of *Cahen v. Insurance Co.*, 41 N. Y. Super. Ct. 296; *Railroad Co. v. Martin*, 41 Mich. 667, 3 N. W. Rep. 173. As the patient is at liberty to waive the privilege which the law affords him, it appears to me it is immaterial whether the patient waives the privilege by calling the physician to testify in his behalf, or whether he waives it, as in this case, by a clause contained in the contract on which the suit is brought; and if the patient himself waives the privilege by a clause contained in the contract, that waiver, in my judgment, is binding on any one who claims under the contract, whether it be the patient himself or his representative. The result is that, inasmuch as the assured by this application waived the privilege which the statute affords him, the father, for whose benefit the policy was issued, and who is now suing on the contract, is bound by that waiver. I therefore hold that the testimony is admissible.

KEENER v. UNION PAC. RY. CO.

(Circuit Court, D. Colorado. May 7, 1888)

NEW TRIAL—AS OF RIGHT—TIME OF MOTION.

After judgment for defendant in an action for the possession of land, plaintiff paid the costs, and filed a motion for a new trial before the first day of the succeeding term. *Held*, under Code Civil Proc. Colo. § 254, providing that the party against whom such judgment is rendered may, at any time "before the next succeeding term," upon paying all costs, have the judgment vacated upon application to the court, that the motion was in time, and that delay of the court in acting upon the motion did not defeat the right granted by the Code.

At Law. On motion for new trial. For the original report see 81 Fed. Rep. 126.

Wells, McNeal & Taylor, for plaintiff.

Teller & Orahood, for defendant.

BREWER, J. After judgment for defendant in an action for the possession of real property, plaintiff paid the costs and filed a motion for a new trial before the first day of the succeeding term, and now asks an order of the court vacating that judgment, and granting him a new trial. It is objected that the application is not made in time. The statute (Code Civil Proc. § 254) provides that, when judgment shall be rendered,

etc., "it shall be lawful for the party against whom such judgment is rendered at any time before the next succeeding term, to pay all costs recovered thereby, and upon application the court shall vacate such judgment." It seems to me the party has brought himself within the very letter of the statute. It says, "before the first day of the next succeeding term." The party did pay the costs, and did file his motion, and that is making his application. Delay in the action of the court does not defeat his right. The hardship of this case, if there be hardship, ought not to interfere with the general rule. The case must be controlled by that rule. Judgment vacated, and a new trial ordered.

UNITED STATES *v.* HARMON *et al.*

(District Court, D. Kansas. May 1, 1888.)

POST-OFFICE—MAILING OBSCENE MATTER—INDICTMENT.

An indictment under Rev. St. U. S. § 3893, charged defendants with mailing "a certain obscene, lewd, and lascivious paper and publication of an indecent character called 'Lucifer,' which paper and publication is so obscene, lewd, and lascivious as to dispense with the incorporation of the words and figures in this indictment," etc. *Held*, on demurrer, that the identification of the obscene matter was insufficient, neither the date of the paper, nor the title of the article, nor its general tenor or purport being given; and that the indictment was therefore bad.

Indictment under Rev. St. U. S. § 3893, prohibiting the mailing of obscene matter, etc. On demurrer.

David Overmyer and *G. C. Clemens*, for the demurrer.

W. C. Perry, Dist. Atty., *contra*.

FOSTER, J. This indictment is drawn under section 3893, Rev. St. It charges that the defendants did unlawfully and knowingly deposit in the United States post-office at Valley Falls, in this district, addressed to, and for the purpose of mailing and delivering to various parties therein named, through the United States mails, a certain obscene, lewd, and lascivious paper and publication of an indecent character, called "Lucifer," which paper and publication so deposited for mailing is so obscene, lewd, and lascivious as to dispense with the incorporation of the words and figures in this indictment, said parties well knowing that said paper and publication was non-mailable matter, contrary to the form of the statute, etc. It will be observed that the paper alleged to be obscene, and to have been mailed by the defendants, is not described or identified in any manner except by its title, "Lucifer." It appears to have been a newspaper published at stated periods at Valley Falls. The date of the particular issue is not set out, nor is the article or articles complained of identified by title or contents. There have been a great number of the paper issued entitled "Lucifer," and probably mailed to these same par-

ties, and each and every one different from the others. How are the accused to know what particular paper, or what particular article of the paper, is referred to in the indictment? The accused are entitled to be informed of the specific charge made against them, and it must be sufficiently explicit and definite to enable them to prepare their defense, and present their evidence; and further, to enable them in any future prosecution for the same offense to make the plea of *autre fois acquit* or *autre fois convict*. This indictment is clearly defective in this respect; nor can it be helped out by means of a bill of particulars. The offense charged is an infamous crime, under the decision of the supreme court, (*Mackin v. U. S.* 117 U. S. 348, 6 Sup. Ct. Rep. 777; *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. Rep. 935;) and the accused cannot be put upon trial except upon the presentment of a grand jury, (Article 5, Amend. Const. U. S.;) and all the essentials of the accusation must be presented by the grand jury in their indictment; and neither the court nor parties by consent can add to or take from the indictment, (*Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. Rep. 781.) It is not sufficient for the grand jury to allege that the contents of the paper are too obscene to be spread upon the records, and omit every means of identification. Surely the objectionable matter can be described or identified in some way, without giving offense to the court, or defiling its records with scandalous and indecent matter. The date of the paper, the title of the article, or its general tenor and purport, couched in decent language, would serve to make the charge definite and certain. The demurrer to the indictment must be sustained.

BABCOCK v. UNITED STATES.

(Circuit Court, D. Colorado. May 5, 1888.)

1. PERJURY—CONSTRUCTION OF STATUTES—PROVING ON PUBLIC LANDS.

The provisions of Rev. St. U. S. §§ 5392, 5393, defining perjury and subornation of perjury, were reaffirmed in the Revision of 1874, and, being general in terms, were not repealed *pro tanto* by the special act of 1857, (11 U. S. St. at Large, 250,) providing for oaths, affirmations, or affidavits made or taken before any register or receiver of any local land-office, or used or filed in any such office, in respect to any right, claim, or title to public lands.

2. SAME—INDICTMENT.

An indictment for subornation of perjury charged that defendant did solicit, suborn, and procure an unknown person assuming and pretending to be Mary L. Pratt, who then and there took an oath administered by the register of a local land-office, she, the said person, not believing the same to be true, as defendant then and there well knew, and that she did take the oath, signed and subscribed the affidavit, not believing it to be true, all of which defendant well knew. It also set out the substance of the affidavit, and alleged wherein it was false. *Held*, that the indictment was clearly sufficient.

3. SAME—JUDICIAL NOTICE.

An indictment for subornation of perjury in procuring false affidavits to be subscribed before the register and receiver of a local land-office, need not aver that such officers were competent to administer an oath, as the court will take judicial notice that they are, under the statute, so authorized.

4. SAME—EVIDENCE.

The evidence showed that defendant procured certain unknown persons to go before the local land-office at Denver and swear to affidavits required for entering government land; that these persons made the applications in the names of persons who were not present, and, in some instances, not in the state; that defendant did this by agreement with the persons whose names were used, and that he obtained the receipts for them, and received money for his services. While it was not shown that he was personally present, except in one instance, when these false affidavits were sworn to, yet they were all made by his procurement, with knowledge of their falsity, and with knowledge that the persons making them knew they were false. *Held*, that a verdict of guilty was amply sustained by the evidence.

5. CRIMINAL LAW—VERDICT—INDICTMENT.

Where an indictment contains several counts, and a general verdict of guilty upon all is returned, if any count be good, judgment may be entered upon the verdict.

6. INDICTMENT—DUPLICITY—AIDER BY VERDICT.

The objection of duplicity in an indictment comes too late after verdict and judgment.

Error to District Court.

L. R. Rhodes, for plaintiff in error.

H. W. Hobson, for the United States.

BREWER, J. Defendant was indicted in the district court for subornation of perjury. On that indictment he was tried, convicted, and sentenced, and therefrom sued out a writ of error to this court. The indictment contained sixteen counts charging eight different offenses, each offense being presented in two separate counts, framed under different sections of the statutes. The substance of the offenses charged consisted in the defendant's procuring certain unknown persons to go before the officers of the local land-office at Denver, and swear to affidavits required for entering land. Of the guilt of the defendant there can be, under the testimony, little doubt. In a number of cases the original affidavits filed in the land-office were presented. These purport to be signed and sworn to by the applicant, before the register or receiver. In fact, the applicants were not present, and, in some instances, were not in the state. In one instance, at least, the pretended applicant,—the party making the oath,—was accompanied by the defendant; and in all the instances he agreed with the applicants for a consideration to procure the entries and informed them that their personal attendance was unnecessary, and that he would procure the receipts without such attendance. He did procure the receipts and delivered them to the applicants. Two of the parties were residents of Illinois, and sent money to him for that purpose, corresponding with him either directly or through a friend. While in only one instance is it shown that he was personally present when these false affidavits were sworn to, yet his agreements with the applicants, his representations as to what he could do, what was in fact done, and the payment of money to him therefor, made it beyond question that he did in fact procure some unknown parties to appear, and make these false affidavits. That the persons appearing and making these

false affidavits may have borne the same names as the applicants is, in view of the repeated instances, highly improbable, and also entirely immaterial, for they were not the real applicants,—the parties for whom the entries were made, or for whom he was acting. Counsel insists that there is no proof that the lands thus entered were public lands subject to entry, and therefore that the testimony is insufficient to sustain the verdict, because a mere voluntary affidavit, however false, cannot be the basis of a charge of perjury. I think that counsel are mistaken, and that the testimony is sufficient. Beyond the general statement of the defendant that he would enter for the parties land in that part of Colorado, and the fact that the entries were made, is a direct certificate of the register at the foot of the applications that the land was surveyed land, which the party might lawfully enter, and that there was no prior valid adverse right thereto. This is clearly sufficient to show that the affidavits were not voluntary oaths, but were affidavits to be used, and they were in fact used, in a legal proceeding before the land department.

These considerations as to the sufficiency of the testimony and the certainty of defendant's guilt lead now to the questions on the indictment, whose sufficiency is the principal ground of challenge by counsel. The first eight counts are based upon sections 5392 and 5393 of the Revised Statutes; the first defining perjury, and the latter providing that one procuring another to commit perjury is guilty of subornation. Now, section 5392 is general in its terms, applying to all cases in which a false oath or false testimony is taken or given before any competent tribunal, officer, or person. This section is of long standing. In 1857 an act was passed which is styled "An act in addition to an act more effectually to provide for the punishment of certain crimes," etc. 11 U. S. St. at Large, 250. The fifth section provides specifically for oaths, affirmations, or affidavits made or taken before any register or receiver of any local land-office, or used or filed in any such land-office in respect to any right, claim, or title to any of the public lands; and declares that the person guilty of corrupt swearing therein shall upon conviction be liable to the punishment prescribed for the offense of perjury. Now, the contention of counsel is that this, being a later and special act, substitutes, so far as all these cases before a local land-office are concerned, the provisions of the general statute; and that these eight counts, being framed under the general statute, and not containing all the details mentioned in the special statute, must be adjudged fatally defective. The decision of this question is really not essential to the disposition of this case, for it is settled law in the federal courts that where an indictment contains several counts, and a general verdict of guilty upon all is returned, if any count be good, judgment may be entered upon the verdict. *U. S. v. Jensen*, 15 Fed. Rep. 138; *U. S. v. Simmons*, 96 U. S. 360; 1 Bish. Crim. Proc. § 1015; Whart. Crim. Pl. §§ 771, 907. Probably, however, the point made by counsel is not good; for section 5392, though one of long standing, was reaffirmed in the Revision of 1874, and for all questions of validity and extent may be taken as of later date than the special act of 1857. The two, any way, are to be considered together, and both will

stand unless there is a manifest repugnancy between their provisions, or it can be said that obviously one was intended as *pro tanto* a substitute for the other. It is unnecessary to copy either of these counts in full. It seems to me clear that the first eight are good under sections 5392 and 5393, and the other eight good under the special act of 1857, taken in connection with section 5393. It is objected that in the last eight counts, there is no specific averment that the register and receiver were officers competent to administer an oath. This is unnecessary, for section 5 in terms refers to an affidavit made or taken before any register or receiver. As by another section of the statute the register and receiver are authorized to administer oaths and take affidavits in these land proceedings, the court will take judicial notice of their qualification, and an averment of the fact is unnecessary. So far as the objection of duplicity is concerned, it is enough to say that the objection is made too late after verdict and judgment. *U. S. v. Bayaud*, 16 Fed. Rep. 376; 1 Bish. Crim. Proc. §§ 442, 1282; Whart. Crim. Pl. § 255. Probably, also, the objection would not have been good if taken at an earlier stage of the proceedings. *U. S. v. Fero*, 18 Fed. Rep. 901.

Again, it is insisted that in no count of the indictment is it alleged that the defendant knew or believed that the parties or any of them would swear to the facts charged to be false. No reasonable objection lies to the sufficiency of either count in this respect. Take the first count, for instance. It charges that the defendant did solicit, suborn, and procure an unknown person assuming and pretending to be Mary L. Pratt, who then and there took an oath administered by the register; she, the said person, not believing the same to be true, as he the said defendant then and there well knew; and that she did take the oath, signed and subscribed the affidavit, not believing it to be true, all of which he well knew. Then it sets out the substance of the affidavit, and further alleges wherein it was false, and that she at the time knew it was false; and that he, knowing the same, solicited, suborned, and procured her to take the oath and sign and subscribe the affidavit, well knowing the same to be untrue, and well knowing that the person falsely personating Mary L. Pratt well knew the same to be untrue. In other words, the indictment charges that this unknown person falsely personating Mary L. Pratt made a false affidavit, knowing that it was untrue; and that he, knowing that it was untrue, and that she knew it was untrue, procured and suborned her to make it. She committed perjury, and he, knowing it was perjury, procured her to commit it. The substance of the crime is fully and clearly stated. Section 1025 of the Revised Statutes is pertinent to a matter of this kind. It reads:

"That no indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed sufficient; nor shall the trial judgment, or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

Can anything be clearer than that the defendant knew precisely what he was charged with, and that there was no doubt or uncertainty in the matter. *U. S. v. Fero*, 18 Fed. Rep. 901.

These are all the matters which I deem it important to notice. I see nothing in the record which would justify me in interfering with the judgment, and it must be sustained.

POPE MANUF'G CO. v. GORMULLY. (No. 824.)

(Circuit Court, N. D. Illinois. April 30, 1886.)

PATENTS FOR INVENTIONS—LICENSE—UNCONSCIONABLE COVENANTS—SPECIFIC PERFORMANCE.

P., the owner of some 65 patents for improvements in bicycles and tricycles, and engaged in the manufacture of machines covered by those patents, granted a license in June, 1883, to G., who was a similar manufacturer and owned somewhat similar patents. This license covered only two of P.'s patents, and the machines made under them were of an inferior character. By its terms, this license was to expire, as to one patent, in nine months, and as to the other at any time upon written notice from G.; and nothing was expressed or implied as to any other of P.'s patents. G., desiring to make more perfect machines, applied to P. for licenses under some of his other patents. Correspondence passed between the parties, from which it appeared that G.'s only object was to have the terms of his existing licenses widened so as to take in his contemplated improvements. The contract in suit was finally executed in December, 1884, G. signing it without referring it to a lawyer. Under this contract, which was drawn with much artificiality, G. was granted licenses under 15 out of the 65 patents of P. until April, 1886, and, in consideration thereof, he was made to recognize and admit the validity of all, and P.'s title to the same, and also to covenant not to manufacture or sell any machines covered by any of the patents after his license ran out or was surrendered, and even after the expiration of all the patents covered by his license. After the license had terminated, P. filed a bill for injunction and account, alleging infringement. *Held*, that the bill amounted to one for specific performance, and that, under the circumstances, it should be dismissed, the contract being unconscionable, and, in a measure, against public policy.

In Equity. Bill for injunction and account.

Before GRESHAM, Circuit Judge, and BLODGETT, District Judge.

Coburn & Thacher, for complainant.

B. F. Thurston and Offield & Twale, for respondent.

BLODGETT, J. This is a bill in equity whereby the complainant seeks a decree enjoining the defendant from the manufacture and sale of bicycles and tricycles containing certain devices, and for an accounting. The bill charges that complainant on the 1st day of December, 1884, and for a long time prior thereto, was engaged in the manufacture and sale of bicycles, tricycles, and other velocipedes of superior quality, grade, construction, and finish, and was the owner of a large number of patents, the features of which were embodied in the construction of such vehicles; that on the 1st day of December, 1884, complainant entered into a contract with the defendant, whereby there was granted to the defendant the right to make, use, and sell, for a certain term therein mentioned, bicycles of 52-inch size, and upwards, of certain grades, style, and finish, and to be sold at a certain price limited by said contract, and embody-

ing the inventions set forth in certain letters patent, mentioned in the contract, and none other; and also containing the further agreement on the part of the defendant that he would not manufacture, sell, or deal in bicycles, tricycles, or velocipedes containing certain features or devices covered by certain other patents which were specifically enumerated in said contract; and charging that the defendant, in violation of the last-mentioned clause and provisions, has manufactured bicycles and tricycles containing the devices which he had so agreed and stipulated not to use; and praying that the defendant be enjoined from the use of said devices, and for an accounting.

There is no contest between the parties as to the execution of the instrument set out in the bill; and the only question made by the defendant is as to whether the complainant under the contract is entitled to the relief asked for, or any relief, from a court of equity. The contract in question recites in the opening paragraph that complainant is the owner of certain patents, amounting to 65 in all, giving the number and date of said patents, and the names of the patentees respectively; and by the first article of the contract the defendant is licensed to manufacture in the city of Chicago bicycles of 52-inch size and upwards, embodying the inventions set forth in 15 of the patents enumerated in the opening paragraph or preamble, and no others; and in the ninth article, the defendant agrees that he will not import, manufacture, or sell, either directly or indirectly, any bicycle, tricycle, or other velocipede, or the pedals, saddles, bearings, rims, or other patented parts, or devices containing any of the inventions claimed in either of said recited letters patent; nor make, use, or sell such vehicles containing any of the devices or inventions covered by any of the patents recited in the preamble of the contract, other than those which were specifically mentioned in the licensing clause; nor, in any way, either directly or indirectly, dispute or contest the validity of said letters patent, or either of them, or the title of the complainant thereto. The eleventh clause of the contract gave to the complainant the right to cancel and terminate the license on the occurrence of certain conditions; and also contained a clause allowing the defendant to surrender the license contained in said contract at any time by written notice to that effect, and returning said contract to the complainant. It was, however, expressly provided that no such revocation or surrender, and no termination of said contract, or any part of it, should release or discharge the defendant from the obligations, admissions, and agreements, contained in the sixth, seventh, eighth, ninth, and eleventh articles of said contract, which it is recited were a part of the consideration for the granting of the license contained in said contract, and are irrevocable except by the written consent of the party of the first part. It was further agreed that if the defendant should continue after the termination of such license to make, sell, or use any machine, or substantial part thereof, containing either of the parts specifically referred to in the ninth article, or any invention in any form set forth and claimed in any of the letters patent recited, the complainant should have its remedy for a breach of said contract, or the defendant might be liable to the complainant as an infringer

of such patents. The proof also shows that the complainant on June 13, 1883, granted to the defendant two other licenses giving him the right to use certain of the patents recited in the preamble to the contract of December, 1884. These two last-mentioned contracts are not counted upon or referred to in the bill, and only become material when considering complainant's right to a remedy against the defendant under this bill; but as the complainant has put these two earlier contracts into the record, they may be properly considered for the purpose of construing and determining the rights of the parties in this case under the first-mentioned contract. It will be seen from this outline of the terms and scope of this contract that the complainant, while licensing the defendant to use some 15 of the 65 patents enumerated in the preamble of the contract, and none other, has, in terms or words, obtained a covenant from the defendant admitting the validity of, and complainant's title to, a large number of other patents owned by complainants, and a covenant not to manufacture, use, or deal in the devices, or any of them, covered by any of the claims of this long list of patents recited in the preamble, and has also perpetuated these admissions and these covenants so that they shall bind the defendant after the license is terminated and surrendered, and even after the expiration of all the patents which the defendant was specifically licensed to use.

It is contended on the part of the defendant that this contract was entered into with the express understanding on his part that it was not to continue later than the 1st day of April, 1886, by which time all the patents enumerated in the licensing clause of the contract, which the defendant used in the manufacture of his bicycles, would have expired; and that the defendant, by inadvertence and mistake, and without knowing the full import of articles 9 and 11, and without knowing that by the terms employed in said articles the obligations of the contract were perpetuated as to all the complainant's patents, executed said contract upon the understanding and with the belief that, whenever the licensing portion of said contract was at an end, he was relieved from all the obligations contained in the contract. In other words, the position of the defendant is that, as he understood the contract at the time he executed it, none of its provisions bound him beyond the time when the contract should be terminated by either party. It will be seen from the statement that this contract develops an attempt on the part of the complainant to bind the defendant not to use any of the devices covered by the complainant's patents, although said patents were not the subject-matter of complainant's license to defendant, and to bind the defendant with specific admissions of the validity of all of said patents, and each and every claim thereof, and of the complainant's title thereto; and in case the defendant should use any mechanism covered or claimed to be covered by a claim in any of these patents, to give the complainant a summary remedy against the defendant by estopping him from denying the validity of the patents, and compelling him to answer in damages for such use. As has been already said, the proof shows that the defendant held two licenses granted by the complainant on the 13th of June, 1883, allow-

ing him to manufacture and sell velocipedes, bicycles, and tricycles under certain enumerated patents, and these two contracts or licenses contain no provisions with reference to any patents owned by the complainant other than those specially enumerated in the licensing clause, and contain no clause or provision perpetuating the obligations of the contract beyond the term of the license. One of these earlier licenses was by its express terms to continue only for a term of nine months from the date thereof; and the other allowed the defendant to surrender it at any time by written notice to that effect, and the return of the agreement to the complainant. These two licenses of June, 1883, restricted the defendant to comparatively small and cheaply constructed bicycles and tricycles; but it would seem from the proof that there had been negotiations between the parties for the privilege, on the part of the defendant, of constructing a larger and better class of such vehicles; and in the spring of 1884 some correspondence commenced between the parties as to the terms upon which the complainant would allow the defendant to manufacture these larger and more expensive vehicles; and some time in October, 1884, the complainant prepared a contract and sent it to defendant for signature. This contract so sent to the defendant provided that it would remain in force until November 21, 1894. The defendant had always contended that he did not use any of the complainant's patents whose life extended beyond April 1, 1886; and it also appears from the proof that the defendant was himself the owner, licensee, or assignee of a large number of patents for devices which went into the construction of the machines manufactured by himself; and that, on an examination of the draft of the contract so sent him by the complainant, he objected that the complainant could render him no protection after the expiration of the patents which he used, which would be in the spring of 1886, and suggested that the whole matter of the permission which he had asked to manufacture the larger and more expensive vehicles could be accomplished by simply indorsing this permission on the licenses which he then had; and complained that the contract tendered him by the complainant would cripple him for the term of 10 years, or until November 21, 1894. The complainant thereupon replied to this objection, under date October 20, 1884, in the following language:

"We suppose your objection to the ten-years matter arises from the words used at the end of the fifth line on the second page,—the 21st day of November, A. D. 1894,—which, if objectionable to you, you may erase, and interline in place of that, 'the 1st day of April, A. D. 1886,' and that will relieve this objection. You should not be so much afraid of our wishing or trying to cripple you, and leave the rest of the world free. Some day you will get this idea out of your mind. With the change in the license above noted, that is the way we are willing to give it, and if there is unnecessary verbiage, let it go as our fault."

Under date October 29, 1884, the defendant also wrote the complainant, and objected to the contract because it included what is known as the "Peters Patent," No. 197,289, claimed to cover ball-bearings, on the ground that he, defendant, had a patent for a globular bearing which he

was then using on his machine; and to this complainant replied under date November 4, 1884: "You misread the license, probably as to the Peters patent, as we do not ask you to admit in the license that the ball-bearings on the 'Ideal' infringe that patent. * * * We would not ask you to relinquish any claim which you have in any patent." And on the 12th of November defendant wrote to complainant in reference to the contract in question: "This license is to terminate, if I wish so, on the 1st of March, 1886, or sooner."

When we take into consideration the fact that the defendant's prior licenses from the complainant contained no clause committing or binding him to any admission as to the validity of any of complainant's patents which he was not licensed to use, and which had no clause perpetuating or continuing any obligation on the part of the defendant not to use any of the complainant's patents, or admitting their validity; and also when we consider the fact that the defendant was himself the owner of a large number of patents used in the construction of machines which he was manufacturing, and that he only considered the patents specially covered by the license clause of this contract as in any way useful to him in the manufacture of his machines; and that the complainant had allowed him, without question or challenge, to manufacture bicycles with ball-bearings, hammock-saddles, bifurcated backbones, and rubber handles; in fact, containing all the special features covered by other patents also held by the complainant; and consider the manner in which the defendant insists that he does not wish a license to extend beyond the life of the patents which he was then using,—we think there can be no doubt that the defendant, at the time he executed this instrument, supposed in good faith that when the license terminated, either on the 1st day of April, 1886, or earlier, as it might by the action of either party, all the obligations it contained were also at an end, and, doubtless, the defendant executed this instrument upon that supposition, and had no thought that he was binding himself for all time, or at least for the lifetime of all the complainant's patents, to an admission of their validity, and every claim thereof, and of the complainant's title thereto, with a covenant that he would not use the devices which were covered or included in any of those claims; in other words, that he was giving away his own patents, covering some of the same devices, and admitting that the Peters patent, for instance, which was not a patent for ball-bearings, but, at most, only a patent for adjustable roller-bearings, was valid, and prevented the use by him of his own patent for globular bearings. The defendant did not apply for or ask any new license from the complainant, but only for the complainant's consent that he might, under his then existing licenses, make larger and more highly finished machines. He did not ask the right to use another one of the many patents which the complainant owned, as the defendant was all the time insisting, apparently with the acquiescence of the complainant, that all the patents belonging to complainant which he used, or had any use for in his business, expired before April 1, 1886, and were included in the two licenses taken by him June 13, 1883, and this license of December 1, 1884;

and it can hardly be deemed possible that the defendant, for the mere privilege of making those large machines for 14 months, would intelligently or understandingly have bound himself for all time, or at least for the longest-lived of complainant's patents, not to make machines which should come within the claims of any of these patents, and in regard to which he had had no dealings with the complainant. We find in the correspondence that the defendant all the time insists that his license shall not extend beyond April 1, 1886, because all the patents he used would have then expired; and the only rational explanation of the defendant's conduct in signing this contract is that he supposed, as he fairly might from the correspondence and dealings between the parties, that when he surrendered and returned his license all relations with the complainant under it were ended. The defendant, in his correspondence and in his negotiations, evidently treated the words "license" and "contract" as meaning the same thing; and had no idea there was anything in this instrument but a license, and the terms on which he should conduct himself under the license while it remained in force. This was the natural conclusion that any unsuspecting man, not a lawyer, would have drawn from the instrument. The defendant is not a lawyer, and in the negotiations of the terms of this contract of December 1, 1884, did not consult a lawyer; and any person who reads the instrument can readily understand that it takes some training and study to detect those vicious clauses, which the complainant now invokes the aid of a court of equity to enforce, as they lie ambuscaded in the several articles which make up the entire document, and which the defendant treated as a mere license, which was to end by its own terms on the 1st of April, 1886, and which he could surrender at will; and had evidently no thought that the instrument would have an after-life.

For reasons which defendant evidently did not then understand, but which are now perfectly clear, the complainant refused to indorse upon the old license then held by the defendant the permission which he asked to make the larger machines under the same patents he was then licensed to use, and insisted on the defendant taking a new license; and the defendant, if he read these elaborate and carefully worded clauses, evidently assumed they would only be operative while the license remained in force, and that when he surrendered it he terminated all the contract relations that the license created. For instance, in article 8 of the contract of December 1, 1884, defendant is made specifically to admit the validity of all patents enumerated in the preamble to the contract, and each and every claim thereof, and complainant's title thereto; that the inventions claimed in patent No. 194,980, which is the Whitehead patent, granted September 11, 1877, for a balanced gear, whereby one driving-wheel of a tricycle may rotate faster than the other. The Peters patent No. 197-289, which is for a laterally adjustable roller-bearing, neither of which patents are included in the licensing clause of either of said contracts, are embodied in the defendant's Columbia and Victor tricycles, and his Expert and Eolus machines; and further expressly admits that any machines or parts of machines constructed in a substantially similar man-

ner are or will be infringements of said patents; and that these admissions are unqualified, and may at any time hereafter be pleaded, or proved in estoppel of the defendant. And by the ninth article of said contract the defendant is made to agree—

“Not to make, use, or sell, directly or indirectly, either backbones bifurcated for a rear wheel, or balance gear, allowing two wheels abreast, differing speeds on curves, or bearings containing balls or rollers and laterally adjustable, or brakes combined with the handle-bars and front wheel, or cranks adjustable to different lengths of throw, or forks of tubular construction, or mud-shield for steering wheels, constructed to turn with the wheel, or pedals that are polygonal or offering two or more sides for the foot, or round, contractible rubber tires in grooved rims, or rims containing or adapted for rubber or elastic tires, or saddles, adjustable fore and aft, or saddles having a flexible seat and means of taking up the slack, or steering heads, open or cylindrical, with stop from complete turning, or leg-guards over front wheel, or rims of wrought metal tubing, and adapted to receive a tire, or rims composed of sheet metal with overlapping edges, or wheels containing hollow metallic rim and rubber tires, or steering spindle and fork inclined to each other at an angle, or two speed or power gears, or tangent spokes, or Warwick rims, or any other device or invention secured by either of these patents other than according to the permission, conditions, or description in paragraph numbered ‘First’ in this agreement, or as otherwise agreed in writing with the party of the first part; nor in any way, either directly or indirectly, dispute or contest the validity of the letters patent hereinbefore mentioned, or either of them, of the title thereto of the party of the first part.”

—While the eleventh article of the contract contains this clause:

“No termination of this contract or any part of it shall release or discharge the party of the second part from any payment, return, liability, or performance which may have accrued, become due, or arisen hereunder prior to or at the date of such revocation or surrender, or from the obligations, admissions, and agreements contained in the sections hereof numbered ‘Sixth,’ ‘Seventh,’ ‘Eighth,’ ‘Ninth,’ and ‘Eleventh’ hereof, which are a part of the consideration for the granting of the license herein, and are irrevocable except by written consent of the party of the first part. * * * And, further, that if the party of the second part shall continue after such termination of license to make, sell, or use any machine, or substantial part thereof, containing either of the parts specifically referred to in section ‘Ninth’ hereof, or any invention in any form set forth and claimed in the letters patent aforesaid, or any of them, the said party of the first part shall have the right to treat the party of the second part either as a party to and in breach of this contract, or as a mere infringer.”

—An agreement which, if it did not by its terms practically prohibit defendant from making bicycles and tricycles, or either, for all time clearly did so during the life of all complainant’s patents, several of which had then been only issued a very few months, except at the will and pleasure of the complainant, and on its own terms; and it can hardly be conceived as possible that a sane man who was engaged in the business of a manufacturer of such machines, and who intended to continue in such business, would have signed such an agreement if he had fully understood its intended effect and purpose. The contract, read in connection with the letters in proof, shows, as it seems to us, that it was an artfully con-

trived snare to bind the defendant in a manner which he did not comprehend at the time he became a party to it.

Coming to the conclusion that this instrument was executed by the defendant under a mistaken understanding of the scope and operation of its terms, we are clear that it is so inequitable, and would operate so oppressively upon the defendant, that it ought not to be enforced in this court. This bill, in effect, seeks a specific performance of this agreement. It asks the court to enforce upon the defendant the admissions and covenants contained in this contract of December 4, 1884. Coming into a court of equity, the complainant must show a case that commends itself to the equitable consideration and sense of justice of the court. Justice STORY states the rule as follows:

"It is important to take notice of a distinction between the case of a plaintiff seeking a specific performance in equity, and the case of a defendant resisting such performance. We have already seen that the specific execution of a contract in equity is a matter, not of absolute right in the party, but of sound discretion in the court. Hence it requires a much less strength of case on the part of the defendant to resist a bill to perform a contract than it does on the part of a plaintiff to maintain a bill to enforce a specific performance. When the court simply refuses to enforce the specific performance of a contract, it leaves the party to his remedy at law. * * * But courts of equity do not stop here, for they will let in the defendant to defend himself by evidence to resist a decree where the plaintiff would not always be permitted to establish his case by the like evidence. For instance, courts of equity will allow the defendant to show that by fraud, accident, or mistake the thing bought is different from what he intended, or that material terms have been omitted in the agreement, or that there has been a variation of it by parol."

Again, in Bigelow on Fraud, 390, it is said:

"Specific performance of an agreement is never compelled unless the case is free from the imputation of all deception. * * * The conduct of the person seeking it must be free from all blame. Misrepresentation, even as to a small part of the subject, will exclude him from relief in equity."

And again, at page 394, he says:

"There is a distinction between the exercise of jurisdiction for setting aside a contract and refusing execution. Equity will not carry hard or unreasonable bargains into execution. * * * The power of awarding specific execution * * * rests in sound judicial discretion, and will not be applied to cases that are hard, or unfair, or unreasonable, or founded upon a very inadequate consideration. The case may therefore be such that equity will neither decree execution for the one party, nor set aside the contract for the other. In such cases the contract stands, and the parties must look to the courts of law for its enforcement or for defense."

Again, in 3 Pars. Cont. *414, it is said:

"Equity will not enforce a contract tainted with fraud on the part of the applicant. * * * Here equity can hardly be said to follow the law, because it goes further, for it requires perfect good faith, and will refuse specific performance of a contract if it were obtained by means of misrepresentation or misdirection, which would not be sufficient to avoid the contract at law. * * * A much stronger case is necessary to set aside an executed agreement on the ground of misrepresentation or concealment than is sufficient to induce a court of equity to refuse a specific performance of one that is executory. Indeed, as equity is never bound to give this relief, so it never will,

unless the justice of the case, as drawn from all its facts, demands it. Hence there must not only be an entire absence of fraud, but an equal absence of oppressiveness, and if a decree would operate more hardly than it should on the defendant, this would be sufficient reason for withholding it."

This rule cited from the text-books is abundantly supported by the adjudged cases. *Race v. Weston*, 86 Ill. 94; *Frisby v. Ballance*, 4 Scam. 299; *Mortlock v. Buller*, 10 Ves. 292; *Willan v. Willan*, 16 Ves. 83; *Joynes v. Stat-ham*, 3 Atk. 388.

We think there can be no doubt that this contract, if enforced according to its letter and spirit, would act oppressively and unjustly upon this defendant. He is a competing manufacturer in the same field with the complainant. He is the owner of patents which the complainant has acquiesced in his right to use in conducting his business, and covering many, if not all, the features in his machines enumerated in the ninth article of the contract; and we cannot but look upon this article and the other provisions of the contract as a cunning device to bind this defendant, not only in a manner which he did not comprehend or understand at the time he executed the agreement, but also in a manner which would be contrary to public policy; as we think the courts should certainly not favor any efforts on the part of patentees or owners of patents to obtain by indirection or subterfuge an admission as to the validity of their patents which ties the hands and cripples the energies of a competitor. Many of these patents held by complainant, and perhaps all of them, may be valid for their specific devices, but the law should not encourage parties holding such patents to invent or devise schemes by which to obtain admissions, directly or indirectly, of the validity of their patents, so as to foreclose investigation and discussion upon the question of their validity; and hence we simply say that this contract seems to be so oppressive, and so unjust and inequitable in its terms, and so contrary to sound public policy, that it ought not to be enforced in a court of equity, even if the defendant fully understood and comprehended the force and import of every paragraph of it.

The bill is therefore dismissed for want of equity.

POPE MANUF'G CO. v. GORMULLY & JEFFREY MANUF'G CO. *et al.*
(No. 830.)

(Circuit Court, N. D. Illinois. April 30, 1888.)

1. PATENTS FOR INVENTIONS—SCOPE OF CLAIM—BICYCLE SEATS.

The first and second claims of letters patent No. 252,280, of January 10, 1882, to Curtiss H. Veeder, for a "seat for bicycles," are: "(1) A suspension saddle, constructed with a flexible portion, and having an under spring in two or more parts, to which the flexible portion is attached at either end, and which metallic parts are extensible." (2) "In a velocipede seat, the combination of plates and clamps, stop and adjusting bolts." The patent also contains a disclaimer limiting the claim solely to the "improved form of spring." *Held*, in view of the disclaimer, that the patent must be restricted to the form of spring

shown; the principles of both suspension and extensibility, as applied to saddles, being old in the art, as evidenced by the English patent of Lamplugh and Brown of July, 1878, the Shire patent of May 26, 1879, and the Fowler patents of May, 1880, and October, 1881.

2. **SAME—JOURNAL-BOXES.**

The second claim of letters patent No. 197,289, of November 20, 1877, to A. L., G. M., and O. E. Peters, for an "anti-friction journal-box," is "the bearings with the shoulders beveled or notched, combined with the nut, or its equivalent, correspondingly beveled or notched." *Held*, in view of the prior state of the art, as evidenced by the English patent of 1858 to Chinnock, and the American patents of 1868 to Jewett and Leach, of 1870 to Alcott, and of 1872 to Ruse and Vernon, that the claim must be strictly confined to the devices shown, viz., a beveled nut for the adjustment of beveled rollers, and that it did not cover a lateral adjustment for ball-bearings by means of a nut.

3. **SAME—VELOCIPEDE HANDLES.**

In letters patent No. 245,542, of August 9, 1881, to Thomas W. Moran, for "handles for velocipedes," the improvement consists in affixing by the device shown a ball of rubber to the ends of the velocipede handles. *Held*, if not void for want of invention, restricted, in view of the prior state of the art, as evidenced by the English patent of July, 1877, to Harrison, to the specific device shown.

4. **SAME—HANDLE-BARS.**

The only feature covered by letters patent No. 810,776, of January 18, 1885, to William P. Benham, for "improvements in velocipedes," is the idea of an undivided handle-bar, and the means by which the bar is fastened to the steering-head. *Held*, that the undivided handle-bar was a mere steering-bar without novelty; and that the patentable novelty, if any, was confined to the means by which the handle-bar was locked to the steering-head.

5. **SAME—INFRINGEMENT.**

The first and third claims of letters patent No. 810,776, of January 18, 1885, to William P. Benham, for "improvements in velocipedes," are (1) "the combination of an undivided bar, and an open slotted lug, and two sleeved nuts, or their equivalents, one on either side the lug, surrounding the bar and adapted to lock it rigidly to the lug." (3) "In combination with the handle-bar, the detent, constructed and adapted to operate substantially as and for the purpose set forth." *Held*, the undivided bar being void for want of novelty, the use of an undivided handle-bar fastened to the steering-head by a method making use of neither the open slotted lug and two-sleeved nuts, nor the detent, was not an infringement.

6. **SAME—PATENTABILITY—INVENTION—PEDAL BARS.**

The feature covered by the second and third claims of letters patent No. 828,162, of July 28, 1885, to Emmett G. Latta, for an "improvement in velocipedes," is the pedal-bar coated with rubber, longitudinally grooved, so as to furnish two bearing surfaces on opposite sides of the groove. *Held* void for want of novelty, a round grooved rubber-coated pedal-bar being old, as shown by the English patent of January, 1876, to Jackson, and the Harrison patent of 1877, and the change of form by Latta to a polygonal shaped bar involving no invention.

In Equity. Bill for infringement.

Before GRESHAM, Circuit Judge, and BLODGETT, District Judge. }

Coburn & Thacher, for complainant.

B. F. Thurston and Offield & Towle, for respondent.

BLODGETT, J. The bill in this case charges the defendants with the infringement of the following patents: (1) Patent No. 252,280, granted on January 10, 1882, to Curtiss H. Veeder, for a "seat for bicycles," (2) patent No. 197,289, granted November 20, 1877, to A. L., G. M., and O. E. Peters, for "an anti-friction journal-box;" (3) patents Nos. 235,551 and 245,542, granted December 14, 1880, and August 9, 1881,

respectively, to Thomas W. Moran, for "handles for velocipedes;" (4) patent No. 240,905, granted May 3, 1884, to John Harrington for an "improvement in bicycles;" (5) patent No. 310,776, granted January 13, 1885, to William P. Benham for "improvements in velocipedes;" (6) patent No. 323,162 granted July 28, 1885, to Emmett G. Latta, for an "improvement in velocipedes;" (7) patent No. 329,851, granted November 3, 1885, to Albert H. Overman for an "improvement in pedals for velocipedes." It is charged that the patents now in question have been duly assigned to, and are now the property of, the complainant. The bill asks for an injunction and an accounting for the damages sustained by the alleged infringement. We find no proof in the record showing or attempting to show infringement of the Moran 1880 patent, the Harrington patent, nor the Overman patent, and as complainant's attorneys have not discussed or insisted in their oral or printed arguments that infringement is shown as to these patents, we shall give them no further attention.

The Veeder patent, No. 252,280, is for an improvement in bicycle saddles, or seats for bicycles; and is stated in the specifications to consist specially in "devices for suspending the leather or other flexible material of which the seating surface is composed, and for stretching or taking up the slack in the same, and for connecting the same with the perch or supporting bar for the seat, and by means of which the seat is made adjustable backward and forward over the perch or bar, * * * and consists, *first*, in a divided metallic spring or supporting plate for the flexible seat; *second*, in a modification of that portion of said metallic spring which forms the frame-work for the rear of the seat; *third*, in mechanism for elongating or extending said metallic spring, so as to take up the slack of the flexible seat." The patent contains eight claims, but infringement is specifically charged, and insisted upon, only as to the first and second of these claims, which are as follows:

"(1) A suspension saddle, constructed with a flexible portion, C, and having an under spring in two or more parts, B, D, to which the flexible portion is attached at either end, and which metallic parts are extensible, substantially as and for the purposes set forth. (2) In a velocipede seat, the combination of plates, B and D, clamp, F, stop b, and adjusting bolt, F', substantially as shown and described."

The patent contains a disclaimer as follows:

"I am aware that a spring has been used to support the seat or saddle of a bicycle. I therefore do not claim the general application of a spring for this purpose; but I do claim the improved form of spring as herein described."

The features of this patent now in controversy are especially the curved spring, which is made in two parts, both ends being curved upward, and the parts connected by a clamp, so that the spring is extensible; and, the flexible seat being attached to these curved ends of the spring, the slack of the seat can be taken up by extending the spring.

The Peters patent, No. 197,289, is described in the specifications as "an improvement for overcoming the friction of the bearings of all vehicles mounted on wheels, and the journals of all revolving shafts, cyl-

inders, and bearings of machinery. * * * The invention is a combination of rollers or cylinders made of iron, steel, or any suitable metals or other materials, of sufficient number, and suitable in length, size, and form, which revolve around the spindle or bearing of the axle within the hub of the wheel, and around the journal or bearing of the shaft or cylinder, and within the journal-box, the rollers being independent of the bearing and the hub or journal-box. * * * To support and keep the rollers from running against one another, and thereby producing friction, both ends of each are made with a bearing which goes into rings or their equivalents in such a manner as to allow the rollers to turn freely on their bearings as they revolve around the bearings of the axle or shaft." Provision was made for making the ends of these rollers beveled so that the inside beveled end would bear against a corresponding bevel on the shoulder of the axle; while the outside ends of the rollers would bear upon an adjustable nut secured upon the outer end of the axle, so as to adjust the nut to the rollers as they become shortened at the ends by wear. The patent contains four claims, but infringement is only insisted upon in this case of the second claim, which is as follows:

"(2) The bearings, with the shoulders beveled or notched, combined with the nut, or its equivalent, correspondingly beveled or notched, as shown in Fig. 4."

The Moran patent, No. 245,542, granted August 9, 1881, is for an "improvement in the handles of bicycles and velocipedes," and consists in affixing, by the device shown in the patent, a ball of rubber to the ends of the velocipede handles. The patent contains three claims, as follows:

"(1) The handle of a velocipede provided with rubber ends, as set forth.
 (2) The handle of a velocipede, in combination with rubber tips sleeved upon its ends as set forth. (3) A rubber handle for a velocipede, consisting of a ball and neck, combined in one piece, as set forth."

The Benham patent, No. 310,776, is for an improved handle-bar for velocipedes or bicycles, and consists of a handle-bar in one piece, extending from the steering-head, and fastened to the steering-head by the peculiar mechanism shown. The patent contains four claims, and infringement is charged as to the first and third, which are:

"(1) The combination of an undivided bar, and an open slotted lug, and two sleeved nuts, or their equivalents, one on either side the lug, surrounding the bar, and adapted to lock it rigidly to the lug, essentially as set forth."
 "(3) In combination with the handle-bar, B, the detent, D, constructed and adapted to operate substantially as and for the purposes set forth."

The Latta patent, No. 323,162, relates, in the language of the specifications, to certain improvements in the "construction of the pedals of velocipedes or bicycles, and more particularly to that class of pedals in which a serrated steel bar is combined with the rubber pedal-bar in such manner that the pedal can be changed from a rubber pedal to a serrated or rat-trap pedal, as may be desired. The object of my invention is to combine a pedal bar of this character in a compact form, and in a simple manner, whereby the pedal can be readily changed from a rubber to

a serrated or rat-trap pedal, or a rubber and rat-trap pedal combined, and to so construct the parts whereby the pedal bars are more elastic and yielding to the foot than those now in use, and whereby the bearing surfaces are increased and the weight of the bars are reduced at the same time." The patent contains eight claims, and infringement is charged as to the second and third, which are as follows:

"(2) The combination, with the pedal-frame, of a rubber pedal-bar, H, provided with a central longitudinal groove, h, and two bearing surfaces, h', h', on opposite sides of the groove, h, substantially as set forth. (3) The combination, with a pedal frame, of a rubber pedal-bar, H, pivoted to the frame by a rod, i, and provided on each of its sides with a longitudinal groove, h, and two bearing faces, h', h', on opposite sides of the groove, whereby the bar, H, is adapted to receive the pressure at its sides or edges, and be compressed on opposite sides of the rod, i, substantially as set forth."

The defenses interposed are: (1) That the patents in question are void for want of novelty; (2) that the defendants do not infringe.

Complainant insists that defendants, by certain license contracts made by complainant to the defendant Gormully, dated June 13, 1883, and December 1, 1884, have admitted the validity of each and all the patents involved in this suit, and the title of complainant thereto; that although said licenses are in terms only to defendant Gormully, yet defendant Jeffrey was, in fact, interested in the business of Gormully as an actual partner, and that the defendant the Gormully & Jeffrey Manufacturing Company is a corporation organized and operated only for the convenience of said Gormully and Jeffrey, and that said Gormully and Jeffrey are the sole owners of its stock and managers of its affairs, and that therefore all the defendants in this case are by virtue of said license contracts estopped to deny the validity of said patents, or either of them, or any claim thereof, and are also estopped to deny complainant's title to said patents or either of them. In the preceding case, (No. 824, *ante*, 877,) we fully discussed the character of these licenses, and considered the question as to how far they are binding, and came to the conclusion that these license contracts ceased to operate upon and bind the defendant Gormully after the termination and surrender thereof; and as the same proofs in regard to the validity of the said contracts are before us in this case, we again say that our conclusion is that the defendant Gormully accepted said license contracts with the mistaken belief and understanding that they terminated and became wholly inoperative on the 1st day of April, 1886, and that thenceforward all his relations with and obligations to complainant by virtue of said license contracts ceased and were at an end, and hence that it would be inequitable to enforce said license contracts against Gormully, the licensee, after such termination; and, as the defendants Jeffrey and the Gormully & Jeffrey Manufacturing Company, by complainant's own showing, were only bound by these contracts through Gormully, they are not estopped to contest the validity of these patents any more than Gormully himself is so bound. We therefore turn to the consideration of the issues made upon the patents themselves.

In regard to the Veeder patent, there can be no doubt, we think, that it was intended to contain not only the idea of a suspension saddle by the suspension of some flexible material, like leather or cloth, but also the idea of extensibility, so that, by extending the bearings or suspension points of the saddle as the seat material became stretched or slacked, the slack might be taken up; and this element of extensibility was obtained by Veeder through his peculiar extensible springs, or his double spring, if it may be so called, coupled together in the center, and capable of being elongated or extended. The proof shows that the idea of a suspension saddle was not new with Veeder; and, without discussing all the patents cited by the defendants as anticipatory of the Veeder device, it is sufficient to say that in the English patent of Lamplugh and Brown, of July, 1878, an extension seat is shown in at least three different forms; the spring upon which the rear end of the seat is suspended being movable, so that the principle of extensibility is clearly shown in this patent. So in the Shire patent of May 26, 1879, a suspension seat is shown with facilities for extending or taking up the slack, and the same feature is shown in the Fowler patent of May, 1880, and the later Fowler patent of October, 1881. Finding, therefore, that the principles of suspension and extensibility are both old in the art, the only inquiry left is whether the defendant uses the peculiar extensible spring shown by the Veeder patent; and a simple inspection of the defendants' saddle shows that, while it may be said to contain the feature of suspension and extensibility by means of certain devices whereby it is connected with and held to the backbone of the bicycle, or seat of the tricycle, yet it does not contain the spring shown in the Veeder patent; and as the Veeder patent must be restricted by the disclaimer to the form of spring shown in that patent, and as suspended saddles were old before Veeder, it is sufficient to say that the defendants do not use that form of spring, and hence do not infringe the Veeder patent.

Neither the complainant nor the defendants use the Peters patent as it is shown and described in the specifications,—that is, they do not use it with roller-bearings, as described and shown in the specifications and drawings,—but the contention on the part of the complainant is that this patent is the germ, so to speak, of all the ball-bearing devices which have a provision for lateral adjustment to compensate for the wear, and that the beveled rollers shown in that patent are but another form of ball or globular bearings, and that Peters was the first to show a means of laterally adjusting these bearings, whether the bearing was in the form of a roller or a ball. The defendants' machines have ball-bearings in the main wheel, the rear wheel, and the treadles, the balls being held in grooves or channels, and there being in all their journal-boxes an arrangement for lateral adjustment; but defendants contend that devices for lateral adjustment of these bearings were old long before the Peters patent, and the proof shows that in 1853 one Chinnock received a patent in England on a ball-bearing which had provision for a lateral adjustment by means of a beveled nut, while the American patent to Alcott, in 1870, shows the same feature of adjustability, and by substantially the same

mechanism, for a roller-bearing. The American patent to Jewett & Leach, granted in 1868, also exhibits the same feature of lateral adjustability. We also find that the American patents to Ruse and Vernon, both granted in 1872, which, while not for roller or ball bearings, show beveled bearings with beveled nuts for endwise or lateral adjustment. These are only a few of the many proofs in the record of devices for lateral adjustment well and publicly known in the art long prior to the advent of this Peters patent. The Alcott patent was for a roller-bearing like Peters', with the ends of the rollers beveled, so as to fit into a V-shaped channel or groove; this groove being what may be termed a double bevel,—that is, there was a beveled bearing over the ends of the rollers as well as under them,—while Peters only had a bevel under his roller ends; but the principle of the Peters bevels is all shown in this Jewett & Leach patent, including the special arrangement and directions for obtaining the endwise or lateral adjustment. Indeed, we can say from common knowledge that it was old long before the Peters patent was granted to secure endwise or lateral adjustment to take up the end wear upon the common wagon and buggy axle by means of a nut and screw, and the fact that the Peters rollers were beveled cuts no figure in this matter of lateral adjustment. A plain screw-nut being old to take up the end wear of an ordinary carriage or buggy axle, we doubt if it required invention to apply it to a beveled roller like Alcott or Peters, when endwise adjustment to beveled rollers was found desirable. We therefore conclude that there was no novelty in the Peters mode of lateral adjustment covered by his second claim. But, if we had any doubt on the question of novelty, we are clear that the defendants do not infringe this claim, as, in the state of the art, this feature of the Peters patent must be strictly confined to the special devices shown,—that is, to a beveled nut for the adjustment of beveled rollers,—and cannot be held to cover a lateral adjustment for ball-bearings by means of a nut, which was old and well known when Peters came into the field. Without, therefore, discussing in detail all the patents and devices shown in this record, which it is claimed anticipate the Peters patent when it is converted into a ball-bearing device, if such conversion is deemed allowable, we certainly find in the evidence several much older devices as readily susceptible of such conversion as the Peters, and hence must hold that the defendants, by the use of their adjustable ball-bearing device, do not infringe the Peters patent.

The Moran patent, No. 245,542, granted August 9, 1881, is, as already stated, for fixing a rubber ball to the ends of the handle of the velocipede. If it can be conceived that there is any patentability, or was any, in August, 1881, in fixing soft rubber, or any soft and flexible material, to the ends of a velocipede handle for the purpose of preventing it from wearing the hands, or taking off the jar of the machine, certainly, that idea is fully anticipated in the English patent of Harrison of July, 1877; and this Moran patent, in its entire scope and means of applying the rubber to the handle, seems to contain nothing new, and nothing which is not shown in the Harrison patent. In his provisional specifications Harrison says:

"The fourth part of my invention consists of a sheath or glove of india rubber, cloth, or any other soft material to fit closely, partly or entirely covering the handles of bicycles or tricycles, which may be filled with air. This is to obviate sore hands, to give greater comfort, especially in long journeys, to the hands, which lessens the vibration, and is softer to the hand-grip, and also lessens the concussion in case of the bicycle falling upon the handles. The probability of bent handle-bars and roughed hands is lessened thereby."

Harrison gives no specific directions as to how his rubber ball, or rubber sleeve, is to be fastened upon the handles, and, of course, any device for that purpose was open to him. It may be that the peculiar method described in Moran's patent of fastening the rubber to the handle involves patentability; but even if that be so, the defendants do not use that exact method, and it is doubtful whether in any of the claims of the Moran patent these particular modes of fastening the rubber to the handles are specifically included. We must therefore find that the broad claim set up by the complainant for the scope of this Moran patent cannot be sustained; and if the patent can be sustained at all, it is only for the specific devices which the defendants do not use.

As to the Benham patent, No. 310,776, granted January 13, 1885, the only feature which it covers is the idea of an undivided handle-bar, and the means by which this bar is fastened to the steering-head. Undoubtedly the idea of a continuous or undivided steering-bar is as old as the attempt to steer ships by a steering bar fastened to the rudder-post, and ropes or chains leading to the wheel, or the old-fashioned auger-handle by which the auger is turned in use. There may be some novelty in the means by which Benham locked his handle-bar to the steering-head so as to make the same easily removable, and at the same time give a firm fastening; but, if there was any patentable novelty in the device, it is certainly not infringed by the defendants, who, while they use an undivided handle-bar, have adopted a different method for fastening the same to the steering-head, and do not use either the complainant's open slotted lug and two-sleeved nuts, or their detent.

As to the Latta patent, the feature covered by the second and third claims, which the defendants are charged with infringing, is the pedal-bar coated with rubber longitudinally grooved so as to furnish two bearing surfaces on opposite sides of the groove. The proof shows that pedal-bars coated with rubber were old long before the date of this patent, and that such pedal-bars had been grooved longitudinally. Pedal-bars with rubber surfaces are shown in the English patent to Jackson, of January, 1876. They are also shown in the Harrison patent of July, 1877. The latter patent shows round pedal-bars coated with rubber, and grooved longitudinally; and it certainly seems almost a libel upon inventive talent, after a round grooved pedal-bar had been shown, to claim that there is any invention in changing the form to a polygonal-shaped bar with grooved surfaces.

The view which we take of all these patents, when considered upon their merits in the light of the prior art, compels us, therefore, to dismiss this bill for want of equity.

POPE MANUF'G CO. v. GORMULLY & JEFFREY MANUF'G CO. *et al.*
(No. 845.)*Circuit Court, N. D. Illinois. April 30, 1889.)***1. PATENTS FOR INVENTIONS—ASSIGNMENT—SINGLE CLAIM.**

It is competent for the patentee to assign a single claim only of the patent, and as to that to reserve to himself a shop-right; and such an assignment carries with it to the assignee the right to maintain a bill for an infringement of such claim so assigned.

2. SAME—PATENTABILITY—NOVELTY—VELOCIPEDE SEATS.

The second claim of letters patent No. 216,371, of June 3, 1878, for an "improvement in velocipedes," is, "in a velocipede, the adjustable hammock seat." *Held* void for want of novelty, hammock-seated saddles being old when the patent was granted, as evidenced by the Bishop saddle, the Miller patent of 1866, the Curry patent of 1867, the Harris patent of 1875, and the English patent of 1878 to Lamplugh and Brown.

3. SAME.

The first claim of letters patent No. 314,142, of March 17, 1885, to Thomas B. Kirkpatrick, for a "bicycle saddle," is "the combination, with the perch or backbone of a velocipede, or similar vehicle, of independent front and rear springs secured to such perch or backbone, and flexible seat suspended directly over said spring at the front and rear, respectively." *Held*, in view of the state of the art, as evidenced particularly by the Fowler patent of 1881, that the claim must be restricted to the special device for the bifurcated forward springs which are carried beyond the steering head.

In Equity. Bill for infringement.

Before GRESHAM, Circuit Judge, and BLODGETT, District Judge

Coburn & Thacher, for complainant.

B. F. Thurston and Offield & Towle, for respondents.

BLODGETT, J. The bill in this case charges the infringement by defendant of two letters patent owned by the complainant corporation, one being patent No. 216,371, granted to John Shire, June 3, 1878, for "an improvement in velocipedes," and the other being patent No. 314,142, granted March 17, 1885, to Thomas B. Kirkpatrick, for a bicycle saddle. The Shire patent shows a hammock-seated saddle, the seat of the saddle being suspended at either end, and fastened at the rear to what is termed a "hammock block," which block is fastened to what the patentee calls a "fender," a part which, to some extent, takes the place in his structure of the backbone or reach of the ordinary velocipede; while the forward end of the saddle is fastened by a strap and buckle to a spring-bar connected with the bifurcated steering-head. The patent contains four claims, and infringement is only charged as to the second claim, which is: "(2) In a velocipede, the adjustable hammock seat, I, substantially as set forth." The element of adjustability seems in this device to be obtained by means of the strap and buckle by which the hammock seat is fastened at its forward end. The Kirkpatrick patent is said in the specifications to consist "in a peculiar arrangement of front and rear springs, secured independently to the reach or backbone of the machine, in connection with the flexible seat suspended at the front and rear from said

springs;" and defendant is charged with infringement of the first claim, (there being six claims in the patent,) which is in the following words:

"(1) The combination with the perch or backbone of a velocipede, or similar vehicle, of independent front and rear springs, secured to such perch or backbone, and flexible seat suspended directly over said spring at the front and rear, respectively, substantially as set forth."

The defenses made are: (1) Want of title in the complainant to the Shire patent; (2) that both patents are void for want of novelty; (3) that the defendants do not infringe.

Complainants hold the Shire patent by virtue of an assignment from the patentee, John Shire, which is in the following words:

"Be it known that I, John Shire, of Detroit, Wayne county, Mich., for and in consideration of one dollar and other valuable considerations to me paid, do hereby sell and assign to Thomas J. Kirkpatrick, of Springfield, Clark county, Ohio, all my right, title, and interest in and to the letters patent on velocipedes granted to me June 16, 1879, and numbered 216,381, including all rights for past infringements, so far as said patent relates to or covers adjustable hammock seats or saddles, except the right to use said seat or saddle in the velocipedes made by me under said patent in my business in Detroit."

—And by an assignment from Kirkpatrick to the complainant.

It is objected that this assignment did not vest the title in Kirkpatrick, and therefore that complainant did not take from him any right, except the right to use one claim of the patent; and that therefore this is not such an assignment of the patent as makes the complainant the owner, and entitles it to bring suit for infringement. Defendants cite no case expressly in point which covers the case here made, but rely upon *McClurg v. Kingsland*, 1 How. 202; *Gayler v. Wilder*, 10 How. 477; and *Goodyear v. Railroad Co.*, 1 Fish. Pat. Cas. 626, where the rule is stated that the assignee of a patent cannot maintain a suit for infringement unless he is the owner of the entire patent either for the whole United States, or some specific portion of its territory. Each claim of the patent, standing by itself, is a separate patent for the device covered by that claim; and it seems to us that it is entirely competent for a patentee to assign the exclusive right to use so much of the patent as is covered by any one of its claims, and that this becomes an operative assignment under the patent laws to transfer the patent covered by that claim. The language of this assignment is broad and comprehensive enough to completely transfer all the rights of the patentee to the hammock-seat feature of his patent, saving to the assignor a mere shop-right for the city of Detroit; and hence we think this objection is not well taken.

As to the questions of novelty and infringement, it was not new at the time this patent was issued to make a hammock-seated saddle for bicycles, nor to make such seat adjustable. Hammock-seated animal saddles, are old, and are shown by the proof to have been well known long prior to the Shire patent, as is shown by defendants' "Exhibit Bishop," which shows a saddle patent issued in 1859, where there was a leather suspension saddle supported by spring attachments at the end; and, while nothing is said about adjustability, it is obvious that if adjustability were

desired it could have been easily secured in this Bishop device, without invention. The same may be said of the Miller patent of 1866, the Curry patent of 1867, and the Harris patent of 1875. The proof also shows that Lamplugh and Brown obtained a patent in England, in 1878, for a bicycle saddle which was suspended upon springs at each end; and, while nothing is said about adjustability, it is plain from the drawings 6 and 7 that it was as readily adjustable at the forward end as the Shire patent; Fig. 6 showing a connection at the forward end by means apparently of an iron strap with an eye-end, which engaged with an iron hook, upon the shank of which there was a screw-thread by which this hook could be shortened, so as to take up the slack; and, even if there was no special adjustability provided for, it is clear that if adjustability became desirable or necessary it could have been obtained by substituting a leather strap or buckle in place of the iron strap, so as to secure the same kind of adjustability which is shown in the Shire patent. It therefore seems to us that so far as the hammock seat was concerned, and making such seat adjustable by means for taking up the slack, or even making it movable upon the reach of the bicycle, it had already been anticipated to such an extent in the art as to make this claim of the Shire patent void, or, if not void, only valid for the special device which was used; and, if valid for the special device, then clearly the defendant's device by which the hammock saddle is suspended at either end, does not infringe this second claim of the Shire patent.

The Kirkpatrick patent is described by the patentee in his specifications as an invention which "relates to that class of bicycle saddles in which a flexible seat is suspended directly over the saddle spring or springs, without the use of an intermediate saddle frame or tree; and my invention consists in a peculiar arrangement of front and rear springs, secured independently to the reach or backbone of the machine, in connection with the flexible seat suspended to the front and rear of said springs." As has already been said in regard to the Shire patent, it was not new at the date of the patent now under consideration to suspend the flexible seat of a velocipede or a bicycle saddle from springs, or fastenings, at each end. In other words, hammock seats, as they are called, were old, and the idea of suspending such seats was shown in the Veeder patent of 1882, the Shire patent of 1879, and the Lamplugh and Brown English patent of 1878; and, even if those patents did not show a suspension from springs at each end of the saddle or hammock, it is clearly and certainly shown in the Fowler patent of October, 1881, where a saddle seat is shown suspended from springs at each end. It may be that this Kirkpatrick patent can be sustained as a special device for the bifurcated forward springs which are carried beyond the steering head, and thereby the seat of the saddle is brought somewhat further ahead than is shown in saddles that are fastened to springs abaft the steering head or post; but the defendants do not use that form of bifurcated springs, and, if the patent can be sustained, it must be for that special device, and nothing else. Hence we conclude that, while it is possible that this first claim of the patent may not be absolutely void for want of novelty, yet it does

not cover the saddles used by the defendant, nor the manner in which they mount their saddles upon springs.

We are therefore of opinion that this suit should be dismissed for want of equity.

POPE MANUF'G CO. v. GORMULLY & JEFFREY MANUF'G CO. *et al.*
(No. 850.)

(Circuit Court, N. D. Illinois. April 30, 1888.)

1. PATENTS FOR INVENTIONS—PATENTABILITY—NOVELTY—AXLE-BEARINGS.

The device shown by claims 2 and 3 of letters patent No. 249,378 of November 8, 1881, to Albert E. Wallace, for an "improvement in axle-bearings for vehicle wheels," consists of an axle upon which slide two sleeves, beveled at the ends which approach nearest to the middle of the axle, so that when these bevels are brought together, or approximately together, they will form a V-shaped groove upon the axle, the inner one of these rings or sleeves resting against the hub or shell of the axle, and the outer coming into close connection with the crank. Upon the axle is fitted a grooved bearing-box, containing metallic balls carried in said groove, and adapted to be partly retained in the groove upon the axle formed by these two beveled sleeves; and the adjustment to take up the wear of these balls is obtained by moving the outer sleeve upon the axle by means of a threaded screw at the outer end. *Held void for want of novelty, being anticipated by the English patent of November 14, 1878, to James Bate.*

2. SAME.

Claims 2 and 3 of letters patent No. 280,421 of July 3, 1883, to Albert E. Wallace for an "improvement in axle-bearings for vehicles," are: "(2) Constructed and combined * * * a two-part sleeve, a bearing-box, a row of balls, a serrated annulus, and a locking button, with an axle and hub and flange. (3) The combination, in a ball-bearing device, of a free bearing-box and a shell case." *Held void for want of novelty, being anticipated by the English patents of November 14, 1878, to James Bate, of March 22, 1880, to Bown & Hughes, and of May 7, 1880, to Monks.*

In Equity. Bill for infringement.

Before GRESHAM, C. J., and BLODGETT, D. J.

Coburn & Thacher, for complainant.

B. F. Thurston and Offield & Towle, for respondent.

BLODGETT, J. In this case defendants are charged with the infringement of patent No. 249,278, granted November 8, 1881, to Albert E. Wallace for "an improvement in axle-bearings for vehicle wheels;" and of patent No. 280,421, granted July 3, 1883, to Albert E. Wallace for "an improvement in axle-bearings for vehicles." Both these patents are for alleged improvements in what is known as "ball-bearing devices" for axles or journals, especially with reference to such bearings when used in connection with bicycles or tricycles; and the features of such patents specially in controversy in this case are the methods by which the adjustment of such bearings is obtained. The first patent contains four claims, but infringement is only charged as to the second and third of said claims, which are as follows:

"(2) The described anti-friction bearing for a wheel and axle, consisting of a one-part bearing-box and a two-part sleeve, having a circular row of balls within said box, and between bearing surfaces in the box, and on either part of the sleeve, and adapted for adjustment for wear and securement in position on an axle by a screw-thread at the outer end of one part of the sleeve, operating to draw it towards and from the other part, substantially as set forth. (3) The described anti-friction bearing for a wheel and axle, consisting of a two-part collar or sleeve adapted to inclose the axle, a one-part bearing-box inclosing said sleeve, and containing a recess with bearing-surfaces between which and a bearing-surface on either part the said sleeve is held, a circular row of balls combined and constructed essentially as shown and described, for securement in position and adjustment for wear by the pressure of one part of the sleeve against the hub of the wheel, and by an external thread on the other part of the sleeve, operating in an internal thread in a box secured to the axle on the opposite side, substantially as set forth."

Plainly stated, and stripped of technical verbiage, the device shown by the patent consists of an axle upon which slides two sleeves, beveled at their inner ends, or the ends which approach nearest to the middle of the axle, so that when these bevels are brought together, or approximately together, they will form a V-shaped groove upon the axle, the inner one of these rings or sleeves resting against the hub or shell of the axle, and the outer one coming into close connection with the crank. Upon the axle is fitted a grooved bearing-box containing metallic balls carried in said groove, and adapted to be partly retained in the groove upon the axle formed by these two beveled sleeves; and the adjustment to take up the wear of these balls is obtained by moving the outer sleeve upon the axle by means of a threaded screw at the outer end.

The second patent, No. 280,421, purports upon its face to be for an improvement upon the first-mentioned patent, and is stated to consist in improved means for adjusting the bearings, and for securing and adjusting the parts in position, and for adjusting and holding the frame of the vehicle and its load with relation to the bearing-box, and shows substantially the same beveled sleeves which were shown in the former patent, and forming a channel or groove in which the ball-bearings ride, or partly ride, with the grooved bearing-box to carry the balls slipped onto the axle so that the balls will move in channels or grooves formed by the beveled ends of the sleeves, operating substantially, so far as its practical service is concerned, like the device shown in the first patent. This patent contains four claims, and infringement is charged as to the second and third of said claims, which are:

"(2) Constructed and combined, substantially as herein set forth, a two-part sleeve, a bearing-box, a row of balls, a serrated annulus, and a locking-button, with an axle and hub and flange, essentially as shown and described. (3) The combination, in a ball-bearing device, of a free bearing-box, G, and a shell-case, E, substantially as set forth."

The defenses set up are want of novelty and non-infringement.

The complainant also charges in this case as in No. 824, *ante*, 877, heretofore considered and disposed of, that the defendants, by the contracts of June 13, 1883, and December 1, 1884, given by complainant to the defendant Gormully, have admitted the validity of these patents, v.34r.no.11—57

and complainant's title thereto, and are now estopped from denying the same; so that the only question left open in this case, as complainant claims, is the question of infringement. As we fully discussed in the first case the question of the binding character of these contracts, we do not consider it necessary to reconsider or review what was there said; but as this suit has special reference to the ball-bearing mechanisms used by the defendants in their machines, it may not be inappropriate to refer to the letter of complainant to Mr. Gormully of November 4, 1884, in answer to a letter of Gormully to complainant of October 29, 1884, in which the complainant says:

"You misread the license probably, as to the Peters patent, as we do not ask you to admit in that license that the ball-bearings on the 'Ideal' infringe that patent. As drawn out, it did ask you to admit the validity of that patent, and the scope of it, as covering ball-bearings with means for lateral adjustment. We would not ask you to relinquish any claim which you have in any patent."

As was said in the former case, it is hardly conceivable that Gormully, being himself the owner of ball-bearing patents, and working under them, would have signed these licenses with any other understanding of their import and effect upon him than that whenever they terminated he was remitted back to the same position in which he stood prior to the taking of the licenses; and, having found that Gormully is not estopped by these contracts in the former cases, we simply reiterate that conclusion in this case, and proceed to the consideration of the issues made upon the patents themselves.

The defendants have put in evidence, with special reference to the patents now in controversy, the specifications of the English patent granted November 14, 1878, to James Bate, which shows beveled sleeves upon an axle, so arranged as to slide with their beveled ends towards each other, forming a beveled or V-shaped groove, with a shell or ball-box surrounding such groove, and carrying the balls in the groove of the shell, so that when the parts were brought together, the balls would move upon these sleeved bevels, and with express provision for endwise adjustment by means of a screw-thread moving one of these sleeves; and, for the purposes of this case, it seems to us wholly immaterial which one of these sleeves or thimbles moves upon the axle, so long as it made provision for endwise adjustment. This device, so far as this matter of adjustability is concerned, it seems to us, is identical in construction and mode of operation with that of the first of the patents now under consideration, and to substantially anticipate the device covered by the second and third claims of the second Wallace patent. The same features are also shown in the specifications of the English patent of Bown & Hughes, dated March 22, 1880, where provision is made for lateral or endwise adjustment as it seems to us, by substantially the same device in all its modes of operation as is shown in the second of these patents; while the English patent to Monks of May 7, 1880, describes a device for lateral or endwise adjustment which, in all respects, seems to fully anticipate and cover the devices, so far as they may seem material, or patentable,

of this Wallace patent. With these old devices found in the art, it seems clear to us that the defendants had the right to use the ball-bearing boxes which are shown by the proof to have been embodied in their machine; and the conclusion is irresistible that the claims of both these patents upon which infringement is charged show nothing new or worthy of the name of invention. The bill is therefore dismissed for want of equity.

SPENCER v. PENNSYLVANIA R. Co.¹

(Circuit Court, E. D. Pennsylvania. October 10, 1887.)

1. PATENTS FOR INVENTIONS—EXTENT OF CLAIM—LOCOMOTIVE TENDER LOADERS.

The first claim of letters patent No. 99,723, which is as follows: "The herein described method of supplying locomotive tenders with fuel or water, which method consists in using the traction of the moving locomotive, acting through chains, or any proper connection, to raise the buckets, boxes, or other delivering apparatus, so that their contents may be discharged into the tender as substantially set forth," must be construed as a claim for the particular means devised and shown to perform the work therein specified, and not as a broad claim for a method of accomplishing the result, and that the patent is therefore valid.

2. SAME—INFRINGEMENT.

The first claim of letters patent No. 99,723, as above set forth, is infringed by an apparatus made in accordance with the specifications contained in letters patent No. 245,350, granted to John B. Collin, August 9, 1881, and reissued letters patent of December 4, 1883, No. 10,417, for supplying locomotives with coal consisting essentially in the employment of the movement of the engine in connection with the hoisting mechanism for elevating the coal into the proper position to be discharged into the tender.

In Equity. Bill for an infringement of letters patent.

This is a suit brought by Albert H. Spencer against the Pennsylvania Railroad Company, for an infringement of letters patent of the United States, No. 99,723, and bearing date February 8, 1870, granted to the said Albert H. Spencer. Complainant's patent has for its object the utilization of the traction of a moving locomotive to raise suitable coal or water delivery apparatus, so that their contents may be discharged into the tender of said locomotive. The invention relates to the construction of a hoisting apparatus for elevating fuel or water into a locomotive tender, and in having the same so arranged, with relation to the locomotive, that the labor of hoisting shall be accomplished by its tractile power. The fuel car rises in the slides until the proper height has been obtained, and discharges its contents into the tender, which, by this time, will be directly opposite; the length of the hoisting chain being determined in such a manner as to accomplish that object. As the available hoisting power is practically equal to any requirement, any reasonable quantity of fuel or water may be thus elevated. The claim of said patent, upon

¹ Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

which complainant asks for relief, which is the first claim in the patent, is as follows:

"(1) The herein described method of supplying locomotive tenders with fuel or water, which method consists in using the traction of the moving locomotive, acting through chains, or any proper connection, to raise the buckets, boxes, or other delivering apparatus, so that their contents may be discharged into the tender, substantially as set forth."

The respondent's apparatus is illustrated and described in letters patent granted to John B. Collin, August 9, 1881, No. 245,350; reissued December 4, 1883, No. 10,417; the claim of which original patent is: "The described method of supplying locomotives with coal, consisting essentially in the employment of the movement of the engine in connection with hoisting mechanism, substantially as described, for elevating the coal into the proper position to be discharged into the tender." The patent also says:

"This invention is an improved method of supplying locomotives with coal, consisting essentially in the employment of the movement of the locomotive, in connection with proper mechanism for lifting the coal from the ground to the requisite elevation for properly discharging the same into the tender."

And also the following:

"The power of the locomotive is employed in combination with the proper hoisting mechanism for lifting the coal from the ground to the requisite elevation for properly discharging the same into the tender, the engine being so connected to the hoisting mechanism, that, when the same is moved into the proper position to receive the coal, the receptacle carrying the latter will be lifted into the proper position for discharging its contents into the tender."

George J. & George Harding, for the complainant.

It is not claimed that an elevating device in itself is the novelty of Spencer's invention, nor that the tractile movement of the locomotive shall lift coal in that elevating device; but the claim is the application of that principle in such manner, through ropes or chains, that when the object which elevates the coal is in the position to receive it, then the lifted coal will be in a position to be discharged into said object which has elevated it. A modification of an elevating apparatus, which changes the relationship of the different elements so as to act in a different manner, and for a different result, cannot be said to be anything but an invention.

Andrew McCallum, for respondent.

Confining the issue to the subject-matter of the first claim, the questions to be determined are in a measure dependent upon the construction to be given to it. Defendant contends that the claim is, on its face, void in law; that to be at all valid it must be construed as for the machine or mechanism described; that there is no patentable novelty disclosed, in view of the state of the art; that the device described is inoperative practically; that the apparatus used by defendant does not infringe.

CONSTRUCTION OF THE CLAIM.

So far as the meaning of the language used is concerned, it would seem to be beyond question that Mr. Spencer has attempted by it to cover a method or mode of supplying locomotive tenders with fuel and water, and not the means or mechanism described, through the operation of which the desired result is accomplished. Complainant's expert, in defining the invention covered by the claim, says: "The essence of the invention, as embodied in claim 1, is

the utilization of the tractile power of a locomotive to deliver to said locomotive in an automatic manner the necessary substances which are to be employed in the development of further power in the locomotive. It is true that the construction shown will automatically discharge its contents, but the inventor is in no wise limited to any such construction." Mr. Chief Justice TANEY, in discussing the principles of patent law in *O'Reilly v. Morse*, 15 How. 62.

"Whoever discovers that a certain useful result will be produced in any art, machine, manufacture, or composition of matter, by the use of certain means, is entitled to a patent for it, provided he specifies the means he uses in a manner so full and exact that any one skilled in the science to which it appertains can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he describes. And if this cannot be done by the means he describes, the patent is void; and if it can be done, then the patent confers on him the exclusive right to use the means he specifies to produce the result or effect he describes, and nothing more." The rule thus announced by the United States supreme court more than 80 years ago, remains the rule to-day, and has been followed by that court in all cases where the same question has come before it. *Burr v. Duryee*, 1 Wall. 531, affirmed in *Case v. Brown*, 2 Wall. 230; *Fuller v. Fenner*, 94 U. S. 299; *Corning v. Burden*, 15 How. 252. Presuming for the purpose of this argument that the complainant, Spencer, was the first to conceive the idea of utilizing the tractile power of a locomotive for hoisting fuel and discharging it into the tender, it does not necessarily follow that such method of loading the tender amounts to a patentable invention, or to anything more than the discovery of a new use of a well-known machine. And if it is shown by the state of the art that the tractile power of the locomotive has before been utilized for analogous purposes, and that substantially the same method and means for loading and unloading with other well-known powers were before known, the mere fact that such old method and means could be employed for loading a tender would not be a patentable invention. In *Railroad Co. v. Truck Co.*, 110 U. S. 490-498, 4 Sup. Ct. Rep. 220, GRAY, J., says: "Whoever discovers that a certain useful result will be produced in any art, machine, manufacture, or composition of matter, by the use of certain means, is entitled to a patent for it, provided he specifies the means he uses in a manner so full and exact that any one skilled in the science to which it appertains can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he describes. And if this cannot be done by the means he describes the patent is void." *O'Reilly v. Morse*, 15 How. 62. "Utility is absent from all processes and devices which cannot be used to perform their specified functions, and patents for such subjects are therefore void." *Bliss v. Brooklyn*, 10 Blatchf. 522; 6 Fish. Pat. Cas. 289; *Rowe v. Blanchard*, 18 Wis. 465. "The patent is void if the machine will not answer the purpose for which it was intended without some addition, adjustment, or alteration which the mechanic who is to construct it must introduce of his own invention, and which had not been invented or discovered by the patentee at the time his patent was issued." *Burrall v. Jewett*, 2 Paige, 143. What is essential to Spencer's apparatus is non-essential to Collin's, and what makes the latter valuable is not shown or described in the Spencer patent, "It is no infringement of a patent for a combination which is in itself impracticable and worthless to add to the combination an element which renders it useful and valuable." *Robertson v. Hill*, 4 O. G. 132.

PER CURIAM. The first claim (which alone is involved) must be construed as for the particular means devised and shown, to perform the work specified therein; not as a broad claim for a method of accomplish-

ing the result. In this view the claim is valid. There is no sufficient evidence to justify the charge of non-utility, anticipation, or want of invention. The devise used by the respondent is substantially identical with the complainant's, to the extent covered by this claim. A decree must therefore go against him for an account.

ASMUS v. FREEMAN.¹

SAME v. ALDEN.

(Circuit Court, E. D. Pennsylvania. April 8, 1888.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—DAMAGES MEASURED BY LICENSE FEES.

A patentee, having granted licenses at less than his regular rates in a few instances where they were taken, either in the settlement of suits for infringement, or several together, towards the end of the patent, has had sufficient cause for such reductions, and, having adhered otherwise uniformly to his rates, is entitled to exclude such licenses from consideration when proving his established license fee as the measure of damages against an infringer.

2. SAME—WORTHLESS CLAIM.

Where "it is reasonably plain" that a claim is structural, and the master has reported it valueless, and the proofs seem to justify him in so doing, the non-use of it by an infringer of another claim embracing the whole invention will not compel the complainant to adduce evidence to show the value of the part taken. *Westcott v. Rude*, 19 Fed. Rep. 836; *Thread Co. v. Thread Co.*, 27 Fed. Rep. 865; *Tondeur v. Stewart*, 28 Fed. Rep. 561,—cited and followed.

In Equity. Exception to master's report.

Order for injunction and account, July 19, 1886. See 27 Fed. Rep. 684. Master reported nominal damages. Plaintiff excepted to report on account of ruling therein that a license fee of \$1,000 per furnace had not been proved.

Bakewell & Kerr, for complainant.

Wayne McVeagh and *W. W. Baldwin*, for defendant.

BUTLER, J. The report shows such intelligence and care that we feel hesitation in disagreeing with the learned master. We are unable, however, to accept his conclusion in one important respect. To show the extent of damage sustained, the complainant undertook to prove the existence of a uniform license fee. In this, the master thinks, he failed. The rule requires a uniform fee within given periods, such as indicates the market value of a license at the times specified. It need not be uniform throughout the life of the patent, and could not be. As the monopoly approaches its close, the value necessarily diminishes, and the price of its use must be correspondingly less. Nor is it important that a larger or smaller sum is demanded and paid under special circum-

¹Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

stances,—as where licenses result from the settlement of suits for, or controversies about, infringement. Here, as in all extraordinary cases, other considerations than the value of the license enter. It is sufficient that the price is uniform when the circumstances are similar, and such as ordinarily exist when these contracts are made. The proofs here show that the license fee demanded and paid in the beginning was \$150 per foot across the boshes, averaging about \$1,500 per furnace; and later on \$100 per foot, about \$1,000 per furnace. After some years it was placed at \$1,000 per furnace, regardless of size. This latter sum was thereafter adhered to uniformly, under ordinary circumstances; and many licenses were taken at that rate. It was never departed from except where licenses arose from the settlement of suits for, or controversies about, infringement; and in one or two instances where several licenses were granted together, towards the expiration of the patent, and these as well as other unusual circumstances operated to induce and justify a reduction. When the master says no reason is given for this latter reduction, he must be understood as meaning no sufficient reason. The proofs show the reasons above stated, and we think them sufficient to justify a reduction, and exclude these licenses from consideration. As respects the infringements here involved, two commenced in the summer of 1878, and the third in 1881. These are the periods, therefore, to which inquiry must be directed, and we think the proofs show the existence at both times of a well-established and uniform fee of \$1,000, demanded and paid under ordinary circumstances. The complainant must therefore have a decree for \$3,000. Whether interest should be added has not been considered. The question was not presented on the argument, and is open to doubt.

We find no substance in the objection that the device covered by claim 7 was not used by respondent. The claim infringed (the first) covered the entire invention. The seventh is structural merely, covering a method of constructing the "slag discharge piece" so as to regulate the cooling process embraced in the first. The master did not pass on this question. We may infer, however, from what is said, that he considered it immaterial. The general rule is that, where less than the whole number of claims has been infringed, evidence must be adduced to show the value of the part taken. This is inapplicable, however, where, as here, the claim infringed embraces the whole invention, and the others are simply structural. *Westcott v. Rude*, 19 Fed. Rep. 830; *Thread Co. v. Thread Co.*, 27 Fed. Rep. 865; *Tondeur v. Stewart*, 28 Fed. Rep. 561. The respondent admits that the several claims between the first and seventh are of this character. We think it reasonably plain that the seventh also is. Furthermore, the proofs show that the license fee paid was the value placed on the use of the invention, irrespective of the device covered by the seventh claim. While it is not shown that this device was ever used, it is shown that generally it was not. It seems to have been regarded as valueless, and for this reason was not used by the respondent. The master reports that "it was admitted by their counsel in argument before the master that the respondents did not regard the method of claim 7 as

being of any practical value, and that had they so regarded it they would have adopted it and practiced it." This view respecting the value of the seventh claim is of itself conclusive. It is said the master is mistaken regarding the imputed admission. However this may be, he virtually reports the matter covered by the claim as valueless; and the proofs seem to justify this conclusion.

STILLWELL v. THE J. D. HALL.¹

(District Court, S. D. New York. April 11, 1886.)

SHIPPING—CARRIAGE OF GOODS—LIABILITY FOR LOSS.

Tin was shipped from New York to Buffalo in an open boat, contrary to custom, and, by reason of heavy rains, and some leaking of the boat, was delivered damaged, for which damage this suit was brought. The evidence indicated that there had been a complete misunderstanding between libelant and claimant as to the hatches of the boat, the libelant supposing they were to be used, the claimant supposing the libelant waived the use of them. *Held*, that both were in fault for the damage; the claimant, as common carrier, being bound to carry the goods safely, and to know what was improper to be carried without hatches; and the libelant, whose employe loaded the boat, for not seeing to it that the latter had hatches. Both were also in fault for not dunnaging such a cargo in an open boat. *Held*, that libelant should recover half his damage.

A. B. Stewart, for libelant.

Hyland & Zabriskie, for claimants.

BROWN, J. The libelant, acting as common carrier, contracted with the captain of the canal-boat *J. D. Hall*, in May, 1886, to carry a cargo of tin in boxes from New York to Buffalo. The *Hall* was a Pennsylvania open-deck boat, provided with large hatches, so that the deck could be covered. The hatches, however, were at this time in Buffalo. During the trip, through heavy rains and some leaking of the boat, a portion of the cargo sustained damages, to recover for which this action was brought. For the claimant it is contended that in the contract of carriage it was expressly stated that the boat was an open-deck boat, and would have no hatches for the trip. If the testimony warranted a finding that this was the understanding, I should have no hesitation in acquitting the boat of liability. The contract in that case would plainly put upon the libelant the risk of the weather, as in the case of a contract for shipping goods to be carried on deck. The libelant's story, however, is precisely the reverse. He testifies that in answer to his inquiries whether the boat had hatches the claimant replied that he had; that tin in cases was a kind of cargo that was never customarily shipped on deck, or in boats without hatches. Considering the fact that the tin was liable to damage from wet weather; that it is never customarily shipped on deck, or exposed in

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

open boats; and that the libelant was well acquainted with the proper handling of such goods, it is impossible to suppose that the libelant, after making the express inquiry whether the claimant had hatches or not, would have shipped these goods in an open boat had he understood that there were no hatches for this trip. Nevertheless, an additional witness for the claimant confirms the latter's testimony that in answer to the libelant's inquiries he told him that the hatches were in Buffalo. In this state of things I can see no alternative but to find that there was a direct and complete misunderstanding on each side; and that both, taking the circumstances all together, are to blame for such a shipment without a clear understanding upon so important a point. The claimant, as common carrier, was bound to carry the goods safely, and to know what was proper and improper to be carried without hatches. The very fact of the libelant's inquiry about his hatches, the nature of the articles, their liability to damage in an open boat, and the custom not to carry them in an open boat, should have put him on his guard against misunderstanding. Ordinary care and prudence, under such circumstances, required the captain, either by repetition or by a very clear statement, to take special care that no misunderstanding existed. In whatever way the misunderstanding arose,—and there are various forms of question and answer by which it might arise,—the previous conversation could not have been wholly clear and unequivocal. Even the libelant, in his protest, did not speak quite surely about it. On the other hand, the boat was loaded by the libelant's employe, who was also presumably acquainted with the custom of the business, and with the impropriety and danger of shipping tin in an open boat. There were no hatches visible; and they are so bulky as to be conspicuously present or absent. Yet no further inquiry was made on the subject. Upon both sides, as it seems to me, there were sufficient circumstances to impose upon each the necessity of more caution, and of more careful inquiry than was made. Moreover, the evidence would indicate that the damage was caused from the accumulation of water upon the bottom of the boat, on which the lower tiers of boxes rested. The claimant, knowing the liability of such cargo to be injured by water accumulating in that way in rainy weather, ought to have put dunnage beneath the lower tiers, to avoid that danger. It is not, indeed, usual to put dunnage in canal boats; but it was not usual to carry tin in open boats. In departing from the custom by taking such cargo in an open boat, the claimant was bound to take reasonable precaution to protect it from injury, by the use of dunnage, as in other cases of known necessity therefor. But in this respect, also, the libelant would seem to be chargeable with blame, since the loading was done by his own man, and no dunnage was suggested. The damages and costs must therefore be divided.

MARK *et al.* v. THE BRITANNIA.¹

(District Court, S. D. New York. April 28, 1888.)

SHIPPING—CARRIAGE OF GOODS—NEGLIGENT STOWAGE—LIMITING LIABILITY.

Two drums of glycerine in a consignment of 102 on board the steam-ship *Britannia*, were cut by chafing together during the voyage, whereby the glycerine leaked out. It appeared that the dunnage wood which was placed between all the drums of the consignment, had fallen out during the voyage from between these two drums only. The voyage had been a rough one. The damage was within the exceptions of the bill of lading. *Held*, that the only fair inference was that the wood between these drums was not secured in the usual and proper manner, and that the loss was therefore the result of negligence in stowage, for which the steam-ship was liable, notwithstanding the exceptions of the bill of lading.

In Admiralty. Libel for damages.

Geo. A. Black, for libelants.

R. D. Benedict, for claimant.

BROWN, J. In December, 1885, the *Britannia* delivered in New York 102 drums of glycerine, consigned from Marseilles on the libelants' account. Two of the drums were so injured on the passage that the glycerine was lost to the value of \$175; the rest of the drums were uninjured. The bill of lading excepted loss from "leakage" or "pressure of other cargo." Drums of glycerine are peculiar in construction, and require to be specially stowed with boards or planks between the drums. The testimony of the mate, given two months after the arrival of the steam-ship, shows that these two drums were in the lower hold, the one being on the top of the other; and that pieces of wood, which in the stowing had been placed between them to keep them properly secured and apart, had dropped out, the ship having met rough weather on the passage. The testimony of the master, taken two years afterwards, as respects the disarrangement of the wood, is, I think, less reliable. The mate states positively that the wood fastenings for these two drums were all that had got out of place, and there is proof of general good stowage. As the loss arose from "leakage," which is one of the exceptions of the bill of lading, the burden of proof, in order to charge the ship, is upon the libelants to show that there was some negligence on the part of the vessel that produced the leakage. The mate's testimony shows the cause to have been the dropping out of the wood that separated these two drums, which allowed the drums to pound or chafe each other. Had there been a general disarrangement of the wood, or had it dropped away between other drums, the proof of such facts, together with the proof of general good stowage, might have warranted the inference that the disarrangement and dropping out of the wood was caused solely by the severe weather, a peril of the sea, which is also within the exceptions of the bill of lading; and not by any defect in securing the wood of these two packages. But the

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

mate's testimony that on arrival the wood had not dropped away from any others except the two injured, will not permit the inference that it arose from rough weather alone; since in that case the wood between other drums would have been similarly affected. The only fair inference of fact is that the wood between these two drums was not secured in the usual and proper manner, and that negligence in this respect was the cause of the wood's dropping out, and thereby of the leakage which caused the loss. *The Burgundia*, 29 Fed. Rep. 607; *The Surrey*, Id. 608, and note. In *The Polynesia*, 30 Fed. Rep. 210, there were no special circumstances indicating negligence on the part of the ship.

The libellant is therefore entitled to a decree for the amount claimed, with interest and costs.

THE JOHN COTTRELL.

THE STARLIGHT.

LAVERTY v. THE JOHN COTTRELL and THE STARLIGHT.

(District Court, S. D. New York. April 21, 1888.)

1. SHIPPING—CARRIAGE OF GOODS—LIABILITY FOR LOSS.

The lighter J. C., with a deck-load of iron bars, moored outside of another vessel lying at a wharf. As the tide went down, she took the bottom, or some obstruction, gradually careened, and lost her deck-load overboard. She selected the mooring place herself, which was an improper one, and was left without a watchman. *Held*, that she was responsible for the loss of the iron.

2. COLLISION—AT PIER—COSTS—FIFTY-NINTH RULE.

On being libeled in this suit, the lighter brought in under the fifty-ninth admiralty rule the barge S., which was the vessel along-side of which she had moored, claiming that the barge, being moored unskillfully, had careened against her, forced down her rail, and thus caused the loss of the deck-load. *Held* that, even had the accident occurred in this way, the barge S. was not liable, as she owed no duty to the lighter, which had moored along-side of her own volition, without request or permission, and at her own risk. Being brought into the suit by petition of the lighter C., *held*, that the barge should recover her costs of the C., and not of the libellant.

In Admiralty.

Hyland & Zabriskie, for libellant.

Edwin G. Davis, for the John Cottrell.

Goodrich, Deady & Goodrich, for the barge.

BROWN, J. In July, 1887, the libellant contracted with the owners to transport for them a quantity of iron bars from the Pennsylvania Railroad, Jersey City, to Cornell's wharf, foot of Twenty-Sixth street, North river. The libellant thereupon made a subcontract with the captain of the lighter John Cottrell to transport the iron. The cargo was loaded and taken to the basin in which Cornell's wharf is located, where the

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

lighter arrived about 7 o'clock in the evening of the 4th of August. The basin is formed by a causeway built of stone and rubble, which, curving outward and to the northward from the foot of Twenty-Sixth street, runs up in a line with the river for about 1,000 feet, leaving but a narrow inlet of from 40 to 60 feet wide along the front of Cornell's wharf, between that and the causeway. The wall of the causeway was not vertical, and the testimony is not satisfactory as to the actual width of the basin in front of the wharf. When the Cottrell arrived there was no one present to give directions where she should go. Another vessel was lying by the wharf to the southward, and there was not room for another to lie along-side. A little to the north of the wharf, or about opposite to its northern end, the barge Starlight was moored along-side the causeway, but angling a little towards the wharf, and the captain of the lighter concluded to moor along-side the barge. About 4 o'clock on the following morning the lighter careened towards the barge to such an extent that the iron, which was loaded on deck, slid off into the water. This suit was brought to recover for the loss and for the damage to the iron thereby occasioned.

It was claimed by the lighter that the barge was improperly moored; so that, by slipping upon the rocks and careening outward, she caught the lighter's rail, and gradually pressed her down until the iron was precipitated into the water. I do not think the evidence sustains this contention; nor, if it were true, do I think the barge could have been held answerable for the damages. Even if she had been moored unskillfully, having reference to the peculiarities of the place, and was liable to take the ground and careen at low water, she owed no duty in that respect to the lighter, which moored along-side of her of her own volition, without request or permission, and, as I find, at her own risk. The duty of watching, as regards any results of grounding, was the duty of each as regards her own safety. When the lighter arrived none of the barge's men were on board, but only a watchman for the night. As against the Starlight the libel must therefore be dismissed; but inasmuch as she was brought in as a party defendant on petition of the Cottrell, under rule 59 in admiralty, the Cottrell, and not the libellant, must pay the costs.

There is a conflict as regards the precise place where the barge and lighter were moored, and as to the cause of the accident. There is considerable evidence to show that the barge extended into the narrow entrance abreast of the wharf, and was angling a little across it, so as to bring the lighter's bows very near to the upper end of the wharf; and that with the fall of the tide the side of the lighter caught upon some projecting log, thereby causing her to careen to starboard, as above stated. This theory finds some confirmation in the fact testified to by the barge's witnesses that neither the barge nor her lines showed any traces of change or injury, such as must have happened had she slid down upon the sloping rocky bottom at the low ebb, when this accident took place. This is sustained by the majority of disinterested witnesses, and, I am inclined to think, is the more probable account of the accident. The lighter was not moored in the usual or customary place, or

in the usual manner. She was left without a watchman, or, if the man on board was intended as a watchman, he wholly neglected his duties, and got on deck but a few moments before the iron went overboard. The evidence shows that the iron was lost after several hours of gradual careening of the lighter, and, as would appear from the almanac, at just about low water. From whichever of the two causes assigned the accident happened, this was not reasonable and proper care for a cargo like iron, liable to slip off the deck. Without considering, therefore, the question whether the lighter, in a case like the present, was under the obligations of a common carrier, which many late authorities in this country would seem to sustain, (see *Hutch. Carr.* §§ 58, 61; *Browne, Carr.* §§ 74, 32, note; *Sumner v. Caswell*, 20 Fed. Rep. 249,) I think the lighter must be held answerable for not in the first place making the necessary inquiries and examination to obtain a safe place to moor for the night, in a place where the circumstances were evidently peculiar and unusual, and also, after having thus moored without ascertainment or inquiry, for being left without any watchman to look after her safety at night during the rise and fall of the tide in such a place.

The libelant is entitled to a decree against the Cottrell, with costs.

THE GIULIO.¹

PAOLILLO v. ONE THOUSAND NINE HUNDRED AND FORTY BALES OF VEGETABLE HAIR.

CORMACK *et al.* v. THE GIULIO.

(*District Court, S. D. New York. April 30, 1888.*)

1. SHIPPING—CARRIAGE OF GOODS—UNREASONABLE DELAY.

A vessel chartered to the Mediterranean and back to New York, put into her home port in Italy on account of stress of weather. Some repairs were put on her there, and, after their completion, she was detained three weeks longer, through acute rheumatism of the master. *Held*, that the owner was not justified in detaining the vessel in her home port for such reason, without indemnifying the charterer for the expense and loss caused by the delay.

2. SAME.

A vessel is liable for the fall in market prices during a period of negligent delay on her part, though such delay arose before the cargo was shipped, when the delay was voluntary, and was in the course of the voyage contracted for by the charter, and after it had been entered upon.

3. SAME—WAIVER.

Charterers who load a vessel with return cargo after a period of negligent delay on the part of the vessel do not thereby necessarily waive the right of action which has already accrued to them for the breach of the ship's legal duty of dispatch in fulfilling the charter requirements.

4. SAME.

Where objection that a vessel has not taken a full cargo is not made at the time when objections in other respects are made by protest, any complaint made afterwards on this score should be looked upon with suspicion.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

5. SAME—LIEN FOR FREIGHT.

Unqualified delivery of cargo to consignee without notice of intent to retain the lien for freight is a waiver of such lien; but a delivery of cargo to a wharfinger or warehouseman on the consignee's account, accompanied by a notice of lien for freight, is no waiver, and the lien continues. Even if the notice of lien is served an hour or two after the last of the cargo is delivered, so slight a delay as the fraction of a day in serving notice should not necessarily be deemed indicative of any intent to make an unconditional delivery.

6. SAME—DEMURRAGE—CUSTOMARY DISPATCH.

A vessel's arrival was reported to charterers on the 6th of February. On the 7th they directed her to a wharf, which she reached the same day, but other vessels in the slip prevented her beginning to discharge until the 14th. She was discharged, without unusual exertion, in four days. No reason was given for sending the vessel to a wharf where she was detained so long. The charter called for "customary dispatch." There was no strict proof of what was customary dispatch for such cargo as the vessel had. *Held*, that the ship was entitled to five days' demurrage.

In Admiralty.

The above are cross-libs arising upon a charter party of the *Giulio* to H. M. Cormack and others, dealing under the name of Latassa & Co. In the second action damages are claimed for the delay of the *Giulio* in proceeding to her destination, and for not taking on board a full cargo; in the first, freight was claimed for the cargo delivered. The vessel was chartered on May 13, 1886, for a voyage from New York to Gibraltar and Malta, and thence for return cargo back to New York, from either Bona or Oran, for a lump sum of £600 sterling. She arrived at Malta September 14th, where she completed her discharge on the 28th of September. By cable directions from the charterers she was ordered to Oran, a port on the north coast of Africa. The vessel left Malta on the 4th of October, and from the 8th to the 9th, meeting heavy weather, according to the master's testimony, she was obliged to put into Castellamare, her home port, which she reached on October 10th. During the next three weeks considerable repairs were made to her there, and, after the repairs were completed, she remained three weeks longer, in consequence of the illness of the master with acute rheumatism. She left on the 23d of November, and arrived at Oran in the extraordinarily short time of eight days. The passage is sometimes from 30 to 40 days. During all this time Latassa & Co. had a cargo in waiting at Oran, and were under expenses for storage, insurance, etc., for which damages were claimed, as well as for loss through the fall of the market price upon late delivery in New York. The charterers claimed that the lien on the goods for freight was lost by unconditional delivery of the goods. The vessel claimed also five days' demurrage.

Wing, Shoudy & Putnam, for Paolillo.

Whitehead, Parker & Dexter, for Cormack.

BROWN, J. 1. The evidence is not sufficient to impeach the statements in either of the three logs which, by the Italian law, it was the duty of the master of the bark *Giulio* to keep. Their purposes being different, greater fullness of detail in log No. 1 as respects the gale encountered on the 9th of October than was entered in log No. 2 was proper.

That the additional matter is not found repeated in log No. 2 casts no discredit upon log No. 1. The other evidence shows that the night was [burrascoso] squally and boisterous. I cannot find, therefore, that the master was not justified in putting in at Castellamare, or overrule his judgment of the necessity of putting into port. *The Maria Luigia*, 24 Blatchf. 15, 28 Fed. Rep. 244; *Insurance Co. v. Catlett*, 12 Wheat. 383; *Fearing v. Cheeseman*, 3 Cliff. 91.

2. After necessary repairs were completed at Castellamare, the vessel was kept there some three weeks longer, through acute rheumatism of the master. That port was her home port; and, under her duty, according to the terms of the charter, and the charterer's instructions, to proceed to Oran, I do not think the owner was justified in further detaining the ship in her home port on account of the master's illness, after the repairs were completed, and after the long delay already incurred, without indemnifying the charterer for the expense and loss caused by the additional delay. The master should have gone aboard, and, with the aid of the mate and other officers of the ship, as in ordinary cases of illness at sea, proceeded to Oran; or, if that were not practicable under the circumstances, it was competent for the owners to appoint another master, either for the rest of the voyage, or temporarily. The ship owes the charterer diligence and dispatch. *The Success*, 7 Blatchf. 551; *The Onrust*, 1 Ben. 431. The expense of that delay, namely, the storage and other expenses of the cargo during this time, should therefore be paid by the ship to the charterer.

3. In addition to the local expenses of storage, Latassa & Co. are, I think, entitled to the amount of the fall in the market price, if there was any fall, during the three weeks preceding the date of arrival in New York. The liability of the vessel for the loss of a market during the period of negligent delay, after the goods have been taken on board, has been often decided in the courts of this country. *The Success*, *supra*; *The City of Dublin*, 1 Ben. 46; *The Golden Rule*, 9 Fed. Rep. 334; *Page v. Munro*, 1 Holmes, 233; *Desty, Shipp. & Adm.* § 256. I see no reason why the same rule should not be applied, though the delay arose before the cargo was shipped, where the delay was voluntary, and arose in the course of the voyage contracted by the charter, and after it had been entered upon. The charterers assuredly had the right to count upon the ship's proceeding to Oran, pursuant to orders, with reasonable dispatch, as it was her duty to do. No notice was given to them of her inability to proceed, nor was there any proposal to give up the performance of the rest of the voyage. The charterers were in daily expectation of her arrival at Oran; and, so far as her delay in leaving Castellamare arose from the fault of the owners, there is no reason why the consequent loss should be borne by the charterers. Their loading her with a return cargo when she did arrive at Oran was no waiver of their right of action which had already accrued to them for the breach of the ship's legal duty of dispatch in fulfilling her charter engagements. The case of *The Parana*, 2 Prob. Div. 118, and of *Olssen v. Drummond*, 2 Chit. 705, do not seem to me applicable here. The period of unjustifiable delay, as I find from

the proofs, is three weeks. The bark is not entitled to offset against this her quick run of 8 days. There is no knowing but that she might have made the same run had she left Castellamare when she ought to have left. Having delayed unjustifiably three weeks at Castellamare, the contingencies of navigation cannot be taken into account. She must answer as for three weeks' expenses of the cargo at Oran, and for the fall in the market price of the cargo, if there was any fall, during the three weeks before the bark arrived in New York.

4. The evidence does not show that the bark did not take a full cargo. All was taken that was tendered at Oran, and the protest made by the charterer's agent at that time and place, though objecting to the previous delay, makes no complaint of her not taking a full cargo. The master says she was full, and the stevedore so certifies. The cargo was of the lightest character. Much was necessarily left to the judgment of the master in regard to the quantity of ballast necessary; and, no objections being made at the time when objections in other respects were made by protest, any complaint made afterwards on this score would be justly looked upon with great suspicion, even if evidence had been offered to sustain it.

5. By the law of this country the vessel has a lien upon the cargo for freight. This lien may be displaced by contract, or it may be waived. *The Eddy*, 5 Wall. 481, 494. An unqualified delivery of the cargo to the consignee without notice of any intent to retain the lien, is deemed a waiver. *Bags of Linseed*, 1 Black, 108; *A Cargo of Brimstone*, 8 Ben. 45; *Wilcox v. Tons of Coal*, 14 Fed. Rep. 49. But a delivery to a wharfinger or a warehouseman on the consignee's account, accompanied by a notice of lien, is no waiver, and the lien continues. In this case the evidence shows that the delivery to the warehouse directed by the consignee was completed about noon of the 17th; and that on the same day, about noon, a written notice of the ship's lien upon the cargo was served on the warehouseman. It is clear that there was no intent to make an unconditional delivery of the cargo; the contrary intent seems to me manifest. Even if the actual service of the notice were an hour or two after the last bale was delivered on the 17th,—which the evidence, however, does not show,—so slight a delay as the mere fraction of a day in serving notice could not justly be deemed as indicative of any intent to make an unconditional delivery; and the situation of the consignee, of the warehouseman, and of the goods, being unchanged, no waiver of the lien can be found. *Bags of Linseed*, 1 Black, 108.

6. The charter stipulated for customary dispatch in unloading at New York. There is no strict proof of what is customary dispatch for such a cargo. The treasury regulations of 1884, p. 92, art. 185, prescribe that if vessels of between 300 and 800 tons are not discharged in 12 working days, the custom-house officers may take possession. The purpose of this regulation is so different from that of the charter requiring unloading with customary dispatch, that the period of 12 days, for vessels of so different capacities, and without reference to the kind of cargoes, is no criterion of what is "customary dispatch" as between the par-

ties to a charter. The arrival was reported to the charterers on February 5th. The charterers, on the 7th, directed the bark to a wharf, which she reached on the same day; but other vessels in the slip prevented her beginning to discharge until Monday, the 14th. She was then discharged, and the discharge was completed about noon of the 17th. No reason is given for sending the vessel to a wharf where she was detained so long before she could commence discharging. Twenty-four hours after that, in addition to the two days after notice of arrival, were certainly a reasonable and sufficient time, in the absence of further proof, to find a dock and berth where the ship might commence her discharge. It does not appear that the discharge in four days after she began was through any unusual exertions. Four days' time must therefore be taken as a reasonable time for the actual discharge of this cargo. This leaves five days for which the vessel is entitled to demurrage. There must be a decree, therefore, in favor of the libellant in the first-named cause for the freight and for demurrage for five days, with interest and costs; and a decree in favor of the libellants in the second cause for the expense of storage of the cargo at Oran, with insurance, for three weeks, and for any fall in the market price during three weeks before its arrival, with interest and costs; the latter decree to be offset against the former, and the stipulators on either side to be held only for the difference.

BROWN v. CERTAIN TONS OF COAL.

(District Court, W. D. Michigan, N. D. May 4, 1883.)

1 SHIPPING—CARRIAGE OF GOODS—DEMURRAGE.

Libellant, the owner of three barges, one of them propelled by steam, entered into an agreement for the transportation of certain coal at a fixed price per ton, the coal to be delivered at the port of discharge on board, and to be there unloaded within three days after its arrival. There was no charter-party or contract of hiring in whole or in part, and the entire negotiations were in parol. Bills of lading were afterwards made out in the usual form, and transmitted in the ordinary course of business. Upon arrival at port of discharge, the facilities provided by consignees for unloading were so poor that only one barge could unload at a time, and about 11 days, including one Sunday, were taken up in the discharge. *Held*, that the parol agreement for a discharge in three days was superseded by the bill of lading, and that the consignees were entitled to a reasonable time; that six days, including Sunday, was such reasonable time; and that demurrage should be allowed for the remaining five days.

2. ADMIRALTY—JURISDICTION.

A libel by the owner of three vessels constituting "one ship" against the cargo for demurrage arising from unreasonable detention by the consignee at the port of discharge is within the admiralty jurisdiction of the district court.

3. SAME—PRACTICE.

Where the owner of the ship libelling the cargo for demurrage had knowledge of what had been done by the master, and had proceeded in recognition of it, it is too late for him to object to the authority of the master to execute the bill of lading under which the cargo was carried, on the ground that the bill was made in the home port.

In Admiralty.

George D. Van Dyke, for libellant.

Ball & Hanscom, for claimant.

SEVERENS, J., (*orally*.) In the case of *Brown v. Certain Tons of Coal*, Wallace being the claimant, the proceeding was in admiralty, and the facts in outline were that the libellant, being the owner of certain vessels, three in number, entered into an agreement for the transportation of certain coal, from Buffalo to Menominee, at a certain price per ton. The coal was to be delivered at the port of discharge on board; that is to say, the expenses of the discharge were to be borne by the consignees. Some preliminary negotiations were had between the libellant and the other parties to the transaction in regard to the transportation of this coal and certain incidentals of the terms on which it should be done. Afterwards the coal was laden, and bills of lading were made out in the usual form, and were transmitted in the ordinary course of business. The vessels proceeded to Menominee, and, on arriving there, the consignees had not provided the facilities for unloading which it is claimed should have been provided, and in consequence only one of the vessels could be unloaded at a time, and the vessels had to take their turn at the dock at a single place of discharge, one after the other; and, of course, the detention would be such as would be necessary from unloading in that way. All of the vessels constituted substantially one fleet; they were not only one fleet, but were, within the meaning of the term in the admiralty jurisprudence, one ship; that is to say, one of them was a steam-barge, carrying a portion of the coal, and the others were two barges that were in tow of the steam-barge. The vessels not being unloaded within the time when it was claimed they should have been unloaded by the owner of the vessels, a claim for demurrage was put in, founded upon the detention of the vessels beyond the time when they should have been discharged, and the coal was libeled by the libellant, for the purpose of enforcing his claim for demurrage.

It is claimed in the first place, on the part of the claimant,—at least it was so claimed originally,—that the case was not one of admiralty jurisdiction; that the remedy could not be had in this way, assuming the facts to be as alleged in the libel; but I have no doubt whatever that it is a proper case for the admiralty jurisdiction, and that the court has authority to award such remedy as the nature of the case requires.

The principal controversy between the parties arose out of the question whether there was a preliminary contract which was in the nature of a charter-party, and which was therefore entitled to stand independently by itself, as attesting the terms and conditions of the agreement for transportation, or whether what transpired is to be regarded as mere preliminary negotiation resting in parol, and which was merged in or superseded by the bill of lading, which of course was in writing, and which it is claimed by the claimant operated to supersede the original or preliminary negotiation between the parties. Now, I have no doubt in this case that what transpired between the libellant and the other parties

to the transaction, by way of parol, was sufficient to have constituted an agreement; that it was within the understanding of the parties, and therefore one of the terms of the agreement, that this coal should be unladen in three days from the arrival of the vessels; and that the consignees should take measures to have the coal unloaded within that time. But no charter-party was made, and I think it must have been intended that the terms and conditions of the contract should be embodied in the bill of lading. It is claimed by the libelant that, where there is a charter-party, or an agreement equivalent to it, that that is the substance to be looked to as the agreement between the parties, and that the bill of lading is a merely formal document, issued by the master, and is not intended to cover the ground of the charter-party. Now, in this case, if there had been a charter-party between the parties to the transaction, I should have no doubt that the contention on the part of the libelant was correct, and that the charter-party must be looked to as indicating the agreement between the parties; but where, as here, there was nothing rising to the dignity of a charter-party, nothing partaking of its substance, form, and effect, but the agreement, such as it was, between the parties, standing in parol, I think that the bill of lading, which was ultimately made, must be regarded as superseding the preliminary arrangements of the parties, and that a different rule would be applicable here from that which would apply if the parties had entered into a charter-party, or other definite agreement intended as the equivalent thereof. And it is to be noted in this case, and is a matter of considerable importance in determining this point, that the transaction between these parties did not have in contemplation the hiring or employment of vessels, or of any definite capacity of those vessels; the parties looked not so much to that as to the simple and only matter that they had in contemplation, which was the transportation of a certain quantity of coal from one place to another at an agreed price per ton.

A question was raised by the libelant as to the authority of the master to execute this bill of lading in the home port,—the port of the owner. There might be a doubt of that if it had stood without any ratification on the part of the libelant; but that bill of lading appears to have been acted upon by the libelant; certainly there is no evidence in the case that he ever repudiated it. It is clear that he must have known of the making of the bill of lading by the master; and therefore the court holds, upon familiar principles of law, that it is too late now to claim that the master had no authority to sign the bill of lading, whether or not he would have such authority if immediate question had been made upon it. Therefore I hold against the libelant upon the proposition that the bill of lading does not supersede what had previously transpired between the parties. The bill of lading must be regarded as attesting the contract between the parties, and it is to be interpreted according to its terms, including also what is reasonably implied in it; for it is a maxim of the law that what is fairly implied in a contract is as much a part of it as though it were expressly written. It was therefore a part of this contract that this unloading should be done within a reasonable time. It being the duty of

the consignee to unload this freight, it was his duty to provide the facilities for doing so. He was bound to promptitude and diligence. The measure of that diligence is to be estimated by the urgency of the case, by the circumstances surrounding the parties, by the loss and damage which would accrue to the owner of valuable vessels by detention during the earning season of the year; and the circumstances in this case required that the consignee should exercise promptitude and a high degree of diligence in unloading these vessels. I think it was fairly within the expectation of the parties, and fairly within the obligations of the consignee, to provide means of unloading two of these vessels, at least, at a time. All that transpired between the parties seems to have indicated that that was the reasonable expectation which they had. Instead of that, only one of the vessels could be unloaded at a time by the means furnished by the consignee. The dock was incumbered with a quantity of material, of lumber, which lay between the coal-bins and the front of the dock; and I am satisfied from the evidence that the consignee did not procure the necessary help. He refused to pay—whether justly or unjustly, I do not know—the price that was charged by the laborers in that vicinity for unloading a vessel; he higgled over a little difference of 10 cents an hour to those employes, and permitted the vessels to lie there until he could coerce the employes to accept 40 cents instead of 50 cents an hour, thereby attempting to save to himself a mere pittance, while subjecting the other parties to serious loss and damage. It is therefore held that, in this case, as a matter of fact, the consignee did not use reasonable diligence.

As I have stated, it was fairly to be expected that the vessels should have been unloading at least two of them at the same time. This would have required the detention of the third in the mean time, and the detention of the two while the third was unloading. Upon the evidence, in my opinion, five days was sufficient for unloading, with reasonable diligence on the part of the consignee. Inasmuch, however, as the court holds that there was no contract for three days, in which case Sunday would have been included, the intervening Sunday must, upon the facts found, and the law as held, be also allowed, which would make six days from the time of the arrival of the vessels until the expiration of a reasonable time for unloading. This would leave five days for which demurrage would be allowed. The damage from demurrage per day appears to be as claimed by the libelant, and it is not unreasonable, I think, in view of the evidence in the case,—\$211.58. That sum is allowed. The libelant is entitled to a decree for five days at \$211.58 per day, amounting to \$1,057.90, and interest at 6 per cent, from the date of the filing of the libel, and costs, except, of course, such as were paid on the opening of the default.

It may be that the libel should be amended in some particulars. The proctor for the libelant may exercise his discretion about that. Leave will be given to amend the libel, if counsel be so advised, so as to claim demurrage for detention beyond a reasonable time, instead of founding the claim for demurrage upon the agreement to discharge in three days.

All that remains will be simply the computation of the interest upon the sum stated, which may be done by the clerk when the decree is entered.

LEVECH v. A CARGO OF WOODEN POSTS.¹

(*District Court, E. D. New York. April 14, 1898.*)

DEMURRAGE—BURDEN OF PROOF.

On the evidence, *held*, that the delay claimed by the vessel against the cargo-owner had not been made out, and the libel should be dismissed.

In Admiralty.

The canal-boat Martha E. Loomis brought a cargo of posts from East Haddam, Conn., to New York, and the libel claimed that the vessel was delayed after arrival in New York by the fault of the consignees. It also claimed damage to the boat from floating ice through the fault of the shipper, which latter claim the answer averred had been settled. The claimant asserted that the boat had been sent at once to a proper dock, and that the delay arose from the slowness and absences of the master, and from the fact that he negligently discharged a part of the cargo at the wrong place.

Peter S. Carter, for libelant.

Charles Murray, for claimant.

BENEDICT, J. The settlement made between Goodrich and the master of the vessel left no claim enforceable except the claim for delay in the unloading of the vessel, which occurred after that settlement. In regard to the claim of a lien upon the cargo for the delay which occurred in unloading the posts, both at Schuyler's dock and at Wallabout, the evidence fails to prove that the delay was caused by fault on the part of the owner of the posts, or of the persons to whom the posts had been sold. The burden is upon the libelant to prove a fault causing the delay. This has not been done. Libel dismissed.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

DE LELLE v. THE ATALANTA.¹

(District Court, S. D. New York. April 30, 1888.)

1. SHIPPING—LIABILITY FOR TORT—STEAMERS RAISING SWELLS.

In plying about rivers and harbors, steamers raising heavy swells must give heed to the presence of other boats following their legitimate business, and slow or stop to avoid damaging the latter by such swells.

2. SAME—NOTICE OF DEFECT.

Masters of old and weak boats are bound to take corresponding precautions to give notice to others of the need of special caution in dealing with them.

3. SAME—DAMAGES.

It appeared that libelant's canal-boat was injured through being thrown against a dock by the swells from the yacht A., but it also appeared that the canal-boat was old and weak, and was hence damaged more than a boat in ordinary condition would have been. *Held*, that libelant should recover half his damages only.

In Admiralty. Libel for damages.

Hyland & Zabriskie, for libelant.

Vanderpoel, Green, Cuming and Goodwin, for claimant.

BROWN, J. The libel was filed for damages caused to the libelant's canal-boat Wm. E. Cleary, while she was discharging brick at the City dock, Yonkers, through the suction and swell caused by the steam-yacht Atalanta in passing down the North river. The evidence shows that the yacht was going at the rate of a little less than 14 knots; that the tide was flood, and within about an hour of high water; that her waves are about the same as those of the largest steamers that go up the North river; that she passed about half a mile from the shore; that she was in the habit of slowing when she received any signal from the dock indicating that a vessel was there unloading; that upon the morning in question she did not slow, no signals being heard; that though the libelant's lines were loose, the rebound of the waves after the first suction thrust the canal-boat with such force against the dock as to snap two of her deck beams and her keelson. There is slight testimony that a signal whistle was sounded from the dock, but as it was not heard, I am not satisfied on this point. But the libelant's boat, while unloading, was in plain sight of the Atalanta as she came down. The libelant's boat was some 14 years old, and was no doubt in a feeble condition. It was nevertheless useful to him, and he had the right to make use of her, subject to the ordinary risks of navigation. The heavy swells from steamers that make waves from one to three feet high are not, however, such ordinary incidents of navigation as boats are bound to take the risk of, whether large or small, new or old. On the contrary, it has been the settled law since the use of steamers in navigation, that, in plying about rivers and harbors where their swell and suction are likely to produce injury to other craft following their legitimate business, steamers must give heed to their presence, and by slowing, or stopping the engine temporarily, as the case

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

may be, avoid doing them unnecessary damage. As the libellant's boat was plainly in sight, it was the duty of the *Atalanta* to have slowed in passing. I do not think, however, that a canal-boat in ordinary condition would have sustained as much damage as was proved in this case, from a steamer at such a distance from the dock. I have constantly held that the masters of old and weak boats are bound to take corresponding precautions to give such notice to others as is practicable of the need of any special caution. There was special need in the present case of a signal by whistle to passing steamers to make sure that her presence and the special need of caution were not unheeded. I allow the Cleary, therefore, for one-half her damages, and interest, the sum of \$40, with costs.

THE POMONA.¹

THE JOSE E. MORE.

CARLISLE *et al.* v. THE POMONA.

KERR v. THE JOSE E. MORE.

(District Court, E. D. New York. April 6, 1888.)

COLLISION—BETWEEN STEAM AND SAIL—MISTAKE OF WHEELSMAN.

As a barkentine and a steamer were approaching, and before they were so near as to require or justify a change of course on the part of the sailing vessel, the master of the latter ordered the wheel starboarded, which would have carried her further from the course of the steamer. By a mistake of the wheelsman the helm was ported, and the barkentine thus thrown in the course of the steamer. *Held*, that the sailing vessel was alone responsible for the collision.

In Admiralty.

The collision in this case happened on the night of December 6, 1885, in the Atlantic ocean, in the neighborhood of Barnegat. The barkentine, bound from Matanzas to New York, was on a N. E. by N. course, and the steam-ship, from New York to Jamaica, was moving slowly S. W. by W. $\frac{1}{2}$ W. The steam-ship alleged that she first saw both lights of the barkentine, and thereafter the green light disappeared, and the collision followed shortly after; the steamer striking the sailing vessel on her port bow. Cross-libels were filed for the damage.

Owen & Gray, for the barkentine.

Wing, Shoudy & Putnam, for the steam-ship.

BENEDICT, J. I think it plain that the cause of the collision in question in these two cases was a change of course by the sailing vessel when near the approaching steamer. The evidence proves that, as the

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

vessels approached each other, the master of the sailing vessel ordered his wheelsman to starboard the wheel, and that, instead of starboarding, the wheelsman ported. At that time the vessel was going from seven to eight knots an hour. She was a quick-steering vessel, and at that speed would answer very quickly. The result of the wheelsman's mistake was that the sailing vessel was thrown in the course of the steamer when it was too late to avoid her. This porting of the helm on the part of the sailing vessel was not caused by the action of the steamer, but by a mistake by the wheelsman as to the order given by the master. This is not, therefore, the case of a collision resulting from a wrong order given to the wheelsman, under the excitement produced by the fault of a steamer in approaching so near as to justify alarm. Here was a case of disobedience of an order given by the master of the sailing vessel. The disobedience, it is true, arose out of a misunderstanding of the order by the wheelsman, but still it was neglect to obey the order given, and a collision so caused must be held to have been caused by the fault of the sailing vessel in changing her course. Moreover, the testimony seems to show that the giving of the order to starboard was a fault on the part of the master, for, according to the testimony of the master as well as that of the wheelsman of the barkentine, when the order was given, the steamer was not so near as to require or justify a change of course on the part of the sailing vessel. It may be that the order given cannot be held to have caused the collision, because the order, if obeyed, would have carried the sailing vessel further away from the course of the steamer. But the order gave opportunity for the mistake that arose, and in that way remotely contributed to the disaster, of which the immediate cause was porting on the part of the sailing vessel, when it was her duty to hold her course. The libel of Carlisle and others against the Pomona must therefore be dismissed with costs, and in the case of *Kerr v. The Jose E. More* the libellant must recover his damages, and with costs.

COFFIN *et al.* v. THE OSCEOLA.¹

(District Court, E. D. New York. April 8, 1898.)

1. COLLISION—DAMAGES—DEMURRAGE.

Demurrage may be recovered for the detention of a boat while undergoing repairs rendered necessary by collision, though it appears that the work that the injured boat would have done but for the collision was done by another boat owned by libelants, and which was at the time without other employment.

2. SAME—PERMANENT DEPRECIATION.

No additional allowance should be made for permanent depreciation as a result of a collision without positive proof of such depreciation.

In Admiralty. On exceptions to commissioner's report.

Edward H. Hobbs, for libelants.

Carpenter & Mosher, for claimant.

BENEDICT, J. The exceptions in this case cover two questions which deserve attention: First, whether the libelants can recover demurrage for the detention of their boat while undergoing repairs, when it appears that the work that the injured boat would have done but for the collision was done by another boat owned by the libelants, and which was at the time without other employment. The commissioner allowed demurrage, and I think he was right. It is true that this is not like the cases of *The Cayuga*, 1 Ben. 171, and *The Favorita*, Id. 30,—an action for detention of a ferry-boat,—but it is within the principle of those cases. The next question is whether the libelants should have been allowed for permanent depreciation. The testimony certainly indicates that for some reason or other the boat was not as available after the repairs as she was before the collision, but it does not appear to me to be sufficiently certain to justify the allowance of any additional sum as damages caused by the collision. It is hardly a case where intrinsic and inevitable diminution of value is shown to have resulted from the collision because it was not possible to make complete repairs.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

THE NEW YORK.¹BARRETT *et al.* v. THE NEW YORK.HUMPHREYS *et al.* v. SAME.

(District Court, E. D. New York. April 9, 1888.)

SALVAGE—VESSEL AT DOCK—FIRE—COMPENSATION.

The steam-ship New York, loaded with cotton and other goods, lay on the upper side of the Morgan Line pier, on the occasion of the breaking out of fire on that pier in February, 1887. The fire spread along the pier with remarkable rapidity, and threatened the New York, which had no steam up, and could not get away by her own motive power. The tug Jason, which was near the slip when the fire broke out, and the tug Goodwin, which had laid up for the night in the slip, took hold of the New York, and towed her out into the stream, accomplishing the service in about an hour. The New York was entirely unharmed. Other tugs which might have performed the service were in the vicinity when the fire broke out. The value of the New York and cargo was some \$458,000. *Held*, that each tug should be awarded \$2,000 as salvage.

In Admiralty. Libel for salvage.

Wing, Shoudy & Putnam, for Barrett and others.

Carpenter & Mosher, for Humphreys and others.

Chas. H. Tweed and R. D. Benedict, for the New York.

BENEDICT, J. This is one of several actions for salvage instituted in this court to recover for services rendered on the occasion of the disastrous fire that occurred at the pier of the Morgan Line of steamers in the North river, on the 28th day of February, 1887. The fire seems to have broken out on a lighter lying at the end of pier 37. On the south side of that pier lay the steamer Lone Star; on the north side of that pier lay the vessel here proceeded against, the steamer New York, with a full cargo on board, consisting of cotton, wine, and other goods. When the fire broke out a strong wind was blowing from the north-west, in fact, a gale. Pier 37 was covered by a shed, the front doors of which were open, and which was full of cotton, piled 20 feet high. The consequence was that the fire, fanned by the gale, spread with great rapidity up the pier, so that not only the cotton in the shed, but also the shed, the pier, and the Lone Star herself were consumed. The fire came so fast as to drive the firemen off the pier, and compel them to take refuge on a tug. According to one witness, it came up the pier towards the New York nearly as fast as a man could walk. When the fire broke out the steam-tug Jason, seeing it, at once turned back from her course, and pushed into the slip for the purpose of towing the New York away from the burning pier. The master of the steam-ship hailed her, as she came near, to take a line from the steamer, which was promptly done. The Goodwin, a more powerful tug, had laid up for the night in that slip,

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

and when her engineer came down to her at 6 o'clock in the morning the fire was then burning. The master of the tug was not there. The engineer of the Goodwin at once took charge of her, put the fireman in charge of the engine, cast off the lines, and moved up the slip to the relief of the New York. As she passed up the slip she met the Jason coming in. When the Jason took a line from the New York, the Goodwin swung around and took a line from the Jason, and both these tugs in this way quickly towed the New York out of the slip to a place of safety in Hoboken. The service was performed so promptly that the steamer sustained no damage whatever. Neither of these tugs would have been able to tow the New York alone under the circumstances. At the time these two tugs towed the New York out of the slip, the lighter Hope, loaded with cotton, and on fire, was crossing the slip, scattering sparks plentifully. The tugs, however, escaped injury from her, except, perhaps, a slight scorching. When the tugs struck the tide the Jason took a list to port, and the ship moving out came against her, so that for a moment she was in peril of being capsized. This peril was also escaped without injury. For the services so rendered each of the tugs mentioned claims salvage compensation. That they are entitled to salvage is not disputed, but a great difference exists as to the sum proper to be awarded. This difference seems to arise from a difference in the estimation of the peril to which the steamer was exposed. There is no disputing that where the steamer lay she was in danger of being destroyed by fire. Neither is there any room for doubt that her only way of escape from destruction by fire was by being removed from the burning pier. The fire department could do nothing. The firemen were driven from the pier by the fire. The steamer could not be saved by water. She had no steam-power. Her removal from the pier by tugs was the necessity of the occasion. The master of the steamer has endeavored to make it appear that, if he had failed to obtain tugs, he could have warped the steamer to a place of safety. I do not doubt that if he could have warped the steamer across the slip he would have done so in the absence of tugs, but the evidence satisfies me that the steamer could not have been warped away from the pier in time. No boat was present ready to run a line to the opposite pier. It was impossible for a man to carry a line around by the bulk-head, and I conceive it to be certain that steam-tugs were the only instruments by which it was possible for the steamer to be saved.

A more serious question of fact, and one which must largely affect the amount of the award, is whether the two tugs that saved the steamer were the only tugs present able and willing to render the service. On the part of the libelants the contention is that, when the Jason arrived on the ground, there were tugs about the mouth of the slip, but none of these dared to go into the slip. It is therefore insisted that but for the services rendered by these two tugs that did dare, the steamer would certainly have been destroyed. The evidence no doubt proves that other tugs arrived off the slip before the Jason did, and that no tugs save the Jason and the Goodwin went to the aid of the steamer. But the evi-

dence also proves that neither the Jason nor the Goodwin incurred any serious danger in going to the aid of the steamer. It therefore seems reasonable to attribute the failure of other tugs to go into the slip to some other cause than fear of danger. In the absence of any danger in the undertaking, it may be properly inferred that if the Jason and the Goodwin had not gone to the assistance of the steamer when they did, other tugs then at the mouth of the slip would have done so. The importance of the fact of the presence of other tugs able to render assistance to vessels in danger of burning at the piers, in determining the extent of the peril, is pointed out in the case of *The Indiana*, 22 Fed. Rep. 925. Of course, the degree of importance to be attached to that fact must vary with the circumstances. It is of less importance in this case than in some, because in this case the fury of the fire, and the rapidity of its approach, made the question of securing the relief by tugs one of minutes. Not only was it necessary that tugs should get a line to the steamer, but that this should be done in time to enable the fasts which held the steamer to the pier to be cast off by those on board before they were driven ashore by the flames, as they were certain to be, unless the vessel was immediately removed. Delay would have kept the steamer at the pier, and there she would have been for the most part destroyed. Such was the fate of the steamer Lone Star, on the other side of the pier. The New York was not in as immediate danger as the Lone Star, because the Lone Star was near the place where the fire broke out, and the wind blew the flames more directly upon her. Still, the position of the New York, conceded by the claimants to be one of serious peril, was, in my opinion, one of very great peril; but it was not one where destruction would certainly have resulted from the absence of the libellant tugs, for the reason that there was a chance of her being relieved by the other tugs then at the mouth of the slip. One of these tugs did go in, and tow out ahead of the New York the lighter that lay at the pier between the New York and the end of the pier. Owing to the need of dispatch, the presence of these two tugs contributed in a large degree to save the steamer unhurt, but I am unable to find as a fact that if they had been absent the steamer would have burned. This conclusion in regard to the peril from which the steamer was rescued by these tugs, of course, goes to reduce the amount of salvage proper to be awarded for their services.

Of the cases cited by the claimants in support of their contention that \$1,000 is a sufficient reward for both these tugs, it is sufficient to notice the case of *The Gallego*, 80 Fed. Rep. 271. That is a case where the same owners who are claimants here were there the salvors, and were awarded by this court the sum of \$25,000 for taking the Gallego into Havana. That case does not seem to me authority in support of an award of \$1,000 in a case like this. One important difference between the two cases is the extent of the peril. The fierce flames on the pier, approaching the New York nearly as fast as a man could walk, have no parallel in the case of the Gallego. The Gallego, if not fallen in with, would in all human probability have been lost; but she had a reasonable chance of being fallen in with. The chance open to the New York was for a few mo-

ments only. In those few moments fortunately these two tugs appeared, and by their exertions property valued at \$433,000 was saved from the danger of substantial and immediate destruction. The libelants in support of their contention that 4 per cent. or \$17,320 should be awarded, cite the case of *The Tees*, 1 Lush. 505, where £1,000 was awarded to a tug for hauling a burning vessel valued at £12,350 out of a dock into the river, and to a place of safety, at some risk of life. But the report of the case of *The Tees* is too meager to entitle it to be cited as authority for awarding \$17,320 in this case. The extent of daring displayed in the case of *The Tees* is not stated, nor can the extent of the peril be ascertained from the report. Indeed, cases of salvage can be seldom compared with advantage. It is the aim of this court, in all cases of saving vessels from fire at the piers, to give such rewards as will insure on such occasions the most prompt, energetic, and daring effort of those who have it in their power to furnish aid and succor. With that in view, taking into consideration the ordinary character of the services rendered by the tugs, and the short time occupied; considering also the promptness displayed, and the success attained; and mindful of the large value of the property saved, and the extent of the peril to which it was exposed; and observing that, although the sum earned by those tugs by this hour's labor will be very many times greater than the sum they would have charged for the same labor rendered in ordinary towing, their services saved the owners of the steamer from what might otherwise have been a very large loss, I award to each of the tugs the sum of \$2,000.

THE ANGELINE ANDERSON.¹

ROSS *et al.* v. THE ANGELINE ANDERSON.

SAME v. BALES OF COTTON.

(*District Court, E. D. New York, April 7, 1893.*)

1. SALVAGE—ABANDONMENT OF SERVICE—LOSS OF CLAIM.

On the occasion of the fire at the Morgan Line pier, New York, in February, 1887, two tugs took hold of the lighter *Angeline Anderson*, which had been lying near the pier, loaded with cotton, and which had taken fire. The tugs took the lighter as far as the mouth of the slip, where in some way she got adrift from them. The tugs paid no further attention to her, but devoted their whole attention to the burning steam-ship *Lone Star*. The lighter drifted into the slip above, where the fire department played water upon her, and other tugs took her to Hoboken, where the fire was finally extinguished. *Held*, that the tugs lost all right to claim salvage compensation by abandoning the lighter when the hawser parted, thereby leaving her to drift into a position of greater peril than she was in at the place whence she was taken.

2. SAME—FAILURE.

Success is a necessary element in a claim for salvage.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

In Admiralty. Libels for salvage. There were two separate suits: one against the lighter, and the other against the cotton which composed her cargo at the time of the fire.

Benedict, Taft & Benedict, for libelants.

Julian B. Shope, for claimants.

BENEDICT, J. These are actions to recover of the lighter Angeline Anderson and her cargo of cotton a salvage compensation for the services of the tugs Margaret Sandford and the Harry Roussel, in towing the Angeline Anderson, on the occasion of the fire which occurred in the month of February, 1887, when the pier of the Morgan Line was burned. It is sufficient, without stating particularly the services performed by these two tugs in getting the lighter to the mouth of the place where she was when she caught on fire, to say that there is no disputing the fact that, after the lighter had reached the mouth of the slip, she in some way got adrift from the tugs; that after the parting of the hawser to the lighter the tugs devoted all their attention to the steamer Lone Star, and paid no further attention to the lighter, which thereafter drifted into the slip above. There the fire department played water upon her for some time, and the tug-boats Indian and Excelsior came and took her to Hoboken, where these two last-mentioned tug-boats, with their crews, and with 100 men from on shore, and a barge, were occupied until the following night in extinguishing the fire. Whatever may have been the value of the services of the libelant in connection with this lighter, they, in my opinion, lost all right to claim salvage compensation therefor by abandoning the lighter when the hawser parted, thereby leaving her adrift in a position of greater peril than she was in at the place from where she was taken. The only excuse made in behalf of the tugs is that it was no fault of theirs that the hawser to the lighter parted; and that, having the steam-ship Lone Star in tow at the same time, they were justified, by the necessity of caring for the steam-ship, in leaving the lighter to be cared for by the other tugs. But although it may have been no fault on the part of the tugs that the hawser to the lighter parted, it was their misfortune, for it severed completely the connection between them and the lighter, and left the lighter to depend upon other and different salvors for safety. Success is a necessary element in a claim for salvage. In this case the two tugs wholly failed of success, and for that reason they are not entitled to a salvage reward. Let the libel be dismissed, with costs.

THE EDITH.

*(District Court, S. D. Georgia, E. D. March 24, 1868.)***SEAMEN—WAGES—ENFORCEMENT IN ADMIRALTY—VESSEL IN CUSTODY OF STATE COURT.**

The district court will refuse a motion to dismiss a libel on a boat for seamen's wages, based upon the ground that the boat is in the custody of a state court under a former levy, where it appears that such levy was upon a half interest only; but will stay proceedings until the termination of litigation in the state court, and will give notice at the sheriff's sale of the libelants' claim for wages.

In Admiralty. On motion to dismiss levy.

Du Bignon & Frazier, for the motion.

Isaac Beckett, contra.

SPEER, J. The steam-boat Edith was levied on by the sheriff of the state court for a debt against a part owner. She was sold, and the one-half interest of the debtor bought by Frazier. Subsequently, she was again levied upon under an execution for costs against the original owners, but Frazier's interest was not levied on. The marshal thereafter, with a proceeding in this court for wages of the seamen, levied upon the entire boat, tackle, apparel, etc. The motion is to dismiss this levy, upon the ground that the boat was in the custody of the officers of the state court.

The question whether a lien for seamen's wages may be enforced in the admiralty court against a vessel notwithstanding she may be under arrest in the state court, if an open question, has been, upon principle and authority, answered in the affirmative. It is true, however, that a majority of the supreme court of the United States have held otherwise. *Taylor v. Carryl*, 20 How. 583; 2 Pars. Mar. Law, 522, and authorities cited. It will be profitable to the student of admiralty law to read the citations upon the topic, made by this copious and lucid text writer. But in this case there is a one-half interest to which the lien of the state judgment does not attach; nevertheless, the entire vessel is in the hands of the sheriff. Now, the elastic powers of admiralty will enable this court to respect the prior seizure by the state officials, and, at the same time, protect the seamen's demands for wages. With this two-fold purpose in view, it is ordered that the motion to dismiss the levy be refused and overruled, but that the marshal will proceed no further therewith until the termination of the litigation in the state court. Ordered further that the marshal give notice to all purchasers at the sheriff's sale that the steam-boat Edith will be subject to the libelants' claim for wages, so soon as the jurisdiction of this court can be made effective, and that all proceedings in this cause be staid until the further order of the court.

HOWARD *et al.* v. THE ROSE AND CARGO.¹

(*District Court, E. D. New York. April 7, 1888.*)

SALVAGE—COMPENSATION—TENDER—COSTS.

Where the tug-boat M. took the barge R. into the stream on the occasion of the breaking out of a fire on the Morgan Line pier in February, 1887, and thereafter the claimant of the barge made a tender of \$70 in payment of such salvage service, which tender was refused, and this suit begun, it was held that such tender was sufficient, and should have been accepted, and that the tug should not recover the taxable costs which had accrued since the filing of the answer.

In Admiralty. Libel for salvage.

Alexander & Ash, for libelants.

Julian B. Shope, for claimants.

BENEDICT, J. This is an action against a cargo of cotton on board the lighter Rose, to recover salvage compensation for the services of the tug Egbert Myers in towing the lighter Rose and her cargo out of the slip between piers 37 and 38 on the occasion of the fire on the morning of February 28, 1887, which destroyed pier 37. The claimants, in their answer, made a tender of \$70. This tender, in my opinion, was sufficient, and ought to have been accepted. Let a decree be entered in favor of the libelants for the sum of \$70, less the amount of taxable costs which have accrued since the filing of the answer.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

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